

EMPLOYMENT APPEALS BOARD DECISION
2015-EAB-0641

Affirmed
Disqualification

PROCEDURAL HISTORY: On April 15, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant voluntarily left work without good cause (decision # 91850). Claimant filed a timely request for hearing. On May 15, 2015 ALJ M. Davis conducted a hearing, and on May 20, 2015 issued Hearing Decision 15-UI-38790, affirming the Department's decision. On May 28, 2015, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) James Wagenschutz employed claimant as an in-home caregiver from October 4, 2014 until October 6, 2014.

(2) In September 2014, the employer's daughter posted an ad seeking an in-home caregiver for her elderly father. The posting stated that the anticipated days for the position were Sundays through Fridays, and the anticipated hours were from 7:00 a.m. until approximately 11:00 a.m. Exhibit 1 at 2. On September 23, 2014, claimant responded to the posting and was later offered the position. The employer hired claimant on October 4, 2014.

(3) On Monday, October 5, 2014, claimant reported for her first day of work at 7:00 a.m. Sometime before 11:00 a.m., the employer's daughter told claimant that she had to take her father to a medical appointment and that she did not need claimant to stay until 11:00 a.m. Claimant left work early that day.

(4) On Tuesday, October 6, 2014, claimant reported for work at 7:00 a.m. Claimant assisted the father in getting up and prepared his breakfast. When claimant was in the kitchen, the employer's daughter told claimant that she could leave and go home after she completed a few remaining tasks, at a time

earlier than 11:00 a.m. Audio at ~7:37, ~14:22. Claimant then inquired about the number of hours that the employer's daughter expected her to work on a regular basis. The daughter told claimant that the hours of work, as stated in the job posting, were "approximate" would "vary" and claimant should not expect to always work until 11:00 a.m. Audio at ~8:19, ~14:50, ~15:46. Claimant pressed the employer's daughter about how many hours on average she was going to work. Audio at ~8:27. Claimant perceived that the employer's daughter was irritated with her questions and told her that "after you're done cleaning up here, you can just go home." Audio at ~7:34. The daughter never told claimant that she was discharged. Claimant was "unsure" what the employer's daughter meant by telling her she could go home, but did not ask. Audio at ~9:15, ~10:15. Claimant never sought clarification from the daughter whether she meant to end claimant's employment.

(5) After claimant went home on October 6, 2014, she never again returned to the workplace. Claimant voluntarily left work on October 6, 2014. Claimant did not contact the employer's daughter until sometime in approximately December 2014 to ask about how the daughter was going to characterize the October 6, 2014 work separation for purposes of claimant's application for unemployment insurance benefits.

CONCLUSIONS AND REASONS: Claimant voluntarily left work without good cause.

The first issue this case presents is the nature of claimant's work separation. Claimant contended that the employer's daughter discharged her when she told her she could go home early on October 6, 2014, and the employer's witness contended that claimant said she was quitting work on October 6, 2014. Audio at ~5:55, ~9:40, ~16:04. The applicable regulation states that if, at the time of the work separation, claimant could have continued to work for the employer for an additional period of time, the separation is a voluntary leaving. OAR 471-030-0038(2)(a) (August 3, 2011). However, if claimant was willing to continue to work for the employer for an additional period of time but was not allowed to do so by the employer, the separation is a discharge. OAR 471-030-0038(2)(b).

The testimony of the parties about the work separation was in irreconcilable conflict. However, claimant never testified that the employer's daughter used unambiguous words of discharge when speaking with her on October 6, 2014 and, if claimant's account of the conversation occurring on October 6, 2014 is accepted, she conceded that she was uncertain about the daughter's intention in telling her she could leave that day earlier than 11:00 a.m. Audio at ~9:22, ~9:40, ~10:15. Claimant's failure to ask the employer's daughter what she meant, when she was ostensibly expected to work the next day and was uncertain what the daughter meant when she told claimant to go home earlier than 11:00 a.m., most strongly suggests that claimant did not want to continue working after October 6, 2014, but, rather, wanted to sever the work relationship. Accordingly, claimant's contention that she was willing to maintain the working relationship is undercut by her failure to contact the daughter for clarification. Audio at ~9:40, ~11:10. Relying on the undisputed evidence in this record, the first unambiguous and objective manifestation of a present intention to terminate the work relationship was claimant's act in not returning to work after October 6, 2014. On this record, more likely than not, claimant's work separation was a voluntary leaving on October 6, 2014.

A claimant who leaves work voluntarily is disqualified from the receipt of benefits unless she proves, by a preponderance of the evidence, that she had good cause for leaving work when she did. ORS 657.176(2)(c); *Young v. Employment Department*, 170 Or App 752, 13 P3d 1027 (2000). "Good cause"

is defined, in relevant part, as a reason of such gravity that a reasonable and prudent person of normal sensitivity, exercising ordinary common sense, would have no reasonable alternative but to leave work. OAR 471-030-0038(4). The standard is objective. *McDowell v. Employment Department*, 348 Or 605, 612, 236 P3d 722 (2010). A claimant who quits work must show that no reasonable and prudent person would have continued to work for the employer for an additional period of time.

If claimant's testimony about the reason that she did not work after October 6, 2014 is accepted, she left work because she was under the impression that she had been discharged. Audio at ~5:55. EAB has consistently held that a claimant has voluntarily left work without good cause if she quits under circumstances where the employer's expression of an alleged intention to discharge was ambiguous or equivocal and claimant did not seek a clarification of that intention before concluding that she was discharged.¹ In this case, the employer's daughter told claimant that she could go home soon after claimant raised the issue of what hours she would be working on a regular basis, and after the daughter had previously told claimant that there was not enough work to keep her busy that day until 11:00 a.m. Audio at ~7:37, ~14:22. Under these circumstances, the daughter's statement was at best ambiguous about whether she was releasing claimant early from her work shift on October 6, 2014 or whether she was expressing an intention to sever the work relationship. A reasonable and prudent person who wanted to maintain her employment would not have concluded that she was discharged and would not have failed to return to the workplace before confirming that the employer would not allow her to continue working and that the employer intended to discharge her by its ambiguous statement.

Claimant did not show good cause for leaving work when she did. Claimant is disqualified from receiving unemployment insurance benefits.

DECISION: Hearing Decision 15-UI-38790 is affirmed.

J. S. Cromwell and D. P. Hettle, *pro tempore*;

¹ See *Chad J. Westlake* (Employment Appeals Board, 2015-EAB-0232, April 16, 2015) (claimant who mistakenly assumed co-owner intended to discharge him when he stated "I'll effing do it myself" and told claimant to "hit the road," was not discharged but voluntarily left work without good cause since co-owner's statements were ambiguous and claimant did not ask co-owner to clarify his intention); *Sonya G. Wasserman* (Employment Appeals Board, 2014-EAB-1670, December 16, 2014) (claimant who mistakenly assumed that owner intended to discharge her when owner asked claimant to turn in her keys and stated "it is what it is" did not have good cause to leave work because owner's statements were ambiguous and claimant did not ask for clarification); *Gary L. Reisen* (Employment Appeals Board, 11-AB-2392, October 10, 2011) (claimant who assumed, without confirming, that he was fired when, after an argument, manager told him to "get out" did not have good cause to leave work because manager's statement, under the circumstances, was ambiguous); *Joshua A. Smith* (Employment Appeals Board, 11-AB-0702, March 15, 2011) (claimant who assumed, without seeking clarification, that he was fired when told the "leave the kitchen" did not have good cause to leave work because statement was ambiguous); *Samantha M. Knauss* (Employment Appeals Board, 10-AB-3931, January 14, 2011) (claimant who assumed, without seeking clarification, that she was discharged when, after calling in sick, he manager told her "no just don't come in" did not have good cause to leave work because statement was ambiguous); *Cliff D. Hoover* (Employment Appeals Board, 10-AB-1790, July 22, 2010) (claimant who assumed, without confirming, that she was discharged when owner said "it's not working out" and "we should probably go our separate ways" quit work without good cause because owner's statements were ambiguous); *Chantel M. Dominguez* (Employment Appeals Board, 09-AB-2465, August 18, 2009) (claimant who assumed, without clarifying, that she was discharged based on employer's statement to her to "do what you gotta do" left work without good cause because employer's intentions were ambiguous).

Susan Rossiter, not participating.

DATE of Service: July 20, 2015

NOTE: You may appeal this decision by filing a Petition for Judicial Review with the Oregon Court of Appeals within 30 days of the date of service listed above. *See* ORS 657.282. For forms and information, you may write to the Oregon Court of Appeals, Records Section, 1163 State Street, Salem, Oregon 97310 or visit the Court of Appeals website at courts.oregon.gov. Once on the website, use the ‘search’ function to search for ‘petition for judicial review employment appeals board’. A link to the forms and information will be among the search results.

Please help us improve our service by completing an online customer service survey. To complete the survey, please go to <https://www.surveymonkey.com/s/5WQXNJH>. If you are unable to complete the survey online and wish to have a paper copy of the survey, please contact our office.