EO: 200
BYE: 201549

State of Oregon
Employment Appeals Board
875 Union St. N.E.
Salem, OR 97311

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VQ 005.00

EMPLOYMENT APPEALS BOARD DECISION
2015-EAB-0708

Affirmed
Disqualification

PROCEDURAL HISTORY: On January 13, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant was not available for work (decision # 94258). Claimant filed a timely request for hearing on decision # 94258. On January 28, 2015, the Department served notice of an administrative decision concluding that claimant voluntarily left work without good cause (decision # 112248). On February 17, 2015, decision # 112248 became final without a request for hearing having been filed. On February 17, 2015, the Department also served notice of an amended administrative decision # 94258 concluding claimant was available for work (decision # 94528). On February 17, 2015, ALJ Seideman reviewed claimant's request for hearing on decision # 94258 and dismissed it in light of the Department's service of notice of an amended decision # 94528.

On March 2, 2015, claimant filed an untimely request for hearing on decision # 112248. On March 11, 2015, ALJ Kangas reviewed claimant's late request for hearing and issued Hearing Decision 15-UI-34947, dismissing claimant's request as untimely, subject to claimant's "right to renew" the request by submitting a response to the "Appellant Questionnaire" attached to the hearing decision within 14 days of the date the decision was mailed. On March 17, 2014, the Office of Administrative Hearings (OAH) received claimant's response to the Appellant Questionnaire. On March 24, 2015, OAH issued a letter order titled "Cancellation of Hearing Decision" for Hearing Decision 15-UI-34947 and setting a hearing on the issue of claimant's untimely request for hearing on decision # 112248. On April 8, 2015, ALJ Triana conducted a hearing, and April 13, 2015 issued Hearing Decision 15-UI-36764, re-dismissing claimant's late request for hearing. On April 27, 2015, claimant filed an application for review of Hearing Decision 15-UI-36764 with the Employment Appeals Board (EAB). On May 8, 2015, EAB issued Employment Appeals Board Decision 2015-EAB-0490, allowing claimant's late request for hearing, and remanding decision #112248 for a hearing on the merits. On May 27, 2015, ALJ Murdock

conducted a hearing, and on June 4, 2015 issued Hearing Decision 15-UI-39572, affirming decision # 112248, and concluding that claimant voluntarily left work without good cause. On June 9, 2015, claimant filed an application for review of Hearing Decision 15-UI-39572 with EAB.

EAB considered claimant's written argument when reaching this decision.

FINDINGS OF FACT: (1) Spruce Villa, Inc. employed claimant as a support worker from December 18, 1998 to December 9, 2014. Among other things, claimant provided caregiving services for residents of apartments that the employer operated.

(2) Claimant occasionally had symptoms of panic attacks in the workplace. Despite the symptoms, claimant was able to perform her work. Claimant experienced this panic as a tendency to worry and a fear of driving. Transcript at 54.

(3) Sometime on or before October 10, 2014, the employer's program director and other staff members observed claimant throw down a metal medication tub in the presence of a very distraught resident who was loudly protesting the restraining actions of other staff. Claimant was then observed to laugh at the resident, point at the resident, and move toward the resident's apartment as if to enter it, although the resident disliked anyone to enter her apartment. On October 10, 2015, the employer issued a written warning to claimant for inappropriate workplace behavior, and for not complying with the mental health guidelines for the resident that had been put into place by the resident's case manager. Exhibit 2 at 20; Transcript at 45-47.

(4) On December 2, 2014, one of claimant's coworkers stated to the employer's program manager that she had tried to assist claimant that day by retrieving some information claimant wanted from the employer's electronic records. The coworker complained that when she could not locate that information, claimant repeatedly "flicked" her ears, "tapped" or "hit" her shoulders or neck, "laughed" at her, and kept saying to her "you like it." Exhibit 1 at 5; Transcript at 19-21, 43-44. Although the coworker stated she had asked claimant to stop several times, claimant did not, but continued the "flicking," "tapping" and "laughing." Later that day, the program manager discussed claimant's behavior with claimant, and claimant said that she and the coworker had only been joking and playing. The program manager thought that claimant was minimizing the seriousness of what she had done. The program manager discussed the incident on December 2, 2014 with the employer's residential director, and both thought that they needed to impress on claimant the inappropriateness of her horseplay in the workplace. On December 3, 2014, the residential director contacted claimant, told her that the employer needed to investigate her alleged behavior on December 2, 2014, and that she was being placed on administrative leave pending that investigation.

(5) On December 5, 2014, the program manager interviewed claimant about her alleged behavior on December 2, 2014. The program manager reviewed the results of this interview with the residential director. They both agreed that they needed to arrange for a meeting with claimant to formulate a plan to improve her behavior in the workplace, and to enable her to "move forward." Transcript at 41, 42. They decided to meet with claimant on December 9, 2014, and one of them notified claimant of the meeting. The employer did not intend to discharge claimant at that meeting for her behavior on December 2, 2014.

(6) On December 9, 2014, the residential director and the program manager met with claimant in a conference room in the workplace. The residential director asked claimant to state her side of what had happened on December 2, 2014. Claimant again stated that she had only been "playing" or "joking" with the coworker, and that her behavior had not been objectionable. Transcript at 42; *see also* Transcript at 18-19. Claimant said that she was sorry for what had happened. Transcript at 43. The residential director read the employer's entire written policy on workplace behavior to claimant, and asked claimant if she understood it. The residential director attempted to explain to claimant that touching a coworker in the workplace was not acceptable. Transcript at 13, 51. Claimant became frustrated and upset as the residential director tried to discuss what she had done on December 2, 2014. Transcript at 14, 42. Claimant understood the residential director to express her "concern" over claimant's behavior, to say that claimant's behavior had "gone too far" on December 2, 2014, and to tell claimant that she had "no more chances." Transcript at 5, 12, 13, 15, 33, 49, 51. Before the residential director or the program manager were able to even begin discussing the plan to improve claimant's behavior, claimant abruptly rose from her seat and stated, without explanation, "I'm not gonna sign anything," and, "I'm leaving." Transcript at 14, 16. Claimant then left the conference room and the workplace without further comment. Transcript at 14, 49-50.

(7) Claimant thought she had been discharged when she heard the residential director's reference to no more chances," and that the employer's representatives were going to ask her to sign work separation papers. Transcript at 15. However, neither representative had asked claimant to sign anything, brought any forms to the meeting for claimant to sign, or brought claimant's final paycheck. Transcript at 15, 61. Neither representative stated any words of discharge to claimant during the meeting, such as "discharged," "fired," "terminated" or "dismissed." Transcript at 15, 33. Claimant did not ask for clarification of whether the residential director had actually stated that she had "no more chances" and, if she had, what she meant, and whether she was discharging claimant by those words. Transcript at 49-50. The program manager and the residential director assumed that by her actions in abruptly leaving the meeting, claimant had quit work.

(8) On December 9, 2014, the program director tried to contact claimant by phone but was unable to do so, and claimant's phone did not allow him to leave a message. On December 10, 2014, the manager called claimant and reached her. The program manager told claimant that she could come into the workplace to pick up her final paycheck. Claimant picked up her paycheck on December 11, 2014.

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

The first issue in this case is the nature of claimant's work separation. Claimant contended that by the words the residential director used during the December 9, 2014 meeting, she reasonably concluded that she was discharged. Transcript at 4-5, 13-14, 33. The program manager, who was present at the December 9, 2014 meeting, denied that the residential manager had stated the words on which claimant relied for her conclusion, and further contended that by her abrupt and inexplicable departure from the meeting, claimant had expressed an intention to leave work, and the employer reasonably concluded that she had done so. Transcript at 41, 43, 47. The Department regulation that define whether a work separation should be considered a voluntary leaving or a discharge states that if, at the time of the separation, claimant could have continued to work for the employer for an additional period of time, the work 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).

In this case, the testimony of the parties about the work separation, and what was said at the December 9, 2014 meeting, was largely irreconcilable. However, it is undisputed that neither of the employer's representatives at that meeting used customary words of discharge, or any words that were substantially similar. Transcript at 15, 33. It also is undisputed that the employer representatives did not ask claimant to sign any separation papers, or any other papers, at the meeting, and did not have with them claimant's final paycheck, as would have been customary at a discharge meeting. Transcript at 15, 61. Accepting claimant's testimony that she understood the residential director to say that she was "concerned" about claimant's behavior, that claimant had "gone too far" in her behavior on December 2, 2014, and that claimant was going to have "no more chances," these are, at best, highly ambiguous expressions of a present intention to discharge claimant. Transcript at 5, 12, 13, 15, 33, 49, 51. Viewed in the context of a meeting to discuss claimant's behavior on December 2, 2014, the first two statements that claimant alleged the residential director to have made to her were most reasonably construed as expressions of the director's view that claimant's behavior had been inappropriate on that day, and not that the director intended to discharge claimant for it. Although the third statement could have been meant to discharge claimant, it just as likely could have been an attempt to make clear to claimant that she would have no more chances to avoid serious disciplinary sanctions if behavior similar to her behavior on December 2, 2014 occurred in the future. The residential director's statements were not clear expressions of an intention to discharge claimant at that time. Under the circumstances, it was not reasonable for claimant to them only as such.

The first objective act that manifested an intention to sever the work relationship was claimant's abrupt departure from the workplace in the middle of the December 9, 2014 meeting, and the employer reasonably construed it as such. While claimant contended in her written argument that her apology early in the December 9, 2014 meeting demonstrated that she was wanted to continue working for the employer, any evidentiary inference that might be drawn from it was subsumed by claimant's sudden, unexpected and unexplained exit from the meeting. Claimant's Written Argument at 3. While claimant also contended in her written argument that her failure to return to work after December 9, 2014 was not reasonably construed as evidencing an unwillingness to continue working for employer since the employer had not told that her administrative leave was over, the credibility of this contention is undermined by the lack of any evidence that claimant brought up that she had not intended to quit on December 9, 2014, or explained why she had walked out of the meeting, when she spoke to the program manager on December 10 and 11, 2014. Claimant's Written Argument at 5. Moreover, in the context of the December 9, 2014 discussion, claimant's action in suddenly leaving the meeting effectively foreclosed the employer from working with claimant to formulate a behavior improvement plan, which presumably was a predicate to lifting the administrative leave. Even accepting claimant's account of the December 9, 2014 meeting, the weight of the evidence shows that claimant's work separation was a voluntary leaving on December 9, 2014. That claimant might have left that meeting under the subjective impression that she had been discharged, is a matter to be considered in determining whether she had good cause to leave work within the meaning OAR 471-030-0038(4).

At hearing, claimant's counsel appeared to assert that under *Van Rijn v. Employment Department and Adventures NW, LLC* 237 Or App 39, 238 P3d 419 (2010), claimant's work separation should be considered a discharge and not a voluntary leaving because, as in *Van Rijn*, claimant left and did not

return to the workplace because she thought he had been discharged. Claimant's Written Argument at 4-5; Transcript at 62-63. However, *Van Rijn* does not set out a bright line rule that the nature of the work separation should be based only on a claimant's contentions about his or her subjective beliefs when he or she left the workplace. In *Van Rijn*, the employer did not appear or present evidence at the hearing, and the only available evidence as to the nature of the work separation was from claimant who testified, without rebuttal, that he believed that he could not have continued to work for the employer, and that his supervisor had discharged him. *Van Rijn*, 237 Or App 42, 43. In this case, the employer's witness disputed that claimant was discharged, disputed that the employer had any intention to discharge claimant, disputed that the residential director said the words on which claimant relied to support that she had been discharged, and disputed that claimant could not have continued to work for the employer, which distinguishes this from *Van Rijn.* In a case where both parties have appeared and contested the nature of the separation, it is incumbent on EAB to weigh the disputed evidence and to resolve, more likely than not, what the nature of the work separation was, as has been done above. Contrary to claimant's apparent view, *Van Rijn* does not hold that claimant's belief that she was discharged is dispositive on the issue of the nature of the work separation. Weighing the evidence in this case, EAB has rejected claimant's position, and determined that she voluntarily left work.

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) (August 3, 2011). The standard is objective. McDowell v. Employment Department, 348 Or 605, 612, 236 P2d 722 (2010). Claimant asserted at hearing that she had panic attacks, which for purposes of this decision are assumed to have been, permanent or long-term "physical or mental impairments" as defined at 29 CFR §1630.2(h). A claimant with that impairment who quits work must show that no reasonable and prudent person with the characteristics and qualities of an individual with such impairment would have continued to work for her employer for an additional period of time.

Although claimant testified that she experienced panic attacks in the workplace, she presented no evidence about how long she had been subject to such attacks and, other than generally stating that the attacks caused her to worry and fear driving, about the manner in which those alleged panic attacks affected her. Transcript at 16, 54. There is insufficient evidence in the record to support a conclusion that claimant's alleged panic attacks were a permanent or long-term physical or mental impairment. Accordingly, the standard for determining whether claimant had good cause to leave work will not be adjusted to take account of claimant's alleged panic attacks as an impairment.

Other than her mistaken belief that she was discharged, claimant presented no evidence as to any other reasons that she left work. Claimant asserted in her written argument that she established good cause for leaving work because she testified that she subjectively believed that the employer was unwilling to allow her to continue working. Claimant's Written Argument at 4. However, EAB has consistently held that a claimant's subjective belief that he or she has been discharged is not, in and of itself, good cause to leave work when it is based on an employer's ambiguous or equivocal statements. EAB has held that, under these circumstances, a claimant cannot show good cause for quitting unless he or she first pursued the reasonable alternative of asking the employer to clarify its intent, and if it was to

discharge him or her.[1] Here, accepting claimant's version of the residential director's statements at the December 9, 2014 meeting, they were, as discussed above, ambiguous and equivocal as to any present intention to discharge clamant. Those statements, as recited by claimant, were markedly similar to those that EAB has previously decided were insufficient on their face to demonstrate good cause for leaving work without a clarifying inquiry. Notably, claimant presented no evidence, and did not contend that the panic attacks to which she was allegedly subject interfered with her thought processes during the December 9, 2014 meeting, or somehow prevented her from reasonably comprehending and understanding the reasonable meaning of the words the employer's representatives spoke to her during that meeting. Claimant also did not present any evidence showing that circumstances existed which, placing the residential director's statements in their context, made the director's facially ambiguous statements reasonably interpretable, without further inquiry, only as statements of discharge. In light of the ambiguous nature of the residential director's statements as recounted by claimant, claimant did not demonstrate that they were good cause to leave work because she did not seek clarification of the intention underlying them. Transcript at 49-50.

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

DECISION: Hearing Decision 15-UI-39572 is affirmed.

Susan Rossiter and D. P. Hettle, *pro tempore*;
J. S. Cromwell, not participating.

DATE of Service: <u>August 7, 2015</u>

[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 discharged when told to "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).

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.

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