

EMPLOYMENT APPEALS BOARD DECISION
2015-EAB-1174

Application for Review of Hearing Decision 15-UI-43991 Dismissed

Hearing Decision 15-UI-43990 Affirmed
Disqualification

PROCEDURAL HISTORY: On April 23, 2015, the Oregon Employment Department (the Department) served notice of administrative decision # 94311, concluding that claimant quit working for the employer without good cause. On April 24, 2015, the Department served notice of administrative decision # 194859, assessing an overpayment based, in part, on decision # 94311, penalty weeks, and a monetary penalty. On May 13, 2015, decision # 94311 became final without a request for hearing having been filed. On May 14, 2015, decision # 194859 became final without a request for hearing having been filed. On June 8, 2015, claimant filed late requests for hearing on decisions # 94311 and # 194859. On June 15, 2015, ALJ Kangas issued Hearing Decisions 15-UI-40030 and 15-UI-40027, dismissing claimant's late requests for hearing, subject to claimant's right to renew the requests by submitting a response to an appellant questionnaire attached to the decisions within 14 days. On June 25, 2015, claimant submitted a timely response. On July 6, 2015 the Office of Administrative Hearings (OAH) cancelled and vacated Hearing Decisions 15-UI-40030 and 15-UI-40027, and served notice of hearings on decisions # 94311 and # 194859 scheduled for July 21, 2015. On July 21, 2015, ALJ R. Davis conducted telephone hearings at which the employer failed to appear. On July 24, 2015, ALJ Davis issued Hearing Decisions 15-UI-41972 and 15-UI-41973, allowing claimant's late requests for hearing on decisions # 94311 and # 194859, concluding the employer discharged claimant, not for misconduct, and assessing no overpayment, penalty weeks or monetary penalty.

On August 5, 2015, the employer filed applications for review of Hearing Decisions 15-UI-41972 and 15-UI-41973 with the Employment Appeals Board (EAB). On August 10, 2015, EAB issued EAB Decisions 2015-EAB-0944 and 2015-EAB-0945, reversing Hearing Decisions 15-UI-41972 and 15-UI-41973, and remanding these matters to OAH for new hearings and hearing decisions. On August 28, 2015, ALJ R. Davis conducted a consolidated hearing. On September 4, 2015, ALJ R. Davis issued

Hearing Decision 15-UI-43991, again allowing claimant's late request for hearing on decision # 194859, but affirming that decision. On September 11, 2015, ALJ R. Davis issued Hearing Decision 15-UI-43990, again allowing claimant's late request for hearing on administrative decision # 94311, but affirming that decision. On September 24, 2015, Hearing Decision 15-UI-43991 became final without an application for review having been filed. On October 1, 2015, claimant filed a late application for review of Hearing Decision 15-UI-43991, and a timely application for review of Hearing Decision 15-UI-43990.

Pursuant to OAR 471-041-0095 (October 29, 2006), EAB consolidated claimant's applications for review of Hearing Decisions 15-UI-43990 and 15-UI-43991. For case-tracking purposes, this decision is being issued in duplicate (EAB Decisions 2015-EAB-1173 and 2015-EAB-1174). No party applied for review of that portion of Hearing Decision 15-UI-43990 allowing claimant's late request for hearing on decision # 94311. EAB therefore limited its review to whether claimant is disqualified from receiving benefits based on her work separation from the employer.

EAB considered the entire hearing record and the parties' written arguments to the extent they were based on information received into evidence at the hearing. *See* ORS 657.275(2) and OAR 471-041-0090 (October 29, 2006). In her written argument, claimant asked EAB to consider documents not offered into evidence at the hearing, pursuant to EAB's authority under OAR 471-041-0090(2) (October 29, 2006). OAR 471-041-0090(2) states that EAB may consider new information when the party offering the information establishes that the new information is relevant and material to EAB's determination, and that factors or circumstances beyond the party's reasonable control prevented the party from offering the information into evidence at the hearing. Claimant's new documents include an email string regarding claimant's final paycheck that "evidences the employer's request that claimant's final paycheck to be issued on October 14, 2014 for work through that day," although the pay period did not end until October 15, 2015, and claimant's written request for vacation/time off from October 15 through 22, 2015. Claimant's Argument at 6, 12-14. However, the fact that the employer provided claimant her final paycheck October 14, 2015, and that claimant submitted written request for time off from October 15 through 22, 2015, is not new information. *See* Transcript at 22, 61. Nor is the information that claimant's pay period ended on October 15, 2015 material to EAB's determination of whether claimant is disqualified from receiving benefits based on her work separation from the employer. EAB therefore did not consider claimant's new documents when reaching this decision.

FINDINGS OF FACT: (1) Stickmen Brewery and Skewery employed claimant as a front house manager from May 23, 2013 to October 14, 2015.

(2) On October 13, 2015, the employer's owners met with claimant to give her a written warning for allegedly leaving work early when she still had duties to perform. Claimant told the owners that she wanted to use the remainder of her available vacation leave, and then terminate her employment. Claimant and the owners instead agreed that claimant's last day of work would be October 14, 2015, and that the employer would pay claimant for the remainder of her available vacation leave.

(3) Claimant last worked for the employer on October 14, 2015, after which the employer gave claimant her final paycheck.

CONCLUSIONS AND REASONS: Claimant failed to establish good cause for filing an untimely application for review of Hearing Decision 15-UI-43991, and her application for review of that decision therefore is dismissed. We agree with the ALJ that claimant quit working for the employer without good cause. Hearing Decision 15-UI-43990 therefore is affirmed, and claimant is disqualified from the receipt of benefits.

Application for Review of Hearing Decision 15-UI-43991. ORS 657.270(6) required claimant's application for review of Hearing Decision 15-UI-43991 to be filed no later than September 24, 2015. OAR 471-041-0065 (October 29, 2006). It was filed on October 1, 2015. OAR 471-041-0070(3) requires that individuals filing late applications for review include with the late application "a written statement describing the circumstances that prevented a timely filing." Claimant did not provide any explanation as to why she filed her application 7 days after the filing deadline expired.

Because the application for review was filed after the 20-day deadline provided by ORS 657.270(6), and good cause to extend the time allowed has not been shown, the application for review must be dismissed.

Review of Hearing Decision 15-UI-43990. The primary issue in this case is whether claimant quit work or was discharged. OAR 471-030-0038(2)(b) (August 3, 2011) states that if the employee is willing to continue to work for the same employer for an additional period of time but is not allowed to do so by the employer, the separation is a discharge. If the employee could have continued to work for the same employer for an additional period of time, the work separation is a voluntary leaving. OAR 471-030-0038(2)(a). "Work" means "the continuing relationship between an employer and an employee." OAR 471-030-0038(1)(a) (August 3, 2011). The date an individual is separated from work is the date the employment relationship is severed. *Id.*

At hearing, one of the owners who met with claimant on October 13, 2015 testified that the employer only intended to give her a written warning for repeatedly leaving work early when she still had duties to perform. Transcript at 6. According to the owner, claimant told them that she wanted to use the remainder of her available vacation leave and then terminate her employment, and that they instead agreed that claimant's last day of work would be October 14, 2015, and that the employer would pay claimant for the remainder of her available vacation leave. *Id.* Claimant testified that the owners told her they were terminating her employment, which the employer characterized as a layoff. Transcript at 31. However, the owner's testimony was corroborated by the employer's office manager, who testified that she heard on October 13, 2015 that claimant had quit during the meeting, and that the owner's paperwork indicated that claimant had quit. Transcript at 22-23.

In her written argument, claimant asserts that the employer's witnesses were not credible because they were clearly heard whispering to each other during their testimony, and it was so "obvious" they were "colluding" in their answers that the ALJ had to admonish them about their behavior on at least one occasion. Claimant's Written Argument at 4. Claimant further asserts that given that the employer was laying off seasonal employees for lack of work, and delegating the bulk of claimant's duties to the employer's office manager, and that the owner gave claimant her final paycheck only one day after the October 13 meeting, the record shows that the employer discharged claimant at the meeting. *Id.* at 4-5. In its written argument, the employer admits that its witnesses were admonished for speaking during each other's testimony, but asserts that they were merely attempting to assist in the development of a full

record, and denies that they were colluding in their answers. Employer's Written Argument at 2. The employer also emphasizes that claimant was not a seasonal employee, and asserts that the fact that it gave claimant her final paycheck after allowing her to work the day after the October 13 meeting shows she quit, given the employer's practice of giving discharged employees their final paychecks immediately, and not allowing them to continue working for an additional period of time. *Id.*

We have reviewed the record in its entirety, and find no reasonable basis for determining that the employer's witnesses were not credible. Absent such a determination, the owner's corroborated testimony regarding what transpired at the October 13, 2015 meeting outweighs claimant's uncorroborated testimony to the contrary. The preponderance of evidence in the record shows that claimant moved to sever the employment relationship during the October 13, 2015 meeting, and that she and the employer then mutually agreed to separate on October 14, 2015. Because claimant could have continued to work for the employer for an additional period of time, the work separation is a quit, and not a discharge.

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 P3d 722 (2010). A claimant who quits work must show that no reasonable and prudent person would have continued to work for her employer for an additional period of time.

In this case, the record fails to show why claimant quit work, and claimant did not assert or show that no reasonable and prudent person would have continued to work for employer for an additional period of time. Claimant therefore failed to establish that she quit work with good cause, and she is disqualified from the receipt of benefits.

DECISION: The application for review of Hearing Decision 15-UI-43991 filed October 1, 2015 is dismissed. The decision remains undisturbed. Hearing Decision 15-UI-43990 is affirmed.

Susan Rossiter and J. S. Cromwell.

DATE of Service: October 28, 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.

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