

EMPLOYMENT APPEALS BOARD DECISION
2015-EAB-1203

Affirmed
Disqualification

PROCEDURAL HISTORY: On August 20, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant voluntarily left work without good cause (decision # 73345). Claimant filed a timely request for hearing. On September 16, 2015, ALJ Murdock conducted a hearing, and on September 21, 2015 issued Hearing Decision 15-UI-44572, affirming the Department's decision. On October 6, 2015, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant submitted a written argument, but failed to certify that she provided a copy of that argument to the other parties as required by OAR 471-041-0080(2)(a) (October 29, 2006). The argument also contained information that was not part of the hearing record, and claimant failed to show that factors or circumstances beyond her reasonable control prevented her from offering that information during the hearing as required by OAR 471-041-0090 (October 29, 2006). Because of claimant's failure to comply with applicable regulations, EAB did not consider claimant's argument or the new information she sought to introduce. EAB considered only information received into evidence at the hearing when reaching this decision. *See* ORS 657.275(2).

The employer submitted a written argument which, while it was certified as having been provided to claimant, also offered new information not presented at the hearing. As with claimant's written argument, the employer did not explain why it did not offer the newly proffered information during the hearing or otherwise show that factors or circumstances beyond its reasonable control prevented it from doing so as required by OAR 471-041-0090. For this reason, EAB did not consider the employer's new information when reaching this decision. EAB considered only those parts of the employer's argument that relied on information received into evidence at the hearing.

FINDINGS OF FACT: (1) Project D O V E employed claimant from June 3, 2008 until June 25, 2015, last as shelter manager.

(2) When claimant was promoted to shelter manager, she began receiving a salary. Upon her promotion, claimant understood that her hours were going to become more flexible than before and she would be allowed to begin work at 8:30 a.m. and to leave work on Fridays at 1:00 p.m. The employer's executive director did not share the same understanding as claimant about the flexibility of her work hours.

(3) Sometime after claimant's promotion, the executive director told claimant that she was expected to report for work at 8:00 a.m. and remain at work until 5:00 p.m. and that she could not leave early on Fridays. Beginning sometime around early June 2015, claimant began commenting to one of her subordinate employees that she "could not take it [continuing to work for the employer] much longer" and that "she was going to quit if she could not get Fridays off or get off early on Fridays." Audio at ~19:00. Claimant made such comments "numerous times," often on Thursdays or Fridays. Audio at ~19:05. Claimant told another subordinate employee that she was going to quit work because she had become unhappy with her job and with the executive director's behavior. Audio at ~21:00.

(4) On Tuesday, June 23, 2015, the executive director had meeting with claimant in which the executive director went over claimant's job description, stated what she expected from claimant in the workplace, and specifically stated that claimant was to work from 8:00 a.m. until 5:00 p.m., Mondays through Fridays. Audio at ~23:00, ~28:30. When the executive director asked claimant to sign a document setting out these expectations, claimant refused to sign it because it set out a work schedule that was not consistent with her understanding of her schedule should have been, including reporting for work at 8:00 a.m. rather than 8:30 a.m. and not allowing her to leave early on Fridays. Audio at ~28:05. Claimant was "very upset" about the document, and thought that the executive director was renegeing on an agreement about her work hours. Audio at ~28:50. The executive director told claimant that she had until Friday, June 26, 2015 to determine whether she was willing to sign the document. Audio at ~13:01. Claimant took Wednesday, June 24, 2015, off from work to decide whether she was going to sign the document.

(5) On Thursday, June 25, 2015, claimant returned to work. The executive director was out of the office that morning. While the executive director was gone, claimant made various comments to a subordinate employee that suggested she was intending to quit work very shortly, including that "she didn't know whether she could make it to noon," "she would not be here much longer" and "you've got to [learn] to schedule yourself because I won't be here." Audio at ~18:11, ~18:20. On a few occasions that morning, claimant took small boxes from her office out to her car. Audio at ~18:26.

(6) Sometime before noon on June 25, 2015, the executive director returned to the office. At around noon, the executive director asked claimant over the phone when she was going to leave on her lunch break because she and claimant were the only employees in the office and they could not take their lunches at the same time. Audio at ~12:28. Rather than responding to the question, claimant told the executive director that she was not going to sign the document that the executive director had given to her on Tuesday, June 23, 2015 about her work schedule. Audio at ~12:58. The executive director repeated her question about when claimant was leaving for lunch and claimant responded that she did not know and hung up the phone. Audio at ~13:05. The executive director then walked to claimant's office and asked claimant again about her lunch break and claimant ignored her question and still did not respond. The executive director asked claimant if claimant had heard her, and told claimant that she was her supervisor and claimant needed to be professional and respectful to her. Audio at ~6:40, ~13:28. Claimant became angry and told the executive director that "she's not my mom [and] not to talk to me

like that.” Audio at ~6:43, ~13:35. Claimant raised her voice and again told the executive director that she was not going to sign the document given to her on Friday, June 23, 2015. Audio at ~13:54. The executive director replied by telling claimant to stop shouting at her and to leave the office until she could behave in a more professional manner. Audio at ~ 13:56. Claimant left the workplace and did not return.

(7) On June 25, 2015, claimant voluntarily left work.

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 discharged her on June 25, 2015, and the employer’s witness contended that claimant voluntarily left work on that day. Audio at ~5:23, ~11:11. OAR 471-030-0038(2) sets out the standard for determining whether a work separation should be characterized as a discharge or a voluntary leaving. If claimant could have continued to work for the employer for an additional period of time when the separation occurred, the separation was a voluntary leaving. OAR 471-030-0038(2)(a) (August 3, 2011). 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 was a discharge. OAR 471-030-0038(2)(b).

While the testimony of claimant and the employer’s executive director agreed as to some of what was said during the interaction on June 25, 2015, it was irreconcilable about the words that actually motivated claimant’s departure from the workplace. If claimant’s account of the June 25, 2015 conversation is accepted then, for no apparent reason and with no provocation, the executive director blew up at claimant and told her to leave the workplace and not return. Audio at ~6:40, ~7:00. Claimant’s account suggested that the document the employer wanted her to sign by June 26, 2015, encapsulating the employer’s work schedule for claimant, was not a factor in claimant’s behavior on June 25, 2015. Audio at ~6:40. However, based on her testimony at hearing, claimant was upset about the document and was resistant to signing it. Audio ~17:23, ~28:05, ~28:40. Since claimant contended that she and the executive director generally had cordial relations up until that document was presented to her to sign, and the deadline for signing the document was one day away, it would seem likely that the document and signing it were on claimant’s mind on June 25, 2015. Audio at ~6:06. In addition, the statements made by claimant’s coworkers about what claimant had told them on and before June 25, 2015 suggested she was going to leave work if she was not allowed to have the work schedule she wanted, and presumably would rather quit than sign a document setting out a different work schedule. While claimant argued that the two coworkers were biased as a result of their ongoing employment relationship with the employer that circumstance does not explain why they would actively conspire with the employer to fabricate evidence, rather than simply not testifying if their truthful testimony would support claimant’s position. Audio at ~25:41, ~26:29. Moreover, the testimony of both coworkers appeared measured, unrehearsed and plausible, and since they were less directly interested in the outcome of the case than claimant or the employer, it is accepted in preference to either party’s testimony. Since both claimant’s and the employer’s description of claimant’s reactions to the June 23, 2015 document supported the logical likelihood that it would come up in an argument between claimant and the executive director on June 25, 2015, and the executive director’s testimony stated that it did while claimant denied that, we discount claimant’s description of the substance of what was said in that interaction and infer both that it was a precipitating factor in the argument on June 25, 2015 and that the testimony of the executive director was more reliable overall than claimant’s about the interaction.

Since the testimony of the coworkers most strongly supports that of the executive director, that claimant quit work on June 25, 2015, it is most likely that the work separation was a voluntary leaving on June 25, 2015 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). 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 his employer for an additional period of time.

Because claimant contended that she was discharged, she offered no reasons for leaving work. From the focus of claimant’s hearing testimony, it can be discerned that claimant may have decided to leave work because she was unwilling to sign the June 23, 2015 document, unwilling to accept the schedule that document set out for her or was upset about what the executive director said to her on June 25, 2015. With respect to signing the June 23, 2015 document, there was little evidence in the record that claimant’s signature was intended to be more than a mere acknowledgment that she was aware of its contents, that any cognizable harms would befall claimant if she signed it or that the employer intended to sanction her if she did not. As well, there was little evidence of any harm to claimant from complying starting work a half hour earlier than she wanted or from not having Friday afternoons off as was set out in the June 23, 2015 schedule. Absent such evidence, the record is insufficient to show that the existence of the document, the schedule it set out or the employer’s request that claimant sign it, was a grave reason for claimant to leave work.

With respect to the executive director’s communications to claimant on June 25, 2015, claimant did not describe them in such a way that they appeared to be insulting or abusive, or otherwise created an oppressive work environment of the type that may constitute good cause for leaving work. *See McPherson v. Employment Division*, 285 Or 541,557, 591 P2d 1381 (1979) (claimants not required to “sacrifice all other than economic objectives and *** endure racial, ethnic, or sexual slurs or personal abuse, for fear that abandoning an oppressive situation will disqualify the worker from unemployment benefits); *accord Stephen G. Wilkes* (Employment Appeals Board, 12-AB-3173, December 14, 2012) (ongoing verbal abuse despite complaints); *James D. Hayes* (Employment Appeals Board, 11-AB-3647, February 9, 2012) (sexist and ageist remarks); *Pamela Latham* (Employment Appeals Board, 11-AB-3308, December 22, 2011) (supervisor’s ongoing verbal abuse and fits of temper); *Shirley A. Zwahlen* (Employment Appeals Board, 11-AB-2864, December 12, 2011) (management’s ongoing ageist comments and attitudes); *Denisa Swartout* (Employment Appeals Board, 11-AB-3063, October 28, 2011) (corporate culture hostile to women); *Kathryn A. Johnson* (Employment Appeals Board, 11-AB-2272, September 6, 2011) (supervisor’s regular fits of temper and verbal abuse). Claimant did not meet her burden to show that the manner in which the executive director communicated with her on June 25, 2015 was a grave reason for her to leave work when she did.

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-44572 is affirmed.

Susan Rossiter and J. S. Cromwell, participating.

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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