

EMPLOYMENT APPEALS BOARD DECISION
2015-EAB-1272

Affirmed
Disqualification

PROCEDURAL HISTORY: On August 17, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 73258). Claimant filed a timely request for hearing. On October 13, 2015, ALJ Murdock conducted a hearing, and on October 16, 2015 issued Hearing Decision 15-UI-46020, reversing the Department's decision and concluding that claimant voluntarily left work without good cause. On October 27, 2015, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant submitted a written argument in which she contended, among other things, that the ALJ erred in allowing hearsay evidence from the employer about what claimant's supervisor might have stated to her during their conversation on July 23, 2015. However, hearsay is admissible in unemployment insurance proceedings when it "is of a type commonly relied upon by reasonably prudent persons in the conduct of their serious affairs." OAR 471-040-0025(5) (August 4, 2004). Here, the hearsay evidence was principally contained in a disciplinary notice to claimant and in notes that appeared to have been made by the supervisor. Since these documents appear to be part of the employer's regularly kept business records, they are the type of hearsay that would be reasonably relied upon in the conduct of serious affairs. It was not error for the ALJ to consider testimony based on them when reaching her decision. Moreover, as set out below, EAB has relied on claimant's account of what the supervisor stated to her when reaching this decision and not on hearsay from the supervisor. Accordingly, claimant has sustained no prejudice from the employer's hearsay evidence. EAB considered the remainder of claimant's argument when reaching this decision.

FINDINGS OF FACT: (1) NW Navigator, LLC employed claimant as a taxi driver from June 9, 2015 until July 23, 2015.

(2) On Thursday, July 23, 2015, claimant met with her supervisor and a coworker to discuss certain statements she had made to the coworker. As a result of the conversation, the supervisor concluded that claimant had been spreading rumors in the workplace. Claimant understood the supervisor to tell her

that she was suspended without pay effective immediately and continuing through Friday, July 24, 2014. The supervisor told claimant that he would call her before her next scheduled shift, on Monday, July 27, 2015, to let her know the status of her employment. The supervisor did not tell claimant that his failure to contact her before July 27, 2015 meant that she was discharged.

(3) The supervisor did not call claimant before her shift began at 2:00 p.m. on July 27, 2015. However, the employer expected claimant to report for work as scheduled on July 27, 2015 and had no plans to discharge her. On July 27, 2015, claimant did not report for work or call and the employer assumed that she had quit work. Claimant never contacted the supervisor or other representatives of the employer to clarify whether, by not calling her, the employer intended to change its initial decision to suspend her to a decision to discharge her.

(4) Sometime around 2:00 p.m. on July 27, 2015, claimant wrote and mailed a letter to the employer's president and registered agent stating that, since her supervisor had not contacted her by the start of her shift, she "had no reason to believe that I have not been effectively terminated." Audio at ~17:00. Claimant demanded that her final pay check be available for her to pick up by Wednesday, July 29, 2015. Claimant did not call the employer before sending the letter because she thought that it was the employer's responsibility to contact her if she had not been discharged. The employer received claimant's letter sometime around July 29, 2015. The employer did not contact claimant after it received her letter.

(5) By not reporting for work on July 27, 2015, without clarifying whether the employer intended to discharge her by its failure to contact her, claimant voluntarily left work after her last shift worked, or on July 23, 2015.

CONCLUSIONS AND REASONS: Claimant voluntarily left work without good cause on July 23, 2014.

Claimant contended that the employer discharged her when her supervisor failed to contact her before her shift began on July 27, 2015, as he had stated her was going to do to inform her of the status of her continued employment. The employer contended that claimant voluntarily left work by failing to report for work on July 27, 2015 and failing to contact the employer. The standard for determining whether a work separation is properly characterized as a discharge or as a voluntary leaving is set out in OAR 471-030-0038(2) (August 3, 2011). If claimant could have continued to work for the employer for an additional period of time at the time of the work separation, the separation was a voluntary leaving. OAR 471-030-0038(2)(a). 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).

Claimant did not contend that the employer or her supervisor ever clearly told her that she was discharged or fired. The supervisor's failure to act, on which claimant relied to conclude she was discharged, was an ambiguous communication at best. Claimant did not contend that her supervisor brought up a possible discharge in their final conversation on July 23, 2015, or state words to the effect that if he did not call her before the start of her shift on July 27, 2015 she should assume her two day suspension had become a discharge. The record shows that neither the supervisor, or the employer, did anything that unequivocally communicated an intention to discharge claimant before her scheduled shift

on July 27, 2015. Claimant was the first party to objectively manifest that she was unwilling to continue the work relationship when she did not report for work on July 27, 2015, did not contact the employer about returning to work or her employment status, and, instead, sent a letter to the employer stating she had been discharged and requesting her final paycheck. Claimant's work separation was a voluntary leaving, and it is inferred that the separation occurred on July 23, 2015, after the last shift she worked.

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 her employer for an additional period of time.

Claimant did not articulate a reason for leaving work other than that she inferred she was involuntarily discharged when the supervisor did not call her before her shift began on July 27, 2015. As discussed above, however, the supervisor's failure to call claimant was an uncertain basis on which to conclude that she was discharged without further inquiry of the employer or the supervisor. EAB has consistently held that when a claimant does not report for work because she mistakenly believed that he or she had been discharged based solely on an ambiguous or equivocal employer action or communication, claimant has voluntarily left work without good cause since a reasonable and prudent person would have sought clarification of the intention underlying the employer's action or communication before concluding that he or she was discharged.¹ Claimant argued, "Does the ALJ really believe that I was supposed to call and beg for my job?" Claimant's Written Argument at 1. However, claimant's assertion assumes that the supervisor intended to discharge her by his failure to contact her, and does not address the obvious ambiguity in his purported failure to act. A reasonable and prudent person, exercising ordinary common sense and to whom an employer made an objectively ambiguous communication of intention, would not have concluded that he or she was discharged and failed to report for work before clarifying the employer's intention.

¹ See *accord* Appeals Board Decision 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); Appeals Board Decision 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).

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-46020 is affirmed.

Susan Rossiter and J. S. Cromwell.

DATE of Service: November 24, 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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