

EMPLOYMENT APPEALS BOARD DECISION
2015-EAB-1487

Affirmed
Disqualification

PROCEDURAL HISTORY: On August 27, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant quit working for the employer without good cause (decision # 173447). Claimant filed a timely request for hearing. On September 28, 2015, ALJ Vincent conducted a hearing, and on October 1, 2015 issued Hearing Decision 15-UI-45226, affirming the Department's decision. On October 6, 2015, claimant filed an application for review with the Employment Appeals Board (EAB). On October 26, 2015, EAB issued Employment Appeals Board Decision 2015-EAB-1200, reversing Hearing Decision 15-UI-45226 and remanding this matter to the Office of Administrative Hearings (OAH) for another hearing and decision. On November 17, 2015, ALJ Vincent conducted a hearing, and on November 24, 2015 issued Hearing Decision 15-UI-48287, again affirming decision # 173447. On December 10, 2015, claimant filed an application for review of Hearing Decision 15-UI-48287 with EAB.

EAB considered the entire hearing record. Claimant submitted written argument with her application for review, but failed to certify that she provided a copy of her argument to the other parties as required by OAR 471-041-0080(2)(a) (October 29, 2006). EAB therefore did not consider the argument when reaching this decision.

FINDINGS OF FACT: (1) Lake Shore Inc. employed claimant as a server from May 1, 2002 to August 5, 2015.

(2) The wife of the employer's owner and co-owner, mother, and sister-in-law performed services for the employer. Claimant did not like the way the co-owner spoke to her. The owner's mother worked in the kitchen, and often criticized employees, including claimant. Her behavior included complaining loudly that "everyone was lazy sons of bitches." Audio Record (November 24, 2015) at 10:00. The owner's sister-in-law washed dishes and waited tables. She often "ordered [employees] around" and interfered with their work, but rarely worked with claimant. Audio Record (November 24, 2015) at 12:00. The co-owner never saw the owner's mother and sister-in-law verbally abuse or yell at claimant.

(3) In early or mid-July 2015, one of the employer's other servers informed claimant that, per the co-owner's instructions, she had been reporting her tips using claimant's employee identification number, which was used to report tip income to the Internal Revenue Service (IRS). Claimant therefore believed that she was paying taxes on the other server's tips. However, she did not complain to the employer's owners. The co-owner had not instructed the employee to report her tips using claimant's employee identification number, and never observed her doing so.

(4) In mid to late July, the co-owner, mother and sister-in law twice criticized claimant for failing to serve a customer in a timely manner. On July 23, 2015, claimant notified the employer she was quitting work, effective August 5, 2015.

(5) Claimant quit work because the co-owner, mother and sister-in-law allegedly verbally abused her, and the co-owner allegedly instructed another server to report her tips using claimant's employee identification number.

CONCLUSIONS AND REASONS: We agree with the Department and the ALJ that claimant failed to establish she had good cause to quit working for the employer.

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.

Claimant quit work, in part, because the owner's wife and co-owner, mother and sister-in-law allegedly verbally abused her. However, the co-owner denied doing so,¹ and the evidence on that issue is equally balanced. Claimant showed that the owner's mother and sister-in-law sometimes behaved inappropriately, but claimant rarely worked with the owner's sister-in-law, and the co-owner never saw her or the owner's mother verbally abuse or yell at claimant. Claimant failed to meet her burden to establish specific behavior so egregious that no reasonable and prudent person would have continued to work for the employer for an additional period of time.

Claimant also quit work because the co-owner allegedly instructed another server to report her tips using claimant's employee identification number, which was used to report tip income to the IRS, leading claimant to believe she was paying taxes on the other server's tips. However, claimant did not complain to the owner before notifying the employer she was quitting work. The co-owner did not instruct the other server to use claimant's employee identification number when reporting her tips, and never observed her doing so. The co-owner testified that the employer later determined that other server did

¹ Audio Record (November 24, 2015) at 38:00.

not use claimant's employee identification number when reporting her tips,² and claimant failed to show otherwise. Absent a showing that the employer knowingly allowed the server to report her tips using claimant's employee identification number, or was unwilling to stop her from doing so, claimant failed to establish that no reasonable and prudent person would have continued to work for her employer for an additional period of time.

We therefore conclude that claimant quit work without good cause. Claimant is disqualified from receiving benefits based on her work separation from the employer.

DECISION: Hearing Decision 15-UI-48287 is affirmed.

Susan Rossiter and J. S. Cromwell

DATE of Service: January 12, 2016

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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² Audio Record (November 24, 2015) at 42:00.