

EMPLOYMENT APPEALS BOARD DECISION
2016-EAB-0072

Reversed
No Disqualification

PROCEDURAL HISTORY: On December 4, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant voluntarily left work without good cause (decision # 130823). Claimant filed a timely request for hearing. On December 30, 2015, ALJ Triana conducted a hearing in which the employer did not participate, and on December 31, 2015 issued Hearing Decision 15-UI-50368, affirming the administrative decision. On January 19, 2016, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant 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). The argument also contained information that was not part of the hearing record, and failed to show that factors or circumstances beyond claimant's reasonable control prevented claimant from offering the information during the hearing as required by OAR 471-041-0090 (October 29, 2006). We considered only information received into evidence at the hearing when reaching this decision. *See* ORS 657.275(2).

FINDINGS OF FACT: (1) Kendall Dealership employed claimant, last as an Audi and Volkswagen sales manager from February 24, 2014 until November 10, 2015.

(2) In June 2015, claimant contacted the employer's president and asked to meet with him to discuss concerns she had about the way in which her supervisor, the employer's general manager, was treating her. The president scheduled a meeting with claimant and the employer's Oregon manager, but the meeting was subsequently cancelled. Claimant made several attempts to reschedule the meeting with the president, but was never able to meet with him.

(3) On July 24, 2015, the employer's general manager reprimanded claimant in writing for failing to timely prepare a web advertisement for the month of July, for failing to train the sales team claimant supervised, and for failing to participate in a telephone training. Contrary to the alleged deficiencies mentioned in this reprimand, claimant had timely prepared the web advertisement, and had properly trained her sales team to the extent that they had the highest sales performance of any team in the

employer's store. The sales performance of claimant's staff was 40% higher than the sales performance of sales teams supervised by male managers. In addition, two other managers in the employer's store had not participated in the telephone training but were not reprimanded for their failure to do so.

(4) On September 22, 2015, the general manager scheduled a meeting with claimant and the employer's human resources (HR) director as a follow up on the July reprimand. That meeting was cancelled, however.

(5) On October 9, 2015, the general manager and the HR director met with claimant and presented her with a list of additional performance deficiencies. Among the deficiencies listed were the failure of claimant and her sales team members to use the CRM system to keep track of customers, claimant's failure to fill vacancies on her sales team, and claimant's failure to participate in telephone training. After this meeting, claimant addressed these deficiencies. By the end of October 2015, claimant's sales team had the highest percentage use of the CRM system of any team in the employer's store. In addition, claimant hired sales people to fill staff vacancies, and participated in telephone training.

(6) On November 3, 2015, the general manager and HR director told claimant that they wanted to meet with her on November 10. They warned claimant that the meeting might not go the way she would like it to go. Audio Recording at 14:37.

(7) On November 10, 2015, at 11:00 a.m., the general manager and HR director met with claimant and told her they were removing her from her position as sales manager. When claimant asked why they were removing her from a managerial position, the HR director did not directly reply, telling her only that certain matters were "subjective." Audio Recording at 15:44. The general manager and HR director then offered claimant a position as a sales person, but provided her with few details about this job. When claimant asked for a complete job description, she was told "we can talk about that." Audio Recording at 21:05. Claimant was told to go home for the rest of the day, think about the job offer and provide the HR director and general manager with her response on November 11.

(8) Claimant was unable to perform the job duties of a sales person, which included taking customers on demonstration rides, delivering vehicles, and shoveling snow. Claimant had been diagnosed with severe anxiety which made it impossible for her to accompany customers on demonstration rides, and she lacked the technical knowledge needed to fully explain and demonstrate the features and equipment in a new car. In addition, because of back problems, claimant was unable to shovel snow. Claimant also believed the unfair treatment she had received from the general manager and HR director would continue and probably worsen if she accepted a demotion to a position as a sales person. On November 11, 2015, she told the employer she would not accept the sales position and quit her job.

CONCLUSION AND REASONS: We disagree with the ALJ and conclude that claimant voluntarily left work with good cause.

Claimant's Work Separation

The ALJ concluded that claimant voluntarily left work for the employer; claimant, however, contended that the employer discharged her. We therefore begin our analysis by determining the nature of claimant's work separation.

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) (August 3, 2011). 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. OAR 471-030-0038(2)(b). Here, claimant could have continued working for the employer as a sales person, but was unwilling to do so. Claimant's work separation is a voluntary leaving.

Voluntary Quit

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 quit her job because the employer removed her from her position as a sales manager; the only work the employment offered to claimant was a position as a sales person, a job she refused to accept. Claimant was physically unable to perform the duties of a sales person. In addition, she was concerned about the treatment to which she would be subjected if she accepted the position. The record shows that claimant's concerns were reasonable. In July 2015, the employer unfairly reprimanded claimant for nonexistent performance deficiencies. In October 2015, when the employer identified supposed additional deficiencies in her work, claimant promptly addressed and corrected them. Despite these efforts, the employer chose to demote her in November 2015 for "subjective" reasons. Claimant had no reason to believe that this unfair treatment would cease and substantial reason to believe it would worsen if she had accepted a demotion to a sales position. Claimant therefore demonstrated that she faced a grave situation if she continued to work for the employer on account of her inability to perform the duties of a sales person and her legitimate concerns regarding unfair treatment.

The ALJ, however, concluded that claimant had reasonable alternatives. According to the ALJ, claimant had the alternative of contacting the employer's HR department "regarding her feelings that she was being harassed or discriminated against" or taking the sales position and "trying it out for a period of time to see what would happen." Hearing Decision 15-UI-50368 at 3. We disagree. Because the employer's HR director was actively involved in reprimanding and demoting claimant, complaining to the HR department about unfair treatment would have been futile. It would also have been futile for a claimant to "try out" a job "to see what would happen" if a claimant is unable to perform the duties of the job. See *Early v. Employment Department*, 274 Or App 321, 328, __ P3d __ (2015) (a claimant is not required to pursue an alternative to quitting a job that would be futile).

Claimant demonstrated that working for the employer as a sales person created a situation of such gravity that a reasonable and prudent person, exercising ordinary common sense, would have no reasonable alternative but to refuse the position and quit work for the employer. Claimant therefore established good cause for voluntarily leaving work and is not disqualified from the receipt of unemployment benefits on the basis of this work separation.

DECISION: Hearing Decision 15-UI-50368 is set aside, as outlined above.¹

Susan Rossiter and J. S. Cromwell

DATE of Service: February 4, 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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¹ This decision reverses a hearing decision that denied benefits. Please note that payment of any benefits owed may take from several days to two weeks for the Department to complete.