

EMPLOYMENT APPEALS BOARD DECISION
2016-EAB-0424

Affirmed
Disqualification

PROCEDURAL HISTORY: On February 26, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant, not for misconduct (decision # 114609). The employer filed a timely request for hearing. On March 17, 2016, ALJ Shoemake conducted a hearing, and on March 24, 2016 issued Hearing Decision 16-UI-55701, concluding claimant voluntarily left work without good cause. On April 13, 2016, claimant filed an application for review with the Employment Appeals Board (EAB).

In its written argument, the employer offered information that was not part of the hearing record. Under OAR 471-040-0090 (October 29, 2006), EAB may consider new information if it is relevant and material to EAB's determination, and the party offering the information demonstrates that circumstances beyond its reasonable control prevented the party from offering the information at the hearing. In its written argument, the employer asserted that it offered work to claimant after March 18, 2016, and that claimant stated she was not available to work full time due to her school schedule. Although it was beyond the employer's reasonable control to offer the new information at hearing because it occurred after the hearing, the employer failed to show that claimant's school schedule in March 2016 was relevant or material to whether claimant is disqualified from receiving benefits based on her work separation from the employer, where she left work in January 2016. EAB therefore addressed only issues raised by evidence in the record, and considered only information received into evidence at the hearing when reaching this decision. ORS 657.275(2); OAR 471-041-0090 (October 29, 2006).

FINDINGS OF FACT: (1) Emerald Temps Inc. employed claimant from July 14, 2015 to January 4, 2016. The employer was a staffing firm. Claimant was assigned to work in a temp to hire position as an electronic medical records technician with the employer's client, Northwest Urology.

(2) Claimant was pregnant and expecting her baby to be born in early November 2015. On October 30, 2015, claimant's manager at Northwest Urology told claimant it would like her to return to work at Northwest Urology after she completed her maternity leave. Claimant told the employer, and it confirmed, that claimant could return to work at Northwest Urology after she completed her maternity

leave. Claimant did not have a formal return to work date, but she and the employer's recruiter agreed that they would maintain communication during claimant's leave about her return to work.

(3) November 6, 2015, claimant began maternity leave. She gave birth on November 11, 2015, and her doctor recommended she not return to work for six weeks following the birth.

(4) At the end of December 2015, the employer's recruiter left claimant a telephone message stating that the position with Northwest Urology was still available and asking claimant to contact her about when she planned to return to work. Claimant did not receive the telephone message until the beginning of January 2016 due to a lapse in claimant's telephone service.

(5) After claimant received the employer's message at the beginning of January 2016, claimant called the employer's recruiter and told her she was not yet ready to return to work. The recruiter told claimant to contact the employer when she was ready to return to work.

(6) The employer did not fill the claimant's position at Northwest Urology with a permanent employee, and was willing to allow claimant return to work if she contacted the employer to notify it that she was ready to return to work. Claimant did not contact the employer, and began to claim unemployment insurance benefits in February 2016.

CONCLUSIONS AND REASONS: Claimant quit work without good cause.

The main issue in this case is whether claimant quit or was discharged from work. 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). "Work" means "the continuing relationship between an employer and an employee." OAR 471-030-0038(1)(a) (August 3, 2011). In the case of individuals working for temporary agencies or employee leasing companies, the employment relationship is deemed severed at the time that a work assignment ends. OAR 471-030-0038(1)(a).

At hearing, the parties provided conflicting evidence as to what was said during the last telephone conversation between claimant and the employer's recruiter in early January 2016. Claimant testified that she believed the employer's client had replaced her because the recruiter told her the employer's client had hired someone else. Audio Record at 24:19 to 25:37. The employer's recruiter testified that she told claimant the position with Northwest Urology was still available and asked claimant if she was interested, but claimant stated she was not ready to get back to work yet. Audio Record at 32:38 to 32:52. The ALJ found the employer's evidence more persuasive because it provided documentary evidence of its response to the Department's notice of claim filed that was consistent with its testimony.¹ See Exhibit 1 at 4-5. We agree with the ALJ. Moreover, it was undisputed at hearing that Northwest Urology had planned to have claimant return to her position there, and there was no evidence as to why that client would have changed its plan to have claimant return. Also, as of the hearing on March 17, the employer still had not assigned a new temp to hire employee in the Northwest Urology position, was

¹ Hearing Decision 16-UI-55701 at 3.

willing to assign claimant to that position, but had not heard from claimant since the beginning of January 2016. Because the preponderance of the evidence shows that claimant could have continued to work for the employer for an additional period of time if she had called to inform the employer that she was ready to return to work, the work separation was a 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) (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 by failing to contact the employer after she spoke with the employer’s recruiter in early January 2016. As stated above, however, the record shows that, more likely than not, the employer’s recruiter told claimant the position with Northwest Urology was still available and asked claimant if she was interested. Claimant did not assert, and the record does not show, that no reasonable and prudent person would have accepted the employer’s offer of continued work. Absent such a showing, we conclude that claimant quit work without good cause. Claimant is thus disqualified from the receipt of unemployment benefits based on this work separation.

DECISION: Hearing Decision 16-UI-55701 is affirmed.

Susan Rossiter and D. P. Hettle;
J. S. Cromwell, not participating.

DATE of Service: May 13, 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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