

EMPLOYMENT APPEALS BOARD DECISION
2016-EAB-0474

Affirmed
Disqualification

PROCEDURAL HISTORY: On March 15, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant, but not for misconduct (decision # 93620). The employer filed a timely request for hearing. On April 13, 2016, ALJ Menegat conducted a hearing, and on April 21, 2016 issued Hearing Decision 16-UI-57801, concluding claimant voluntarily left work without good cause. On April 25, 2016, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant's argument contained information that was not part of the hearing record, and failed to show that factors or circumstances beyond her reasonable control prevented her from offering the information during the hearing. Under ORS 657.275(2) and OAR 471-041-0090 (October 29, 2006), we considered only information received into evidence at the hearing when reaching this decision. Even if we had, however, this decision would remain the same, because the new information was mostly repetitive of information the parties provided during the hearing.

FINDINGS OF FACT: (1) Satellite Specialized Transportation employed claimant, last as the controller, from April 8, 2002 to February 29, 2016.

(2) Over time, the employer's co-owners became dissatisfied with claimant's work as controller and decided to hire a replacement. The co-owners discussed, amongst themselves, options that would allow them to retain claimant as an employee but move her to a different position. The co-owners discussed transferring claimant to a position in sales, the only position with an earning potential similar to that of controller. They discussed paying claimant while she trained her replacement, and paying her the same amount she earned as controller for several months until she was able to become established enough in the sales position to earn roughly the same income she earned as controller. The co-owners advertised and began interviewing for claimant's replacement without first informing claimant of their plans.

(3) On approximately February 22, 2016, claimant received a phone call from someone indicating that he was an applicant for the controller position. A few days later, a coworker told claimant she had seen an internet ad for a controller position at a trucking company. On February 26, 2016, claimant

overheard one of the co-owners interviewing someone. Claimant concluded, correctly, that the applicant, ad and interview were for her position. She asked the co-owner if the employer was interviewing other people to fill her controller position. The co-owner did not want to answer the question, and denied that the employer was seeking to replace her.

(4) That night, claimant sent a text message to the co-owner explaining that she had spoken with an applicant for her position on the phone, and wanted the co-owner to say something if she was correct that the employer was going to replace her. The co-owner then admitted that the employer was interviewing people for claimant's position because she "just was not a fit for SST." Transcript at 10. The co-owner then asked claimant "what's next?" *Id.* Claimant replied in later messages, stating, in pertinent part, that she "didn't know there was much more of a next move for her", and,

I thought much more of you and this company. With that being said, you can just let me go on Monday. I will be there at 8 to get my personal belongings and drop my key off.

Transcript at 9. In reply, the co-owner asked claimant to come in and "discuss future options." Transcript at 16.

(5) On February 29, 2016, claimant reported to the workplace. She and the co-owner met for almost half an hour. The co-owner spoke with claimant about possible continued employment in sales. The co-owner did not make any specific employment offers, did not give claimant a specific date upon which the employer planned to end her employment as controller, and did not tell claimant that there was no other work for her after the employer hired a new controller. Claimant did not think the co-owner was acting like he and the other co-owner wanted her to remain at work. Transcript at 19. She collected her belongings, left, and did not return to work thereafter.

(6) The other co-owner initiated communication with claimant after she left work. Claimant sent a text message that she had been told "you decided it was time to replace me . . . [m]y replacement was starting in a week . . . [the other co-owner] let me know there wasn't really a position for me . . ." Transcript at 10-11. The co-owner replied, "that is why I thought it would be good for us to talk because none of that is true. Just let me know if you want to talk." Transcript at 11. Claimant replied that she "was having a really hard time trusting anyone." Transcript at 18. Claimant did not respond to the co-owner's invitation to speak with him about her employment.

CONCLUSIONS AND REASONS: We agree with the ALJ that claimant voluntarily left work without good cause.

The nature of the work separation is in dispute. 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).

There is no dispute in the record that, at the time of the work separation, the employer was planning to remove claimant from her position as the employer's controller. However, for purposes of

unemployment insurance benefit determinations, "work" is not defined in terms of the particular position an employee holds, it means "the continuing relationship between an employer and an employee." OAR 471-030-0038(1)(a). Therefore, the fact that the employer intended to remove claimant as controller does not determine whether the work separation was a quit or a discharge.

Claimant testified at the hearing that she was never offered a different position or asked to continue working for the employer, and believed by the way the co-owners were acting that they did not want to employ her anymore. Transcript at 19, 31. Although the employer was removing her as controller and claimant believed he said "he was looking for [the] replacement to start in a week or so," however, notably absent from claimant's testimony was any indication that the employer had informed her that she was going to be fired or discharged on any particular date or that the employer expected her to leave the office before the new controller started work. Although claimant testified that the co-owner was vague as to what future work opportunities she might have with the employer and did not make any actual offers to transfer her to another position, she did not indicate that she was told there were none.

Although the employer did not provide claimant with any definite information about a transfer or its plans for her replacement, claimant is the party that on February 26th that stated the employer "can just let me go on Monday." After her conversation about possible options with one co-owner on February 29th during which the co-owner did not tell her she was discharged or that her employment would end on a particular day, claimant chose to collect her belongings and leave. Claimant also chose not to follow up with the other co-owner after he offered to speak with her after telling her that the information she had that "you decided it was time to replace me . . . [m]y replacement was starting in a week . . . [the other co-owner] let me know there wasn't really a position for me . . ." was untrue. It appears more likely than not that the employer had continuing work available for claimant, at least until it hired her replacement and likely beyond that point, and claimant chose to leave when she did. Because continuing work was available to claimant at the time she left, the work separation was a voluntary leaving.

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 work because the employer was going to hire a new controller and remove her from that position. Although a reasonable and prudent person might have considered that a situation of some gravity, claimant had reasonable alternatives to leaving work when she did. At the point claimant left on February 29th, the employer's co-owners had expressed to her that they wanted her to remain with the employer in a different position or indicated that her beliefs that she was not welcome to remain working for the employer were incorrect and offered to speak with her about those things. Although they had not made any definite offers to her, they also had not given her a termination date, told her she was discharged, or indicated that the employer was going to entirely discontinue her employment. Based on the information claimant had at the time she quit, we conclude that a reasonable and prudent

person of normal sensitivity, exercising ordinary common sense, would not have concluded she had no reasonable alternative but to quit her job. We therefore conclude that claimant quit work without good cause, and she is disqualified from receiving unemployment insurance benefits because of her work separation.

DECISION: Hearing Decision 16-UI-57801 is affirmed.

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

DATE of Service: May 25, 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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