

EMPLOYMENT APPEALS BOARD DECISION
2016-EAB-0530

Affirmed
No Disqualification

PROCEDURAL HISTORY: On March 22, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant voluntarily left work without good cause (decision # 101342). Claimant filed a timely request for hearing. On April 18, 2016, ALJ Ainsworth conducted a hearing, and on May 4, 2016, after reviewing the record, ALJ Holmes-Swanson issued Hearing Decision 16-UI-58803, concluding claimant voluntarily left work with good cause. On May 9, 2016, the employer filed an application for review with the Employment Appeals Board (EAB).

The employer submitted written argument to EAB, but failed to certify that it provided a copy of the argument to the other parties as required by OAR 471-041-0080(2)(a) (October 29, 2006). Therefore, we considered claimant's written argument and the entire record, but did not consider the employer's argument when reaching this decision.

FINDINGS OF FACT: (1) Eye Care Services, Inc. employed claimant from November 22, 2004 until February 29, 2016 as a front desk clerk, medical assistant and optician.

(2) Since before 2007, the office administrator and manager directed claimant to follow an office protocol where she would perform three particular eye tests on every patient who visited the clinic.

(3) In 2007, one of the doctors told claimant she should not perform the three tests for every patient, that she could not bill the patients for the tests, and that, "This is fraud. You can't do this." Transcript at 11. Claimant told the doctor she had to follow orders from the administrator and manager. The doctor began to remove the patient names from the tests so the patients could not be billed for the tests. The doctor's employment with the employer ended in 2012.

(4) On November 26, 2013, claimant reported to work and discovered that the Federal Bureau of Investigation (FBI) was conducting a raid of the clinic. The FBI had a copy of claimant's driver's license and questioned her independently about the clinic's patient testing procedures and why claimant followed those procedures. The FBI confiscated medical records and all the employer's computers before it left the clinic.

(5) After the FBI went to the employer's clinic, the employer conducted an employee meeting and told the employees not to be concerned, that the employer would "take care of this," and that the incident was related to the codes used to provide information to medical insurance providers about the services performed and billed. Transcript at 14.

(6) In January 2014, the employer hired a new doctor who did not know about the FBI investigation at hire. In September 2015, the new doctor began asking claimant why she was performing certain eye tests on every patient without doctors' orders for the tests, and told claimant, "You're not supposed to do these tests unless I ask for them." Transcript at 16. Claimant told the doctor her supervisors had directed her to conduct the tests on all patients. Claimant stopped performing the tests on every patient.

(7) The doctor hired in January 2014 quit due to the employer's testing protocol, and told claimant she was "really worried" about claimant because the employer was being "heavily watched by the FBI." Transcript at 17. Claimant perceived the doctor's comments as a warning to her and she became "fearful" about continuing to work for the employer. *Id.*

(8) In March 2015, the employer provided claimant with legal representation to assist her in responding to a subpoena to provide information as a witness in the government's investigation. On April 3, 2015, the office of the U.S. Attorney questioned claimant regarding the employer's eye testing and billing procedures. Claimant understood from the questions she was asked that the government was investigating the tests the employer performed and billed to patients, and that the FBI investigation was not merely regarding the codes the employer provided to insurance companies. The investigators told claimant they could not confirm or deny whether claimant would be charged with a crime.

(9) On February 28, 2016, the FBI investigation was still open. The employer's office manager told claimant that a new doctor would begin work the next day. When claimant reported for work on the morning of February 29, 2016, the manager told claimant, "Okay, we have a new doctor now and we're doing all the tests again." Transcript at 18. Claimant told the manager, "I can't do that anymore," and the manager asked claimant if she was "going to be a problem." Transcript at 20. Claimant responded that she could not be forced to perform the tests on every patient, and that was afraid she would "get in trouble" with the FBI. *Id.* Claimant quit because she feared criminal prosecution if she began doing the tests again.

CONCLUSIONS AND REASONS: We agree with the ALJ and conclude claimant voluntarily left work with good cause.

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 left work because she feared criminal prosecution if she followed a testing protocol that claimant believed would be unlawfully charged to the patients. The record shows claimant faced a grave situation because the employer expected her to begin conducting the tests again. The office manager's statements to claimant on her final day of work were that claimant was to begin conducting "all the tests" again, and when claimant refused, to refrain from being a "problem." The employer's owner testified at hearing that the employer "did not do anything wrong" in its testing and billing procedures. Transcript at 30-31. However, despite the employer's assertion, claimant had objective reasons to be concerned about following the testing procedures that apparently gave rise to the FBI raid and subsequent investigation of the employer and its premises. Two doctors who worked for the employer during 2007 to 2014 told claimant she could not lawfully do the tests the employer required and bill the patients for them. One of the doctors quit because she was opposed to the testing. The employer's owner testified at hearing that she did not blame the doctor for quitting. Transcript at 36. Moreover, when federal agents questioned claimant in November 2013 and April 2015, their questions related to claimant's role in the eye testing and billing practices at the employer's clinic. Claimant learned that some of the employer's employees were being investigated for crimes, and that she herself might be held liable for her activities on behalf of the employer. Accordingly, claimant's working conditions created a grave situation.

Claimant did not have a reasonable alternative to leaving her job on February 29, 2016. Claimant had an objectively reasonable basis to believe that continuing to work for the employer might involve her in illegal activities, especially where the manager commented about claimant being a "problem" if she refused to follow orders. Under such circumstances, a reasonable and prudent person would conclude that she had no reasonable alternative but to leave work. Claimant had good cause to leave work when she did. She is not disqualified from receiving unemployment insurance benefits based on this work separation.

DECISION: Hearing Decision 16-UI-58803 is affirmed.

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

DATE of Service: June 10, 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.

Please help us improve our service by completing an online customer service survey. To complete the survey, please go to <https://www.surveymonkey.com/s/5WQXNJH>. If you are unable to complete the survey online and wish to have a paper copy of the survey, please contact our office.