

EMPLOYMENT APPEALS BOARD DECISION
2016-EAB-0682

Affirmed
Disqualification

PROCEDURAL HISTORY: On December 3, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant voluntarily left work without good cause (decision # 125356). Claimant filed a timely request for hearing. On March 28, 2016, ALJ Vincent conducted a hearing, and on April 6, 2016 issued Hearing Decision 16-UI-0425, affirming the Department's decision. On April 11, 2016, claimant filed an application for review with the Employment Appeals Board (EAB). On May 4, 2016 EAB issued Appeals Board Decision 2016-EAB-0425, remanding this matter for further development of the record. On May 23, 2016, ALJ Vincent conducted a hearing, and on May 31, 2016 issued Hearing Decision 16-UI-60731, again affirming the Department's decision. On June 7, 2016, claimant filed an application for review with EAB.

FINDINGS OF FACT: (1) Residence Inn Marriott employed claimant as a housekeeper from April 1, 2014 until October 9, 2016.

(2) Claimant's native language was Zomi, a dialect spoken in Vietnam. Claimant did not speak, read or understand English well. When claimant needed to communicate with the employer, a supervisor who spoke Zomi and English usually translated.

(3) In August 2015, claimant injured her ankle at work. As a result, the employer assigned claimant to light duty work in the laundry. Claimant's ankle was slow to heal and she decided to seek less physically demanding work with other employers.

(4) On Monday, October 5, 2015, a potential new employer called Salon Centric offered claimant a job that she thought would be less physically demanding than housekeeping. Claimant accepted. Claimant's job with Salon Centric was scheduled to start on Monday, October 26, 2016.

(5) On Tuesday, October 6, 2015, accompanied by her husband and the supervisor who often translated for her, claimant told the employer's operations supervisor that she was leaving work to accept another

job. Claimant did not specify the final day she wanted to work for the employer. The supervisor gave claimant a resignation form to complete for the employer's records. Claimant's husband helped her fill out the form. The form stated the claimant's last day of work would be Friday, October 9, 2015. Claimant signed and dated the form as did the operations supervisor. Exhibit 1. Claimant did not object to the last day of work listed on the resignation form.

(6) On October 9, 2015, claimant voluntarily left work.

CONCLUSIONS AND REASONS: Claimant voluntarily left work without good cause.

Claimant testified at the April 6, 2015 hearing that she thought she was giving two weeks' notice of quitting on October 6, 2015, "but they just let me go on October 9th." Transcript of April 6, 2016 Hearing (Transcript 1) at 11. If claimant reasonably notified the employer on October 6, 2015 she planned to leave work within two weeks of her notice, or on October 20, 2015, but the employer discharged her as of October 9, 2015, ORS 657.176(8) potentially applies to her unemployment claim. ORS 657.176(8) states that when an individual has notified an employer that the individual will leave work on a specific date, the leaving would be for reasons that do not constitute good cause and the employer discharges the individual, not for misconduct, no more than 15 days before the planned voluntary leaving, the work separation is adjudicated as if the discharge had not occurred and the planned voluntarily leaving had occurred. However, the individual may be entitled to benefits for a specified period of time between the discharge and the planned voluntary leaving date. ORS 657.176(9)(a).

Although it is not disputed that claimant notified the employer that she was quitting work on October 6, 2015, a threshold issue for purposes of ORS 657.176(8) is whether the employer discharged claimant on October 9, 2015, before the date on which she planned to leave work. The work separation was a discharge if claimant was willing to continue to work for the employer for an additional period of time after October 9, 2015 but was not allowed to do so by the employer. OAR 471-030-0038(2)(b) (August 3, 2011). The separation was a voluntary leaving if claimant could have continued to work for the same employer for an additional period of time after October 9, 2015. OAR 471-030-0038(2)(a).

At the May 23, 2015 hearing on remand, claimant clarified the testimony she gave at the first hearing by stating she never explicitly told the operations supervisor that she intended to leave work on a specific date or within two weeks of October 6, 2015 and someone other than her must have written on the resignation form that her final day was going to be October 9, 2015. Transcript of May 23, 2015 Hearing (Transcript 2) at 9. Assuming the employer filled in claimant's last day of work on the resignation form because claimant had not provided one, it was reasonable for the employer to select October 9, 2015 since it was a Friday and the end of the work week in which claimant gave notice. Claimant also did not dispute the testimony of the operations manager that had she known claimant wanted to continue working after October 9, 2015 until closer in time to when her new job with Salon Centric started, she was willing to allow claimant to continue working and needed that help. Transcript 2 at 13. Giving claimant's testimony the construction most favorable to her, claimant appeared to have assumed that absent supplying a specific date for her final day of work, the employer should have implicitly understood she would work for the two weeks after she gave notice. Transcript 1 at 11. However, by signing the resignation form, which listed October 9, 2015 as her final day of work, claimant manifested agreement with the final date chosen by the employer. Where, as here, claimant

told the employer she was quitting, gave no specific date for leaving, and later agreed with the employer to a specified termination date, that type of separation is properly characterized as a voluntary leaving and not a discharge. See *Employment Department v. Shurin*, 154 Or App 352, 959 P2d 639 (1998). A claimant's agreement to a termination date may be inferred if claimant did not voice disagreement with the separation date established by the employer or otherwise did not insist on working until the original date she planned to leave. See *J. R. Simplot Company v. Employment Division*, 102 Or App 523, 795 P2d 579 (1990). Here, claimant did not protest the employer's decision to select October 9, 2015 as her leaving date, and acquiesced by not protesting that date or expressing that she wished to work longer. Transcript 1 at 11, Transcript 2 at 7, 9, 10. On the facts in this record, the employer did not discharge claimant on October 9, 2015, before the date on which she planned to leave work. As such, ORS 657.176(8) is not applicable to claimant's claim, and we conclude for the reasons explained that claimant agreed to voluntarily leave work on October 9, 2015.

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). An individual who leave work to accept an offer of other work has quit work with good cause only if the offer is definite and the new work is scheduled to begin in the shortest time reasonable under the circumstances. OAR 471-030-0038(5)(a). 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 principally because she had accepted the job offer from Salon Centric and she thought the new job would be less physically demanding and would allow her ankle to heal. It does not appear on this record that claimant quit work because of the condition of her ankle or that she would have left work if she had not received the offer from Salon Centric. Therefore, in order to show good cause for leaving work, claimant must meet the standard set out in OAR 471-030-0038(5)(a), including that her job with Salon Centric was to begin in the shortest reasonable time after her existing job ended. In this case, claimant quit work on October 9, 2015, but her new job with Salon Centric did not begin until October 26, 2015, approximately 17 days after she left work. Claimant did not assert or show that it was necessary for her to have 17 days between these two jobs. Absent such evidence, claimant did not show that her new job with Salon Centric began in the shortest reasonable time after her job with the employer ended.

Claimant did not show that she had good cause for leaving work when she did. Claimant is disqualified from receiving unemployment insurance benefits because of this work separation.

DECISION: Hearing Decision 16-UI-60731 is affirmed.

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

DATE of Service: July 20, 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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