EO: 200
BYE: 201711

State of Oregon
Employment Appeals Board
875 Union St. N.E.
Salem, OR 97311

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VQ 005.00

EMPLOYMENT APPEALS BOARD DECISION
2016-EAB-0804

Affirmed
Disqualification

PROCEDURAL HISTORY: On May 19, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant voluntarily left work without good cause (decision # 161955). Claimant filed a timely request for hearing. On June 14, 2016, ALJ Menegat conducted a hearing, and on June 22, 2016 issued Hearing Decision 16-UI-62304, affirming the Department's decision. On July 7, 2016, claimant filed an application for review with the Employment Appeals Board (EAB).

Both parties submitted written arguments that complied with the procedural requirements set forth in OAR 471-041-0080 (October 29, 2006). EAB therefore considered both parties' arguments when reaching this decision, to the extent the arguments were relevant and based on the hearing record. Claimant's request for EAB to consider new information under OAR 471-041-0090 (October 29, 2006) is denied because claimant did not establish that it was beyond her reasonable control to present the same information at the hearing, even if the witness was not available to testify, or subpoena the witness if he was reluctant or refused to attend the hearing. Even if she had, she did not establish what the witness would have said had the witness been able to testify and therefore failed to establish the relevance or materiality of the evidence to the matter within EAB's jurisdiction to decide.

The employer's request for EAB to exclude claimant's argument is also denied. There is no requirement in OAR 471-041-0090 that written arguments be served contemporaneously. In addition, it appears that both copies of claimant's argument included the required certification, and, to any extent claimant might not have sent a copy of her first argument to the employer or otherwise delayed sending it, the applicable administrative rule does not include provisions allowing for responsive pleadings. Any defect in service therefore did not adversely affect the employer's right to present its own argument for EAB's consideration. We also note that, although the employer indicated in its argument that it had

failed to meet the deadline for filing a written argument with EAB, the employer's argument was, actually, filed three days before the deadline expired, and EAB therefore considered it as a timely argument. The remainder of the parties' arguments are, generally, resolved in EAB's findings and analysis, below.

FINDINGS OF FACT: (1) Abdill Career College, Inc. employed claimant as a program director and instructor from September 26, 2010 to March 23, 2016.

(2) Claimant had concerns that she was working excessive hours. She thought the employer treated some students unfairly with respect to fees, treatment, discipline and externship assignments. The Higher Education Coordination Committee was investigating students' complaints, and claimant believed the complaints were founded. She had been looking for other work and was planning to resign in the future.

(3) On March 1, 2016, the owner asked claimant if she planned to teach the following term. Claimant responded that she would let the owner know.

(4) On March 22, 2016, the employer's owner again asked claimant to discuss the class schedule for the following term. The owner asked claimant if she was going to come back the following term, which was scheduled to begin on March 28, 2016. Claimant replied, "I was hoping not to." Transcript at 5. Claimant told the owner that she was waiting to finish refinancing her home loan, which had depended upon verification of claimant's employment with the employer, and then was going to quit work.

(5) The owner asked claimant if they could talk about it or if claimant would reconsider, and claimant declined. The owner said that she "may have to" contact the loan company and tell them claimant was no longer employed. Transcript at 5. The owner suggested claimant take some time to think about it, but claimant said she did not need to think about it and did not want to continue working. The owner asked claimant if she should give her classes to another instructor, and claimant said yes. The owner asked claimant if claimant was sure, and claimant said yes.

(6) At some point during that conversation with the owner, claimant asked the owner "if she felt that that was my resignation." Transcript at 6. The owner said she did. Claimant left the owner and "did not respond to that." *Id.*

(7) Later on March 22, 2016, claimant approached the owner while the owner was on the phone with someone else. Claimant said that she was going to discuss the situation with her husband and then speak with the owner the following morning. The owner only heard part of what claimant said because she was on the phone speaking with someone else at the time and did not understand claimant to have asked to rescind her resignation.

(8) Before leaving the workplace on March 22, 2016, claimant removed her personal items from the employer's school. Claimant asked a student to stay while she gathered her belongings and then sign a note stating that he saw claimant had not removed any of the employer's property. The coworker signed the note, and claimant slid the note under the employer's office door.

(9) The night of March 22, 2016, claimant and her husband discussed claimant's work situation. Claimant was afraid that the owner would sabotage her loan by reporting to the loan company that claimant was going to quit her job after getting the loan. Claimant and her husband agreed that claimant would go to the workplace in the morning and tell the owner she would continue working.

(10) Before work on March 23, 2016, claimant's loan company called her and reported that it was told claimant no longer worked for the employer. She was told the loan would be placed on hold. Claimant was upset because she thought the owner had agreed the night before to give claimant time to discuss things with her husband, then had "taken [the time] away from me without even discussing it with me." Transcript at 6. Claimant then went to the workplace to enter a student's grades that she had not completed the day before and return her keys. She did not return to work after March 23, 2016.

(11) Before March 22, 2016, claimant did not tell the owner she was upset or unhappy with her job or was contemplating leaving her employment.

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

Claimant alleged the employer discharged her, and the employer alleged claimant quit work. The nature of the work separation is determined by application of OAR 471-030-0038(2) to the facts of the case as developed at the hearing, and does not depend upon the parties' characterizations. 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).

On March 1 and March 22, the owner asked claimant, an instructor, to discuss her class schedule for the next term, which was to begin March 28, 2016. In response, on March 22, claimant told the owner that she hoped not to continue working for the employer, she planned to quit when she got a home loan, she wanted the owner to assign her classes to a different instructor, and she did not want to take time to reconsider whether or not to continue working for the employer. Claimant testified at the hearing that "I had also asked her if she felt that that was my resignation, which she said she did, and I did not respond to that." Transcript at 6. The same night, when leaving work, claimant took her personal property with her and asked a student to confirm that she had not taken any of the employer's property. Considering the totality of the circumstances, the owner made it clear to claimant that continuing work was available to claimant in the next school term, claimant refused to agree to teach any classes the next school term. In addition, when she clarified with the owner that the owner believed her to have resigned, claimant did not respond or otherwise indicate to the owner that the owner was mistaken and that claimant was willing to continue working for the employer an additional period of time. The work separation was a voluntary leaving.

One of claimant's witnesses, a former student, alleged that the owner and the owner's daughter made references to "somebody else that they needed to get rid of," and that he concluded that they were referring to claimant. Transcript at 21-22. However, he did not allege that either person identified claimant by name, and specifically testified that the owner "never said that she fired" claimant. Transcript at 24. Another witness, a former employee, alleged that an investigator told her that the

owner said she had fired claimant. Transcript at 34. The record does not include any information about the context of that conversation from which we can gauge the reliability of the hearsay. Even assuming the hearsay is true and from a reliable source, however, it is immaterial that the owner told someone she had fired claimant. For purposes of unemployment insurance cases, the parties' characterizations about the nature of the work separation are not controlling, but, rather, our application of the above-referenced rules to the facts as they were developed at the hearing. The same witness also later alleged that two students told her that the owner said "one instructor was fired meaning me" and "the next one would be fired soon." Transcript at 34-35. Notably, however, the evidence developed at the hearing suggested that the same witness, whom the students said had been "fired," voluntarily left her job. Transcript at 20, 24, 28, 44, 47. The fact that the students upon whom the witness was relying for information as to whether claimant quit or was fired also mischaracterized the witness's own work separation suggests that they were not a reliable source of hearsay about claimant's separation.

Finally, claimant testified that the employer discharged her because, after claimant asked for time to discuss the situation with her husband, the owner "agreed" to allow her time and then had "taken [the time] away from me without even discussing it with me." As a preliminary matter, we cannot reasonably conclude that there is evidence the employer "agreed" to anything on March 22nd given that the entire exchange occurred while the owner was on the phone having a conversation with another person and does not appear to have been participating in a two-way discussion with claimant. It is also immaterial. Earlier in the day, claimant told the owner, in essence, that she was not returning to teach classes the following term and would not reconsider that decision, then specifically asked the owner if the owner understood she had resigned from work and did not disagree when the owner said she did. Claimant's resignation occurred at that time. Assuming that claimant's subsequent request for time to discuss the matter with her husband was an attempt to rescind that resignation, and assuming for the sake of argument that the owner actually heard and understood it, the employer was under no obligation to allow claimant to rescind her resignation. We also conclude that for purposes of this case, any rejection by the owner of claimant's attempt to rescind her resignation would, effectively, be an acceptance of her initial resignation. *See accord Counts v. Employment Dept.*, 159 Or App 22, 976 P2d 96 (1999) (the employer's refusal to allow claimant to rescind a resignation did not change the nature of the work separation); *Schmelzer v. Employment Division*, 57 Or App 759, 646 P2d 650 (1982) (the employer's rejection of an attempted rescission is, effectively, an acceptance of the initial resignation).

For the foregoing reasons, we conclude that the employer had continuing work available to claimant after March 23, 2016, but claimant was not willing to continue working for the employer. The work separation was, therefore, 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 P2d 722 (2010). A claimant who quits work must show that no reasonable and prudent person would have continued to work for she employer for an additional period of time.

To the extent claimant alleged that she left work based on her belief the employer had discharged her, claimant did not have good cause for quitting work. Any such belief would not be reasonable under the circumstances, which included claimant specifically asking the owner if she believed claimant had resigned, and not offering any disagreement or dispute when the owner said she did. It was also unreasonable for claimant to have believed she reached any agreement with the owner about the status of the employment relationship based on the vague remarks she made to the owner while the owner was on the phone with another person. Claimant did not reasonably believe that the employer had discharged her, and, therefore, any action she took based upon any such belief did not constitute good cause for quitting work. Given the circumstances, a reasonable and prudent person of normal sensitivity, exercising ordinary common sense, would not have acted on such a belief without specifically telling the owner that she had, in fact, not quit work, or otherwise specifically refuting the owner's belief that she had.

Claimant had concerns about her working conditions, including the number of hours she was required to work, the manner in which the employer treated some students and an investigation related to that treatment. Prior to quitting, however, claimant did not notify the employer of her concerns, ask the employer to rectify any particular situations, or otherwise notify the employer that she was considering quitting work due to those situations unless the employer took steps to resolve her concerns. A reasonable and prudent person of normal sensitivity, exercising ordinary common sense, would not have considered the circumstances claimant described to be of such gravity that she had no reasonable alternative but to quit work immediately, without allowing the employer some reasonable opportunity to resolve the situation or address claimant's concerns. Absent a showing that such circumstances existed, we conclude claimant quit work without good cause, and she must be disqualified from receiving unemployment insurance benefits because of this work separation.

DECISION: Hearing Decision 16-UI-62304 is affirmed.

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

DATE of Service: <u>August 5, 2016</u>

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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