

EMPLOYMENT APPEALS BOARD DECISION
2016-EAB-0870

Reversed
Disqualification

PROCEDURAL HISTORY: On June 8, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant, but not for misconduct (decision # 112800). The employer filed a timely request for hearing. On July 8, 2016, ALJ Shoemake conducted a hearing, and on July 15, 2016, issued Hearing Decision 16-UI-63903, affirming the Department's decision. On July 26, 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 its argument to the other parties as required by OAR 471-041-0080(2)(a) (October 29, 2006). Therefore, we considered the entire hearing record, but did not consider the employer's argument when reaching this decision.

FINDINGS OF FACT: (1) Skyland Pub employed claimant as a bookkeeper and bus person from October 18, 2010 to April 17, 2016. Claimant typically worked a split shift, opening the establishment and performing bookkeeping tasks in the morning and bussing work in the afternoon or evening.

(2) Between March 1 and April 17, 2016, claimant became dissatisfied with the owners, Jason Blume (JB) and Stayce Blume (SB) for two principal reasons. On March 2, 2016, after JB became irritated with claimant based on his belief that she ignored and embarrassed him in front of a customer, he spoke with her outside the restaurant, initially in a loud, angry tone, which upset her. On or about March 25, 2016, SB rescinded his prior approval of a day off for claimant on March 27, which SB had intended to cover, because SB had to attend a conflicting medical appointment. Claimant had requested March 27 off because she was going to be without teeth that day while her dentures were being adjusted and she did

not want to work in that condition. Claimant came into work early on March 27 to perform her bookkeeping shift to avoid contact with others.

(3) The employer had a written policy regarding calling in about anticipated absences that read, "Employees who through sickness or other related reasons find themselves unable to work a scheduled shift are to notify management at the earliest possible time, but no later than 4 hours prior to their scheduled shift." Exhibit 2. Claimant was aware of the policy. On April 16, 2016, two hours after working her morning bookkeeping shift, claimant called the employer's general number and asked the server who answered the phone if coverage could be obtained for her evening shift because she would not be able to work due to dental pain. The server responded "probably" and later told SB about claimant's call. Transcript at 24. SB called claimant to discuss her call-in to the server and her call went directly to voicemail. SB left claimant a message for claimant to call back regarding how she was feeling and to "work something out." Transcript at 6. Claimant never returned the call and was scheduled to work the following morning's bookkeeping shift.

(4) Because she had not received a return call from claimant and did not know if claimant would arrive for work, on April 17, 2016, SB came in early to open the business and perform the morning bookkeeping tasks. However, claimant arrived shortly before her shift. SB told her that because she had not received a return call the previous day, she came in to make sure the business would be opened and the morning bookkeeping completed. She also criticized claimant for not following procedure by contacting a server to report she would not be at work. She then told claimant that because she was already there and had started the bookkeeping tasks, claimant "could go home" and they would "talk later." Transcript at 5. At that point, claimant responded "that [is] fine because [I] quit anyway" as she handed SB a bag containing all of her work shirts. Transcript at 5. SB then asked claimant, "We're not going to get any notice or anything?" to which claimant responded "no." Transcript at 7-8. SB then asked claimant, "What have we done to deserve this?" and "Why are you leaving me, what have I done wrong?" Transcript at 8, 27. At that point claimant mentioned the event that had occurred with JB on March 2 and the events of March 25-27, and that being yelled at by JB and having to report for work with no teeth upset her. Claimant then told claimant to "leave" the premises and that she would box her belongings and return them to her at a later time.

(5) Continuing work was available to claimant before she told SB she "quit anyways" on April 17, 2016.

CONCLUSIONS AND REASONS: We disagree with the ALJ. Claimant voluntarily left work without good cause.

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 work separation is a discharge. OAR 471-030-0038(2)(b).

At hearing, SB asserted that claimant quit when she responded that she "quit anyways" and handed her a bag containing all of her work shirts after SB told her she could leave without performing the bookkeeping tasks that morning because SB already was there and had begun them. Claimant asserted she was discharged when SB told her to "leave" during their April 17 conversation after criticizing her for not contacting her or JB about not being able to work the night before. In Hearing Decision 16-UI-

63903, without any analysis, the ALJ concluded the employer discharged claimant on April 17, 2016, finding, “The employer saw that claimant was carrying a bag with work shirts in it and discharged claimant.” Hearing Decision 16-UI-63903 at 2. We disagree with the ALJ’s finding that the work separation was a discharge because it ignores the undisputed facts that claimant handed SB *all* of her work shirts during the April 17 exchange. In addition, claimant admitted that during the exchange SB asked claimant, “Why are you leaving me, why, what have I done wrong?” and that claimant told SB why she was unhappy working for the employer. Transcript at 27. We conclude that, more likely than not, none of those things would have occurred had SB discharged claimant that morning without any warning to her. On this record, more likely than not, claimant could have continued to work for the employer for an additional period of time, but was unwilling to do so. Accordingly, the work separation was a voluntary leaving.

A claimant who leaves work voluntarily is disqualified from the receipt of benefits unless she (or he) 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 the employer for an additional period of time.

As can best be discerned from the record, claimant decided to leave work because she was upset over JB raising his voice to her on March 2, 2016 and SB rescinding her grant of a day off on March 27, 2016 resulting in claimant having to work the morning bookkeeping shift that day without any teeth. Assuming these reasons, there was nothing in claimant’s or the employer’s accounts of those incidents that rose to the level of a grave reason to quit the job. A relatively mild rebuke in private by an irritated owner about workplace behavior, of which he disapproves, even if it is off-duty, is not an unprecedented event in an employment relationship, and a reasonable and prudent employee would not leave work over such a rebuke, even if the owner temporarily raised his voice. Moreover, claimant did not dispute SB’s account of that exchange as short-lived and reportedly resolved as demonstrated by JB and claimant giving each other a hug and JB buying claimant a beer after they reentered the pub. Transcript at 9. Regarding the rescission of the day off scheduled for March 27, claimant was understandably upset over having to work without any teeth. However, there was no dispute that SB had a medical issue of her own to attend to that day and no evidence regarding how serious of a medical issue it was. Moreover, by claimant’s own account, she was allowed to modify her work shift to avoid any contact with others and the potential embarrassment of anyone learning she had no teeth that day.

Claimant failed to meet her burden to demonstrate that no reasonable and prudent person in her circumstances would have continued to work for the employer for an additional period of time. Accordingly, she is disqualified from receiving unemployment insurance benefits until she has earned at least four times her weekly benefit amount from work in subject employment.

DECISION: Hearing Decision 16-UI-63903 is set aside, as outlined above.

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

DATE of Service: September 6, 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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