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

EMPLOYMENT APPEALS BOARD DECISION
2016-EAB-0884

Affirmed
No Disqualification

PROCEDURAL HISTORY: On May 31, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant voluntarily left work without good cause (decision # 94139). Claimant filed a timely request for hearing. On July 11, 2016, ALJ Menegat conducted a hearing at which the employer did not appear and issued Hearing Decision 16-UI-63506, concluding that claimant had good cause to voluntarily leave work. On July 29, 2016, the employer filed an application for review with the Employment Appeals Board (EAB).

The employer submitted a request to reopen the hearing to allow it to present evidence since it did not appear at the hearing and could not offer any information on its own behalf. EAB construes the employer's request as one to have EAB consider new information under OAR 471-041-0090 (October 29, 2006). OAR 471-041-0090 allows EAB to consider information not presented at the hearing if the party offering it shows that factors or circumstances beyond its reasonable control prevented it from presenting that information during the hearing. In its request to reopen, the employer asserted only that it was unable to participate at the hearing and could not offer information on its own behalf "due to an unforeseeable circumstance." Absent more specific explanatory detail, the employer's bare assertion is an insufficient basis on which to conclude that circumstances beyond its reasonable control prevented it from appearing at the hearing and offering information. The employer's request to have EAB consider new information therefore is denied.

FINDINGS OF FACT: (1) BKD Employee Services, LLC/Brookdale employed claimant as a medication aide from April 1, 2009 until May 16, 2016.

(2) The employer operated an assisted living unit (ALF) and a residential memory care unit (RCF) that were located in the same building and were adjacent to each other. Regulations of the Oregon Department of Human Services (DHS) considered these two units to be separate facilities and required that they be considered separately for purposes of determining if the staffing for each was adequate to meet DHS standards.

(3) Claimant worked the graveyard shift. On that shift, there were residents in both the ALF and the RCF who required the assistance of two caregivers if they had needs, which necessitated that the employer schedule two graveyard caregivers for both the AFL and the FCF. Beginning in April 2016, the employer was short-staffed on the graveyard shift and scheduled only one caregiver for the ALF, one caregiver for the RCF and assigned claimant to administer medications and provide caregiving services to residents in both the ALF and the RCF. As a result, claimant was consistently overworked and rushed to complete her tasks. Beginning in April 2016, claimant was unable to take meal breaks. Also beginning in April 2016, claimant became very concerned that due to the speed with which she had to work that she would make a "horrible mistake" in administering medication to residents or in providing other caregiving services to them.

(4) Beginning in April 2016, when the employer started short-staffing the graveyard shift, claimant complained several times to her supervisor that the employer was violating DHS staffing standards and state labor standards by not allowing her to take meal breaks. Claimant also told her supervisor she was very concerned that the short-staffing on graveyard shift and the increased workloads of her and the other graveyard staff was jeopardizing the safety of residents in both the ALF and the RCF. The supervisor did not deny that the employer's graveyard staffing and the resulting workplace conditions were against the law. The supervisor told claimant she was trying to hire new graveyard workers that would allow the employer to comply with legal requirements.

(5) On Friday, April 29, 2016, claimant again raised her concerns with her supervisor about the illegality of the employer's staffing on graveyard shift, the illegality of the working conditions and her patient safety concerns. The supervisor told claimant she would "get it [the graveyard shift] [adequately] covered." Audio at ~10:45.

(6) On Friday, May 6, 2016, claimant saw the employer's schedule for the upcoming weekend and saw that the graveyard shift she was assigned to work was short-staffed again as it had been throughout April 2016. Claimant concluded the employer was not going to rectify either her concerns about the illegality of the employer's behavior or about patient safety. Claimant quit work that day.

CONCLUSIONS AND REASONS: 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's testimony at hearing that the employer had residents in the ALF and RCF who required two caregivers to provide assistance to them during the graveyard shift was unrebutted. Accepting claimant's testimony as correct, the employer was required to assign at least two caregivers to both the ALF and RCF during the graveyard shift. *See* OAR 411-054-005(10) and (63) (June 28, 2016) (where

ALF and RCF units are distinct parts of one complex or building, they are considered separate facilities); OAR 411-9540 0010(3) (June 28, 2016) (ALFs and RCFs must be licensed, maintained and operated as separate and distinct facilities); OAR 411-053-0045(1)(c) (November 1, 2011) (ALFs and RCFs must assure an adequate number of nursing hours to meet the acuity levels of the resident population); OAR 411-054-0070(1)(g) (November 1, 2011) (a minimum of two caregivers must be scheduled and available whenever at least one resident of a facility [i.e. an ALF or a RCF] requires the assistance of two caregivers for scheduled or unscheduled needs during a particular shift). Based on claimant's testimony, the employer's method of staffing the ALF and RCF during April 2016, in which neither unit had two caregivers available at all times when residents of both needed the assistance of two caregivers was unlawful under DHS regulations and standards . As well, claimant's testimony that lunch breaks were not available to her from April 2016 until the date she left work as a consequence of the employer's unlawful staffing during that period was also unrebutted. Since there was no evidence that the employer was exempted from the requirement of providing breaks and we infer claimant was working more than six hour shifts, the employer's failure to make lunch breaks available to claimant also violated the laws in Oregon regulating workplace conditions. *See* ORS 653.261(1) (BOLI authorized to adopt rules requiring meal breaks); OAR 839-020-0050(2)(a) and (c) and (c) (January 1, 2014) (unless employer makes the required showing, it is required to provide a 30 minute meal period for each work period of more than 6 hours).

Claimant testified she repeatedly told her supervisor that the way in which the employer was staffing the ALF and RCF and the working conditions to which she was subjected in April and May 2016 were unlawful. Claimant also testified she warned the supervisor repeatedly that the employer's unlawful practices were likely to lead to harm to the residents of both the ALF and the RCF. Despite claimant's persistent entreaties, the supervisor did nothing to rectify the employer's unlawful behaviors or to protect the residents from harm. A reasonable and prudent caregiver in the circumstances that claimant described would have quit work when claimant did. A reasonable and prudent caregiver would not have tolerated the employer's unlawful behavior for an indefinite period of time or remained working under circumstances in which she was reasonably concerned that she or other staff would inflict harm on residents as a result of the working conditions or staffing levels the employer condoned.

Claimant established good cause for leaving work when she did. She is not disqualified from receiving unemployment insurance benefits based on her work separation from the employer.

DECISION: Hearing Decision 16-UI-63506 is affirmed.

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

DATE of Service: August 26, 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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