

EMPLOYMENT APPEALS BOARD DECISION
2016-EAB-1059

Affirmed
Disqualification

PROCEDURAL HISTORY: On August 3, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant voluntarily left work without good cause (decision # 92104). Claimant filed a timely request for hearing. On August 29, 2016, ALJ Vincent conducted a hearing, and on September 6, 2016, issued Hearing Decision 16-UI-66971, affirming the Department's decision. On September 13, 2016, claimant filed an application for review with the Employment Appeals Board (EAB).

EVIDENTIARY MATTER: At the August 29, 2016 hearing, the ALJ identified and admitted a packet of documents submitted by claimant as Exhibit 1 (Audio Record ~ 5:30 to 6:50) and a flash drive recording submitted by claimant as Exhibit 2 (Audio Record ~ 8:00 to 11:35). In the hearing decision, however, the ALJ stated that no exhibits were offered or admitted into evidence. Neither Exhibit 1 nor 2 as identified and admitted by the ALJ during the hearing were marked or included in the record, which appear to be clerical oversights. Accordingly, we have marked and included the exhibits based on the ALJ's description of them as Exhibit 1 and Exhibit 2 respectively, and considered them when reaching this decision.

EAB considered the entire hearing record and claimant's written arguments, to the extent they were based on the record, when reaching this decision.

FINDINGS OF FACT: (1) Sunnyside Mobile Homes, a mobile home park, employed claimant as an office assistant from May 27, 2014 to July 2, 2016.

(2) When claimant was hired, she had responded to an internet ad that described the job as part-time at seventeen hours per week. Over the next two years, claimant worked increasing hours approaching full-time work, in part because the office became shorthanded, and in part because claimant was driven to complete her work duties to a high standard. The stress of those hours aggravated claimant's heart condition, tachycardia. Claimant's physician advised claimant to reduce her hours to reduce her stress, but did not specify or restrict claimant to a particular work schedule. The employer, in turn, wanted to reduce claimant's hours for business reasons to a specific part-time schedule.

(3) Claimant, the employer's on-site manager (JS) and its owner (FG) met and agreed to reduce claimant's work week back to seventeen hours a week, and she would work one day from 8:00 a.m. to 3:00 p.m. and two days from 10:00 a.m. to 3:00 p.m. Over claimant's next seven work days, claimant worked past her scheduled departure time four times, despite being asked to leave at the end of her shift, and accrued overtime, which displeased FG and JS.

(4) Shortly before July 2, 2016, JS sent claimant an email inviting her to attend and enjoy a catered party for the park's residents scheduled for that day, but to not work. After claimant arrived on July 2, she sensed there was a problem and inquired if she was going to be fired. JS denied that the employer was going to discharge claimant, but stated, "We need to talk...It's not working the way it is," and told her she would discuss it with her the following week. Audio Record ~ 39:30 to 41:30. After claimant insisted they discuss it immediately, JS told her she could not just pick the time she would leave on her work days, that she needed to stick to the schedule. Claimant responded, "I'm not going to leave you with things to fix of mine. I'm a little OCD about this...nobody's going to own me. I'm going to leave when I'm done with my work," to which JS responded, "Sunnyside needs you but you need to work the hours [assigned]." *Id.* Claimant then responded that she was "too old for that...If [FG] wants somebody who is here from 10 to 3, then I'm not that girl." *Id.* After JS told her she needed to follow to her assigned schedule, quit, or be dismissed, claimant responded, "Then dismiss me," to which JS agreed. *Id.* JS asked claimant to turn in her keys, and claimant did so.

CONCLUSIONS AND REASONS: We agree with the Department and 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; 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, the separation is a discharge. OAR 471-030-0038(2) (August 3, 2011).

At hearing, claimant asserted that the employer discharged her on July 2. JS admitted that she agreed to discharge claimant that day after claimant refused to abide by her scheduled work hours and chose to have the employer discharge her. However, the manager's admission at hearing that she agreed to claimant's July 2 request to be discharged is not dispositive, because the nature of the work separation is determined by application of the rules, cited above, to the facts developed at hearing, and not the characterization of the parties. Because claimant could have continued to work for the employer after July 2 by agreeing to abide by her work schedule in the future, but was unwilling to do so, 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). The standard is objective. *McDowell v. Employment Department*, 348 Or 605, 612, 236 P2d 722 (2010). Claimant had been treated for tachycardia, which we assume is a permanent or long-term "physical or mental impairment" as defined at 29 CFR §1630.2(h). A claimant

with such impairment who quits work must show that no reasonable and prudent person with the characteristics and qualities of an individual with such impairment would have continued to work for the employer for an additional period of time.

Claimant quit work because she would not agree to abide by her work schedule and leave when her shift was over. Rather, she wanted to work on each scheduled day until she determined her work was finished. In her words, "If [the owner] wants somebody who is here from 10 to 3, then I'm not that girl." In so deciding, claimant essentially chose to ignore both the advice of her physician who had recommended that she work less, not more, because of her tachycardia, and the request of the employer that she limit herself to working only her scheduled hours. Claimant did not establish that leaving some of her work unfinished when her work day was scheduled to end was a grave situation. Nor was it a grave situation for claimant to follow both her doctor's advice to reduce her hours and adhere to her agreement with the employer's reasonable directive to work only her scheduled hours. Claimant failed to show that no reasonable and prudent person with the characteristics and qualities of an individual with tachycardia would have continued to work for the employer because of her working environment or the conditions of employment that existed at the time she left.

Claimant failed to meet her burden to establish that she quit work with good cause and is disqualified from receiving unemployment insurance benefits until she has earned four times her weekly benefit amount from work in subject employment.

DECISION: Hearing Decision 16-UI-66971 is affirmed.

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

DATE of Service: October 25, 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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