

**EMPLOYMENT APPEALS BOARD DECISION**  
**2016-EAB-1099**

*Reversed*  
*Disqualification*

**PROCEDURAL HISTORY:** On August 2, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for committing a disqualifying act under the Department's drug and alcohol adjudication policy (decision # 132558). Claimant filed a timely request for hearing. On September 7, 2016, ALJ M. Davis conducted a hearing, and on September 8, 2016 issued Hearing Decision 16-UI-67077, concluding the employer discharged claimant, not for misconduct, for reasons that did not fall under the alcohol and drug policy. On September 23, 2016, the employer filed an application for review with the Employment Appeals Board (EAB).

**FINDINGS OF FACT:** (1) North Coast Lawn employed claimant as a landscape maintenance worker at various times over a seven-year period, last from December 1, 2014 to June 10, 2016.

(2) The employer had concerns about claimant's work performance. Employees and customers complained about claimant to the employer's owner. Complaints included that claimant did not perform adequate maintenance for the employer's customers, made an excessive amount of trips to the restroom, fell asleep while driving other employees in the employer's vehicle and caused a traffic accident in the employer's vehicle. For months prior to June 2016, the owner repeatedly spoke with claimant and issued her warnings because of her poor work performance.

(3) On June 6, 2016, the owner intercepted claimant as she arrived to work. The owner spoke with claimant about her work and asked her if she could pass a drug test. Claimant replied that she did not know whether or not she could pass a drug test. The owner told claimant that no one wanted to work with her anymore. The owner told claimant she was replaceable and that he could lay her off or fire her.

(4) The owner told claimant to come to the workplace on Friday, June 10, 2016, which was the employer's regular pay day, to pick up her regularly scheduled paycheck and "get ahold of me" "then" so claimant could "tell me where she was at in her life," and "if she could straighten herself out, um, I would love to have her come back to work with us." Audio recording at ~ 14:15, ~ 20:40. The owner did not tell claimant that she was fired, discharged or laid off.

(5) After the conversation with the owner, claimant left the workplace. Claimant did not believe the owner had discharged her. Audio recording at ~ 21:05. Claimant thought the owner had laid her off work and understood he wanted to speak with her about her employment on Friday. Audio recording at ~ 20:40.

(6) On Friday, June 10, 2016, claimant went to the employer's shop to pick up her paycheck. The owner was not present. The owner's office was located elsewhere, and the owner did not usually spend time in the shop after the beginning of the workday. Claimant did not know what to think, and, although the owner had not told claimant she was discharged or that she had been replaced by another employee, claimant assumed the new employee she had been working with prior to June 6<sup>th</sup> was her replacement, and left. She did not make any attempts to contact the owner on June 10, 2016 or thereafter.

(7) Claimant never told the owner that she was quitting work.

**CONCLUSIONS AND REASONS:** We disagree with the ALJ, and conclude 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 separation is a discharge. OAR 471-030-0038(2)(b). "Work" means "the continuing relationship between an employer and an employee." OAR 471-030-0038(1)(a).

Neither claimant nor the employer's owner provided unambiguous testimony about the nature of the work separation. For instance, claimant testified that she was not discharged, did not quit her job, did not know what to think about the work separation, and concluded the owner had laid her off work; the owner testified that he did not discharge claimant, and she did not say she quit work, but that he assumed she had quit because she "walked away." *See e.g.* Audio recording at ~ 13:00, ~ 15:00, ~ 21:00, ~ 28:00, ~ 31:00. The ALJ concluded that the employer discharged claimant, effective June 6, 2016, reasoning that although "the owner may have believed claimant voluntarily quit her position, claimant's testimony was more persuasive that she never informed the owner that she quit and that the employer informed her that he could discharge her or that he could lay her off from work." Hearing Decision 16-UI-67077 at 3. The ALJ further reasoned that, "[w]hile both parties' testimony was credible, it is not logical that claimant would stop reporting to work when she was willing to continue working for the employer." *Id.* We disagree with the ALJ's assessment of the evidence.

Although the owner told claimant that he could discharge her or lay her off work, and claimant did not say she quit work, both claimant and the employer agreed that when claimant left the workplace on June 6, 2016 she had not been told she was discharged or laid off, and had not told the owner that she quit. In fact, claimant testified at the hearing that she did not believe she was discharged on June 6<sup>th</sup> and, at most, thought she had been laid off work. Audio recording at ~ 21:05, 21:30. Although the owner alleged claimant quit work because she "walked out" on June 6<sup>th</sup>, the owner testified that he told claimant on June 6<sup>th</sup> to "get ahold of me" on June 10<sup>th</sup> because he "would love to have her come back to work" if she had straightened herself out by then. The evidence therefore suggests that claimant left work because the owner implicitly barred her from working until they spoke on Friday, June 10<sup>th</sup>,

making it unlikely that she intended to quit by leaving work on June 6<sup>th</sup> or that her act of leaving work that day could reasonably be construed as having ended the employment relationship.

Claimant and the owner both testified that, at the time claimant left the workplace on June 6, 2016, both expected that they would talk again about claimant's employment on June 10, 2016. Audio recording at ~ 14:15, 20:40.<sup>1</sup> Therefore, although the parties' statements and actions on June 6, 2016 were ambiguous, it is more likely than not that the employment relationship was ongoing on June 6, 2016, and no "work" separation occurred on June 6, 2016. Given that claimant and the owner shared a mutual understanding that claimant had not been fired and had not quit on June 6, 2016, and that claimant was to "talk" with or "get ahold of" the owner on June 10, 2016 when she picked up her paycheck on the employer's regularly scheduled pay day, it is more likely than not the employment relationship continued to that date.

The evidence about what occurred on June 10<sup>th</sup> is, again, ambiguous, as there is no evidence suggesting that the employer told claimant she was laid off or discharged that day, nor that claimant said she quit work. In fact, claimant and the employer did not speak on June 10<sup>th</sup> or after. Claimant testified that she assumed she had been replaced on approximately June 10<sup>th</sup> because when she picked up her paycheck the owner was not there and she saw a "new girl" working. Audio recording at ~ 31:00. On this record, however, the fact that the owner was not at the shop on Friday, June 10<sup>th</sup> is not significant. The owner's office was at a different location and he did not typically spend time at the shop except at the start of the business day, circumstances claimant should have known based on her seven years of periodic employment with the owner's business. Nor is the fact that a "new girl" was working significant as to the nature of the work separation. Claimant testified that the "new girl" began work prior to the events of June 6<sup>th</sup>, and that there was a lot happening at work because it was the employer's busy time of year, some experienced employees were no longer working, and there were new employees, all of which suggests that it was just as likely that the "new girl" was an additional employee hired to supplement the employer's existing workforce as it was that she was claimant's replacement. *See* Audio recording at ~ 20:15, ~ 21:30. Nor is the fact that the employer had claimant's paycheck ready on June 10<sup>th</sup> significant, given that June 10<sup>th</sup> was the employer's regularly scheduled payday and there is nothing in this record suggesting that the June 10<sup>th</sup> paycheck was her final paycheck or that claimant was told that it was.

In sum, without seeing the owner, and with the understanding that the owner expected claimant to "come in," "get ahold of" him and "talk" on Friday, claimant left the employer's business with her regularly scheduled paycheck and did not make any attempts to contact the owner that day or thereafter. The employer did not tell claimant that she would not be allowed to work for the employer after June 10<sup>th</sup>, and communicated the opposite by telling her that he would "love to have her come back" on or after June 10<sup>th</sup>. Given the circumstances, it is more likely than not that claimant could have continued to "work" for the employer, meaning she could have continued the employment relationship, an additional period of time on or after June 10<sup>th</sup> had she gotten "ahold" of the owner as directed to talk about her employment. Because claimant chose not to do so, we find it more likely than not that this work separation was a voluntary leaving.

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<sup>1</sup> Claimant later testified that the owner never said to call or contact him, but did not retract her previous testimony that the owner told her to come in Friday, get her check, and we'd talk "then." *Compare* Audio recording at ~ 20:40, ~ 31:00. Because claimant's earlier testimony was consistent with her testimony to that point, and consistent with the employer's version of events, we conclude it is more likely than not that events occurred as the employer and claimant initially described.

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 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 quit work because she assumed the employer had laid her off, discharged her and/or replaced her. The basis of claimant’s assumption included the owner’s absence from the shop on June 10<sup>th</sup> at the time claimant picked up her regularly scheduled paycheck, and her conclusion that a “new girl” in the shop had replaced her. For the reasons previously explained, however, neither basis was significant to the existence or severance of the employment relationship. There is no dispute that the owner had concerns about claimant’s work performance, viewed her and every employee, as replaceable, and had told claimant as much on June 6<sup>th</sup>. However, when claimant was forming an assumption that the employer had ended her employment on June 10<sup>th</sup>, claimant also knew the “new girl” was hired before the events of June 6<sup>th</sup>, knew she had worked with the “new girl” on or before June 3<sup>rd</sup>, knew it was the employer’s busy season, knew some previous employees had not returned to work and the employer had hired new employees, and knew the owner wanted her to “get ahold of” and “talk” with the owner about her employment on June 10<sup>th</sup>. Given those circumstances, there was not a reasonable basis for claimant to assume without asking that the owner had ended her employment. As such, claimant has not shown that no reasonable and prudent person of normal sensitivity, exercising ordinary common sense, would have continued to work for the employer for an additional period of time.

Claimant voluntarily left work without good cause, effective June 10, 2016. Claimant is, therefore, disqualified from unemployment insurance benefits beginning June 5, 2016 and until claimant has earned four times her weekly benefit amount from work in subject employment.

**DECISION:** Hearing Decision 16-UI-67077 is set aside, as outlined above.

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

**DATE of Service: October 18, 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](http://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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