

EMPLOYMENT APPEALS BOARD DECISION
2016-EAB-1124

Affirmed
Disqualification

PROCEDURAL HISTORY: On August 26, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant voluntarily left work without good cause (decision # 145638). Claimant filed a timely request for hearing. On September 22, 2016, ALJ Seideman conducted a hearing, and on September 23, 2016 issued Hearing Decision 16-UI-67961, affirming the Department's decision. On October 4, 2016, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Thomas R. Madison, DDS employed claimant as a dental surgical assistant in his periodontal practice from February 14, 2016 until July 6, 2016.

(2) The dentist who operated the employer's periodontal practice examined patients with periodontal conditions and, among other things, performed periodontal surgery on them. The dentist had practiced in the specialty of periodontics for more than thirty years. Before entering private practice, the dentist worked in hospitals for fourteen years. The dentist also taught periodontics at the university level.

(3) When claimant assisted the dentist with a patient and she took off her gloves to perform ancillary duties during the patient's procedure, she was expected to put on new gloves when she resumed working on the patient to avoid cross-contamination. The dentist required claimant to re-use the same gloves if she was performing non-patient, clerical work and, for some reason, took the gloves off during that non-patient work and then resumed performing non-patient work.

(4) In approximately June 2016, claimant became aware that, although the workplace would be closed on Memorial Day, May 30, 2016, she would not receive holiday pay for that day and other employees would. Claimant was upset and told the dentist she did not want to work for an employer who did not provide holiday pay. The dentist told claimant she would be eligible for paid holidays after she had worked longer for the employer.

(5) During the time she was employed, claimant had conflicts with the employer's hygienist, front office employees, a United States Postal Service mail carrier and a representative from a dental supply company. The dentist thought claimant had a difficulties getting along with others.

(6) Sometime around approximately June 22, 2016, claimant was assisting the dentist in treating a new periodontal patient. As claimant was preparing to put some equipment in the patient's mouth to take x-rays, the dentist noticed claimant did not have gloves on. The dentist took claimant aside and reminded her that she needed to have gloves on if she was going to place her hands in a patient's mouth. Claimant became upset because she had intended to put gloves on before placing her hands in the patient's mouth. The conversation between claimant and the dentist became heated and claimant told the dentist she was going to quit work. On that day, claimant notified the dentist that she was leaving work in two weeks.

(7) On July 6, 2016, claimant voluntarily left work.

(8) Sometime after claimant left work, she filed complaints about the dentist's practices with the Oregon Occupational Safety & Health Division (OSHA), the Oregon Bureau of Labor and Industries (BOLI) and the Oregon Board of Dentistry (OBD). The complaint to BOLI alleged that the dentist was violating the requirements of the Health Insurance Portability and Accountability Act (HIPAA). The complaints to OSHA and OBD alleged, among other things, that the dentist required claimant to re-use gloves on the same patient after she had taken them off, which was contrary to accepted patient practice. Exhibit 4, Exhibit 5, Exhibit 6. OSHA sent investigators to look into claimant's complaint and concluded "per employee interviews, employees were not using contaminated gloves when performing procedures on the same patient." Exhibit 4 at 1. Claimant concluded that OSHA had failed to understand the nature of her complaint about the re-use of gloves in the dental practice.

CONCLUSIONS AND REASONS: Claimant voluntarily left work without 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 contended that she left work because the dentist was requiring her to re-use the same gloves on the same patient after she had removed them to perform some ancillary non-treatment related tasks, which jeopardized patient safety. Audio at ~14:49, ~16:45, ~17:28, ~19:00, ~33:40, ~36:57. While claimant was vigorous in stating her position, the dentist was equally vigorous in denying that he required claimant or any other employees to re-use gloves after they were removed on the same or other patients. Audio at ~26:48, ~39:35. While claimant offered a hearsay statement from a former employee of the dentist's in support of her contention, the report of the OSHA investigation and the employee interviews that OSHA undertook, which claimant also offered into evidence, supports the dentist's contention that he did not require re-using gloves and seriously undercuts claimant's position. There is

no reason in this record to prefer the testimony of one party over the other, or to find one party more credible than the other. Where, as here, the evidence on the dispute issue is evenly balanced, the dispute must be resolved against claimant since she was the party who carried the burden of persuasion in this voluntary leaving case. *See Young v. Employment Department*, 170 Or App 752, 13 P3d 1027 (2000). On this record, claimant did not establish by a preponderance of the evidence that the dentist required her to re-use gloves on patients. Because claimant contended she left work because the dentist compelled the re-use of gloves, claimant also did not establish that a grave reason motivated her to quit work.

Claimant did not show good cause for leaving work when she did. Claimant is disqualified from receiving unemployment benefits.

DECISION: Hearing Decision 16-UI-67961 is affirmed.

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

DATE of Service: October 27, 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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