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

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VQ 005.00

EMPLOYMENT APPEALS BOARD DECISION
2016-EAB-1193

Reversed
Disqualification

PROCEDURAL HISTORY: On August 25, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant voluntarily left work without good cause (decision # 142548). Claimant filed a timely request for hearing. On September 23, 2016, ALJ Allen conducted a hearing, and on October 19, 2016 issued Hearing Decision 16-UI-69496, concluding the employer discharged claimant not for misconduct. On October 25, 2016, the employer filed an application for review with the Employment Appeals Board (EAB).

The employer submitted written argument to EAB that contained information that was not part of the hearing record, and failed to show that factors or circumstances beyond the employer's reasonable control prevented the employer from offering the information during the hearing. For this reason, EAB did not consider the employer's new information, but did consider its argument to the extent it was based on information received into the record at the hearing. ORS 657.275(2) and OAR 471-041-0090 (October 29, 2006).

FINDINGS OF FACT: (1) Gresham Dodge, Inc. employed claimant from January 7, 2007 to April 28, 2016 as a general sales manager.

(2) Claimant had epilepsy that was aggravated by stress. Claimant was not released to drive by his doctor during April 2016 because it had been less than three months since he last had an epileptic seizure.

(3) On Saturday, April 23, 2016, claimant reported to work. The employer's owner discharged its general manager, claimant's father, that day. Before he left work that day, claimant informed another sales manager that he would not be reporting to work on April 24 or 25 due to stress regarding his father's discharge.

(4) On the morning of April 24, 2016, the interim general manager called claimant and told claimant he wanted to discuss claimant's future with the company, and stated that claimant would be in a position with less authority and pay in the future and that "he thought [claimant] would be gone because of a

father and son team." Transcript at 36-37. Claimant responded that he and his father worked independently from each other. The interim manager also stated that in a week, the employer would need to "process [claimant] one way or another." Transcript at 37. Claimant did not normally work on Tuesdays and Wednesdays, and did not report to work on April 26 or 27, 2016.

(5) After April 24, 2016, the employer temporarily suspended claimant's remote access to all of the employer's computer systems. On April 27, 2016, claimant discovered that he was no longer able to access the employer's computer systems from home. Claimant knew that the employer typically suspended employees' computer access after being discharged. Claimant also believed his dental insurance had been discontinued by the employer because his wife took their children to the dentist that week and the dentist told her the insurance was no longer valid. However, the employer had paid claimant's insurance premiums through the end of April or May 2016.

(6) On April 27, 2016, claimant called the employer's office manager, but was unable to reach her. She did not return his call that day. Claimant called two sales managers and asked them if they knew claimant was restricted from the employer's computer system. Both managers told claimant they did not know claimant was blocked from using the employer's computer systems, why he had been blocked, or if claimant had been discharged. Transcript at 40-42. Claimant did not contact the interim general manager or anyone else from the employer's business until he sent an email to the employer's office manager and another sales manager on April 28, 2016.

(7) On April 28, 2016, claimant sent the office manager and a sales manager an email thanking them for "all the wonderful years and [their] hard work" and stating that he had been "removed out of the [computer] system," would always value the employer's dealership, and would take the opportunity to "take some time to work on [his] health." Transcript at 22-23. Claimant also requested that the employer send him his final paycheck and payment for his accrued vacation time "should [the employer] have not already done so." Transcript at 23.

(8) The employer had continuing work available for claimant after April 28, 2016.

CONCLUSIONS AND REASONS: We disagree with the ALJ and conclude that claimant voluntarily left work without good cause.

It is first necessary to address the nature of the work separation. If claimant, 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).

In Hearing Decision 16-UI-69496, the ALJ concluded that the employer discharged claimant because claimant was willing to continue working for the employer as a general sales manager, but the employer was not willing to allow claimant to continue working "in that capacity after April 23."[1] The ALJ

[1] Hearing Decision 16-UI-69496 at 3.

reasons further that it is "not in issue" whether claimant would have been willing to continue working for the employer "in another capacity."[2] EAB disagrees with the ALJ's conclusion and reasoning.

Work Separation. For purposes of unemployment insurance benefit determinations, "work" is not defined in terms of the particular position an employee holds. It means "the continuing relationship between an employer and an employee." OAR 471-030-0038(1)(a). Therefore, the fact that the employer might have removed claimant as general sales manager and put him in a different position does not determine whether the work separation was a quit or a discharge. The record shows that claimant assumed the employer discharged him because of the interim manager's statements to him on April 24 about changes in claimant's position with the company, the problem with claimant's family dental insurance, and the employer's act of blocking claimant's access to its computer systems. Transcript at 50-55. Although the interim general manager told claimant he could expect a change in his position after April 24, the employer never told claimant he was discharged. Nor did the other managers have information showing that the employer had discharged claimant when claimant contacted them on April 27. The record does not show that claimant's inability to use the employer's computer system and his problems with his dental insurance were attributable to being discharged. The employer's witness testified that the employer did not discharge claimant, suspended claimant's internet access only temporarily, and paid claimant's insurance premiums for April 2016. Transcript at 29, 20, 57-58. The preponderance of the evidence shows that claimant assumed the employer had discharged him without first pursuing the reasonable alternative of verifying his employment status with the employer and, based on his assumption, ended the employment relationship by email on April 28, 2016. Because continuing work was available to claimant when he left, the work separation was a voluntary leaving.

Disqualification. A claimant who leaves work voluntarily is disqualified from the receipt of benefits unless he proves, by a preponderance of the evidence, that he had good cause for leaving work when he 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). Claimant had epilepsy, a permanent or long-term "physical or mental impairment" as defined at 29 CFR §1630.2(h). A claimant with that 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 his employer for an additional period of time.

Claimant quit work because he mistakenly assumed the employer had discharged him. For the reasons previously explained, the record does not show that claimant had a reasonable basis to assume without asking a superior and receiving a definitive answer that the employer had ended the employment relationship. Thus, claimant has not shown that no reasonable and prudent person with claimant's medical condition would have continued to work for the employer for an additional period of time.

To the extent that claimant quit his job because he was dissatisfied with the employer's plan to lower his pay and position at work, claimant failed to demonstrate good cause for leaving work. Although OAR

[2] *Id.*

471-030-0038(5)(d) provides that under limited circumstances the reduction to an individual's rate of pay may constitute good cause for leaving work, the provision does not apply to situations where, as here, an employee's earnings are reduced as a result of demotion or reassignment. OAR 471-030-0038(5)(d)(A). Under the general provision OAR 471-030-0038(4), claimant did not show that his earning and duties under his new position would constitute a grave circumstance. A reasonable and prudent person with claimant's medical condition would wait to see what his earnings and job duties would be before deciding that the reassignment would significantly reduce his income to such an extent that he had no alternative but to quit his job.

To the extent claimant quit work because his father's discharge caused him stress that aggravated his medical condition, claimant did not show that he faced a grave situation at work. The employer permitted claimant to take time off work to reduce his stress after his father was discharged, and there is no evidence to show that the employer failed to accommodate claimant's medical restriction from driving.

Claimant voluntarily left work without good cause, effective April 28, 2016. Claimant is, therefore, disqualified from unemployment insurance benefits beginning April 24, 2016 and until claimant has earned four times his weekly benefit amount from work in subject employment.

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

DECISION: Hearing Decision 16-UI-69496 is set aside, as outlined above.

DATE of Service: <u>November 22, 2016</u>

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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