EO: 200
BYE: 201626

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

767
VQ 005.00

EMPLOYMENT APPEALS BOARD DECISION
2016-EAB-1344

Affirmed
Disqualification

PROCEDURAL HISTORY: On September 28, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant quit working for the employer without good cause (decision # 131934). Claimant filed a timely request for hearing. On November 2, 2016, ALJ Murdock conducted a hearing, and on November 4, 2016 issued Hearing Decision 16-UI-70587, affirming the Department's decision. On November 28, 2016, claimant filed an application for review with the Employment Appeals Board (EAB).

EAB considered the entire hearing record and claimant's written argument. However, claimant's argument contained information that was not part of the hearing record, and failed to show that factors or circumstances beyond claimant's reasonable control prevented her from offering the information into evidence at the hearing. Under ORS 657.275(2) and OAR 471-041-0090 (October 29, 2006), EAB considered only information received into evidence at the hearing when reaching this decision.

FINDINGS OF FACT: (1) Finn Rock Grill employed claimant from August 15 to December 31, 2015 as a bartender and server at the employer's restaurant in Vida, Oregon.

(2) Toward the end of claimant's employment, the employer's owner reduced her hours because it was the employer's slow season. The owner also hired a full time bartender and server to replace one who had quit, and another to work the day shift two days per week. Claimant speculated that the owner was preparing to discharge her and had hired one of the bartenders to replace her.

(3) Claimant last performed services for the employer on December 22, 2017. During that last shift, a newly hired coworker poured beers and mixed drinks for bar customers while claimant was serving other customers. Claimant informed the coworker that without her "service permit or the paperwork to even start it," the coworker could not legally serve customers alcohol. Transcript at 12. The coworker told claimant that the employer's owner had told her she could serve alcohol, and the coworker continued to do so. When claimant again asserted that the coworker could not legally serve alcohol, the coworker "took on an attitude," for which she later apologized. *Id.*

(4) On or about December 22, 2016, claimant decided to visit family in Portland, Oregon over the holiday weekend. Claimant informed the employer, who did not object, and claimant left for Portland on or about December 25, 2016.

(5) On December 27, 2016, the owner sent claimant a text message stating that they needed to "chat," that he would be at the employer's restaurant from 10:00 a.m. to 4:00 p.m. the following day, and that if claimant could "stop by," that would be "great." Transcript at 7. Claimant replied with a text message stating that she was in Portland, not sure when she would return, or whether the owner had scheduled her to work that week. The owner replied with a text message stating that he had not scheduled her to work, and instructing claimant to let him know when she returned from Portland. Claimant believed the owner was "mad" at her for having told the coworker on December 22 that she could not legally serve alcohol. Transcript at 13.

(6) Claimant returned from Portland on December 31, 2016. That morning, she received several text messages from a friend who was a frequent customer at the employer's restaurant, stating that the owner had "badmouthed" claimant the night before, said claimant "won't be back," called her a "troublemaker," and said "a lot of bad" about claimant. Transcript at 8. Based on those text messages, claimant believed the owner intended to discharge her. Claimant therefore did not inform the owner that she had returned from Portland and was available for work. As a result, the owner removed claimant from the following week's work schedule, and stopped scheduling her to work. However, claimant could have continued to work for the employer after December 31, 2016 if she had notified the owner that she had returned from Portland and was available for work.

(7) On January 10, 2017, claimant contacted the employer to inquire about two paychecks that were due to her. An employee told claimant that she was not on the work schedule, and had been removed from prior work schedules. Claimant asked the employee about her "food card and OLCC permit" because she was searching for other work. Transcript at 8. On or about January 15, 2017, claimant received her two paychecks from the employer in the mail. The employer did not inform claimant that she was discharged. Claimant did not contact the employer's owner.

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

The first issue in this case is the nature of the work separation, if any. 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) (August 3, 2011). 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). "Work" means "the continuing relationship between an employer and an employee." OAR 471-030-0038(1)(a). The date an individual is separated from work is the date the employer-employee relationship is severed. *Id*.

Here, the record shows claimant may have been willing to continue working for the employer after December 31, 2016. However, it fails to show the employer did not allow her to do so. Claimant could have continued to work for the employer after December 31, 2016 if she had notified the employer's owner that she had returned from Portland, as he had instructed her to do, and told him that she was available for work. In deliberately failing to do so, claimant severed the employment relationship, as

demonstrated by the fact that she was searching for other work and made no attempt to clarify her employment status with the owner when contacting the employer on January 10, 2017, or after having received her paychecks but no termination paperwork on January 15, 2017. We therefore conclude that claimant voluntarily left work on December 31, 2016.

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 voluntarily leaves work must show that no reasonable and prudent person would have continued to work for her employer for an additional period of time.

Claimant voluntarily left work because she believed the employer's owner intended to discharge her. Claimant based that belief, in part, on the fact that the owner had reduced her hours and hired two new employees. Claimant also believed the owner's December 27, 2016 text messages and those she received from her friend on December 31, 2016 meant the owner intended to discharge her and, at hearing, asserted that the owner's subsequent failure to contact her and her removal from the work schedule confirmed that belief. However, the owner denied he had intended to discharge claimant, and it is undisputed that all employee hours had been reduced because it was the employers' slow season, that the owner had hired the full time bartender and server to replace one who had quit, and the other to work only two day shifts per week. Transcript at 27, 32-34. The owner's text messages, which claimant admitted were not unusual, did not indicate that he intended to discharge claimant, and his testimony that he did not disparage claimant on December 30, 2016 or state that she would not return to work outweighs claimant's hearsay information that he did. Transcript at 7-8, 213-14, 29-30. The owner's subsequent failure to contact claimant does not show he had intended to discharge claimant, given that he had instructed her to contact him when she returned from Portland. Nor does claimant's subsequent removal from the work schedule, given her failure to notify the employer she had returned from Portland and was available for work.

In sum, claimant failed to show by a preponderance of evidence that the employer's owner had intended to discharge her. Nor do we find that a reasonable and prudent person would, based largely on text messages from a friend who did not work for the employer, conclude that her imminent discharge was so certain that she would fail to notify the owner that she had returned from Portland and was available for work. We therefore conclude that claimant voluntarily left work without good cause, and that she is disqualified from the receipt of benefits.

DECISION: Hearing Decision 16-UI-70587 is affirmed.

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

DATE of Service: <u>December 23, 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.

Please help us improve our service by completing an online customer service survey. To complete the survey, please go to https://www.surveymonkey.com/s/5WQXNJH. If you are unable to complete the survey online and wish to have a paper copy of the survey, please contact our office.