

EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-0035

Affirmed
Disqualification

PROCEDURAL HISTORY: On November 23, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant voluntarily left work without good cause (decision # 84556). Claimant filed a timely request for hearing. On December 8, 2016, ALJ Shoemake conducted a hearing, and on December 29, 2016 issued Hearing Decision 16-UI-73794, affirming the Department's decision. On January 9, 2017, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant submitted a written argument, but failed to certify that she provided a copy of that argument to the other parties as required by OAR 471-041-0080(2)(a) (October 29, 2006). Claimant's argument also contained information that was not part of the hearing record, and she failed to show that factors or circumstances beyond her reasonable control prevented her from offering that information during the hearing as required by OAR 471-041-0090 (October 29, 2006). For these reasons, EAB considered only information received into evidence at the hearing when reaching this decision.

FINDINGS OF FACT: (1) CSL Plasma, Inc. employed claimant as a group leader and trainer from July 26, 2010 until October 18, 2016.

(2) On October 17, 2016, claimant was scheduled to work from 11:00 a.m. until 8:00 p.m. Claimant left work at approximately 2:45 p.m. The center manager thought claimant had left work early because she disliked working the closing shift. Sometime shortly after 2:45 p.m., the center manager telephoned claimant at her home and told her she should return to the workplace and work the balance of her shift. The manager also advised claimant that she should not have walked off the job because it was unprofessional and, if she had issues working the closing shift, she needed to bring them with her managers. Claimant returned to work around 3:30 p.m. Claimant left the workplace a second time at approximately 4:30 p.m.

(3) On October 18, 2016, claimant did not report for work. Around noon, an assistant manager went to claimant's home to check on her. Claimant had consumed alcohol before the assistant manager's mid-day arrival at her home. Claimant told the assistant she was going to go to sleep, but would try to report for work the next day. The assistant manager sent a text message to the center manager while she was still at claimant's home informing the center manager that claimant was not going to report for work that day. The center manager replied that claimant needed to report for work on October 19, 2016, the next day. The assistant manager told claimant of the center manager's reply. Claimant told the assistant manager she would return to work on October 19, 2016. Shortly after, the assistant manager left claimant's home and returned to the workplace.

(4) On October 18, 2016 at 6:52 p.m., claimant sent a text message to the assistant manager stating "Okay, I'm not returning to work. Sorry." Audio at ~22:24. The assistant manager replied by text message, "So, what does that mean? Are you quitting or what?" Audio at ~22:30. Claimant replied, "Yes," to which the assistant manager responded, "Nice. I need your key back." Audio at ~ 22:35. On October 18, 2016, claimant voluntarily left work.

CONCLUSIONS AND REASONS: Claimant voluntarily left work without good cause.

The first issue this case present is the nature of claimant's work separation. The standard for determining the proper characterization of a work separation is set out in OAR 471-030-0038(2) (August 3, 2011). If claimant could have continued to work for the employer for an additional period of time when the work separation occurred, the separation is a voluntary leaving. OAR 471-030-0038(2)(a). If claimant was willing to continue to work for the same employer for an additional period of time but was not allowed to do so by the employer when the separation occurred, the separation was a discharge. OAR 471-030-0038(2)(b).

Claimant contended that the center manager sent her a text message sometime around October 18, 2016, in which the manager for no apparent reason asked claimant, "Would you like to be fired or do you quit?" and according to claimant's account, she replied, "I quit, I guess." Audio ~12:11. Had this exchange occurred as claimant recounted it, it is not clear from the language of the manager's text message that the employer was unwilling to allow claimant to continue working if she was willing to do so. The language of the text message, as recounted by claimant, was not without ambiguity and could reasonably be construed as a simple inquiry into the intentions underlying claimant's absence. Accepting claimant's account as accurate, it is also notable that claimant did not respond to the manager's supposed message by asking why the manager was asking what she was asking, stating she was not quitting or asking why she would be fired if she did not quit, as would have been expected if she truly did not intend to leave work. Rather, according to claimant, she merely responded that she was quitting without questioning the manager at all.

There are also reasons to doubt the accuracy of claimant's recall of the text messages leading up to the work separation. Claimant's testimony about them was vague as to dates, uncertain about the exact language of the messages that were exchanged, and subject to many expressions of qualification as she testified such as "I think," "I guess" and "what did she [the manager] say?" Audio at ~12:11, ~12:34, ~13:59, ~26:35. It was apparent from her hesitancy and her tone of voice that claimant did not have access to those messages during her testimony, and was trying to remember the substance of communications that had been exchanged nearly two months before the hearing. By contrast, the

employer's witness had in her possession during the hearing copies of the actual text messages and her testimony was largely a verbatim recitation of those messages. Audio at ~20:58, ~21:43, ~21:51, ~22:11, ~22:19, ~23:01. The testimony of the employer's witness, based on the actual text messages, appears more reliable than claimant's unaided and uncertain recall, and nothing in the record suggests that the employer fabricated the contents of the text messages exchanged between claimant and the assistant manager. Accordingly, the testimony of the employer's witness as to the contents of those messages and the sequence in which they were generated is accepted. Based on their contents, the assistant manager received a text message initiated by claimant at 6:52 p.m. on October 18, 2016 stating that she was quitting, without any predicate communication from the employer, and the assistant manager asked claimant to clarify if she intended the quit by her message. Since the employer had not expressed any unwillingness to allow claimant to continue working when she responded to the manager's request for clarification shortly after 6:52 p.m. and stated she was quitting work, claimant's work separation was a voluntary leaving on October 18, 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). 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 testified at hearing that she was sick on October 17 and 18, 2016, and was upset that the employer did not want her to take time off when the employer's point-based attendance policy would have allowed her to take the sick days she wanted without disciplinary consequences. Audio at ~7:16, ~10:48. Assuming the accuracy of claimant's testimony, to the extent claimant quit work because she was upset about the employer wanting her at work when she was ill, claimant's circumstances were not grave. Rather than leaving work, claimant had the reasonable option of not complying with the employer's wishes, not working due to illness and either using her accrued sick leave or incurring attendance points for discretionary absences. Other than the employer allegedly advising claimant that she needed to work when she was ill, there are no other discernible reasons in the record for claimant's decision to leave work.

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

DECISION: Hearing Decision 16-UI-73794 is affirmed.

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

DATE of Service: February 1, 2017

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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