EO: 200
BYE: 201737

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
2017-EAB-0108

Affirmed
Disqualification

PROCEDURAL HISTORY: On October 28, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant, but not for misconduct (decision # 84507). The employer filed a timely request for hearing. On January 13, 2017, ALJ Lohuis conducted a hearing, and on January 20, 2017 issued Hearing Decision 17-UI-75155, concluding that claimant voluntarily left work without good cause. On January 26, 2017, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant submitted a written argument that included new information. OAR 471-041-0090(2) (October 29, 2006) provides that EAB will not consider new information unless claimant establishes that the information is relevant and material to EAB's determination and factors or circumstances beyond her reasonable control prevented her from offering the information into evidence at the hearing. The new information claimant offered included the following documents, each of which we will address separately: a copy of claimant's September 15th email titled "Suspension of position" (2 pages); a copy of the COO's September 28th email to claimant titled "Thursday and Friday" (1 page); claimant's "summary of events" (2 pages); claimant's narrative argument (3 pages); an email from DH titled "Account of 9/26" (1 page) and claimant's argument that EAB should consider the "Account of 9/26" email when reaching this decision (2 pages).

The September 15th and September 28th emails are excluded from evidence, and EAB did not consider them when reaching this decision. Although the contents of both emails are relevant to the matter before EAB, both existed as of the date of the hearing, and both were either within claimant's possession or capable of being obtained by her in time to offer into evidence at the hearing. As such, claimant has not established that factors or circumstances beyond her reasonable control prevented her from offering the emails into evidence at the hearing. We also note that information about the substance of both emails was offered into evidence through testimony at the hearing, making the documents themselves largely duplicative of evidence already in the record.

Claimant's summary of evidence is excluded from evidence as duplicative of evidence already in the record. The ALJ admitted an identical document into the record at the hearing, marked as Exhibit 1, and EAB considered Exhibit 1 when reaching this decision. It is therefore unnecessary for us to admit another copy of that document into evidence, and the document is excluded.

EAB considered claimant's narrative argument under OAR 471-041-0080 as written argument. The argument itself is not evidence, however, and we therefore did not admit it as such.

Finally, the email from DH titled "Account of 9/26" is also excluded from evidence and EAB did not consider it when reaching this decision. The email is relevant, and claimant argued that EAB should admit the additional evidence in the record because it was not available at the time of the hearing since the individual who authored it was "reluctant to put anything in writing as she was still" employed by the employer. While claimant's witness's reluctance to provide it is certainly understandable, the fact of the matter is that the evidence existed at the time of the hearing, claimant was aware of it, and claimant had it within her ability to compel the witness to testify, for example, by obtaining a subpoena from OAH for the witness's testimony or a statement. Given the circumstances, we cannot say that it was beyond claimant's reasonable control to offer the information into the hearing record.

For the sake of argument, however, even if we had admitted the email into evidence it would not have changed the outcome of this decision. Claimant said she offered the email in part for the purpose of refuting the ALJ's finding that "There is no evidence in the record, that claimants [*sic*] discharge was imminent or even planned." The email does not, however, show that the employer "planned" claimant's "discharge" or that a "discharge" was imminent," it merely establishes that the COO told the witness claimant "will not be returning to work." In other words, the email from DH did not characterize claimant's work separation or indicate whether claimant chose to leave or was involuntarily discharged. As such, the email does not show that the employer planned to discharge, terminate or replace claimant by its own choice, only that the employer had some awareness that claimant's employment would not continue, awareness that just as likely as not was founded in claimant's September 26th refusal to speak with the COO and reasonable inferences the COO might have drawn therefrom.

Claimant also offered the email to resolve the discrepancy between claimant's and the COO's testimony concerning whether the COO told employees on September 26th that claimant had "quit." Claimant averred that the email from DH establishes conclusively that the COO "did make a statement about my termination on September 26" thereby confirming claimant's version of events was true and the COO's was not. We disagree. First, as noted, the email claimant offered into evidence does not suggest that claimant "quit" or that she was "terminated," it merely states that claimant "will not be returning" without indicating that the COO said why that was, or whose decision it was for claimant not to return. Second, even if we assume for the sake of argument that the email conclusively established that the COO had lied at the hearing and disregard her testimony in its entirety, the outcome of this case would still remain the same because the remaining evidence, based on claimant's testimony and Exhibit 1, for the reasons explained herein, conclusively established not only that claimant chose to quit work, but also that the reasons claimant cited for doing so did not amount to good cause.

FINDINGS OF FACT: (1) Totalsource employed claimant as a nurse from January 21, 2015 to September 28, 2016. Claimant had previously worked for the employer's predecessor in the same capacity since approximately 2003.

(2) Claimant last worked for the employer on September 15, 2016. The employer's facility was undergoing construction and claimant was concerned about the effect the construction dust was having on the employer's patients, particularly after one patient required oxygen because of the dust. Claimant reported her concerns to the construction supervisor and the employer's chief operating officer (COO).

(3) The COO consulted with the construction crew and determined that the crew was in compliance with OSHA standards and there was nothing more they could do to reduce the amount of dust in the facility. The COO contacted the owner and reported that claimant was personally experiencing a scratchy throat and watering eyes because of the construction dust. The owner recommended that claimant remain home for her comfort, and not report to work, until that stage of the construction ended.

(4) The COO and owner contacted claimant by phone after her shift, indicated that claimant had reported she was ill, and instructed her to remain home for approximately one and one-half weeks. Claimant had two or three days of paid time off accrued, and the COO instructed claimant to use it to cover her absences. Claimant said she was not ill and disagreed with the instruction. The owner and COO did not change the instruction based on claimant's disagreement. Claimant then emailed the owner and one of the employer's doctors and communicated that she was willing to return to work on September 16; the doctor confirmed he received claimant's email, but she did not receive a response from either with respect to returning to work.

(5) By September 26, 2016, the stage of construction that had caused the dusty conditions had ended. On September 26, 2016, the COO called claimant on the telephone, told her the dust was gone, and asked her to return to work on September 29 and September 30, both of which were days claimant would normally be scheduled to work. Claimant said the COO's "lack of communication has been disrespectful, unprofessional and unwarranted" and "completely unacceptable." Transcript at 28. Claimant instructed the COO not to contact her except by email and did not indicate whether or not she planned to report to work on September 29 or September 30.

(6) Claimant believed the only reason the COO had asked her to return to work was that the employer's new nurse planned to be on vacation those two days. After being off work for eleven days, claimant felt she did not know what her employment status was and felt she "needed [something] in writing." Transcript at 29.

(7) On September 28, 2016, claimant received an email instructing her to report to work on September 29 or her "non-presence would be taken as termination." *Id.* Claimant felt she had already been terminated, and, on September 28, 2016 at 9:19 p.m., sent the COO an email stating that the COO had "claimed I was ill and I wasn't," and that the decision to keep her off work after September 15th "was to create an adverse working relationship and the hope of forcing me to quit my position or punish me for some perceived action." Transcript at 8-9. Claimant stated that the COO had incorrectly construed her concern for patients as "riding roughshot" and "challenging or overriding" the COO's authority. *Id.* Claimant stated that after "two weeks you waited until the end of the day to make a half hearted [*sic*] demand of my return in the morning. I expected I expect [sic] this last minute action is most likely a limited attempt to avoid my employment claim. To be clear, I did not resign my position. I was removed from the schedule under false premise and terminated from my position without cause." Transcript at 10.

(8) The employer did not respond to claimant's September 28, 2016 email. Claimant did not report to work as scheduled on September 29 or September 30. On October 3, 2016, the employer sent claimant a letter stating that her employment was terminated, effective October 5, 2016, for abandoning her job.

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

Although the parties characterized claimant's work separation as a termination, the record establishes that, for purposes of unemployment insurance benefits, claimant voluntarily left work. The distinction between a voluntary leaving and a discharge is as follows: 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; 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).

In this case, the employer contacted claimant on September 26 and September 28 to offer her at least two days of employment, on September 29 and September 30. Although claimant thought the employer was offering her only two days of employment, and made the offer for its own convenience rather than out of a desire to continue employing her indefinitely, claimant did not dispute that the employer had a minimum of two days of additional work for her, and she agreed that she chose to reject the employer's offer. Because claimant could have continued to work for the employer for an additional period of time, no matter that it might only have been for two days, under OAR 471-030-0038(2), the work separation was a voluntary leaving. The effective date of the voluntary leaving was September 28, 2016, the date that claimant indicated via email that she would not return to work for the shifts she had been offered.

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 rejected the employer's offer to continue working for a minimum of two days because she thought the COO and owner had treated her unfairly, she thought they were only bringing her back from work for two days to cover a new employee's vacation days, and she thought if she returned to work the employer would ultimately try to find a reason to discharge her to "clean[] house" by replacing experienced, more expensive professionals with less skilled, less expensive workers. Transcript at 31-32. Assuming all of claimant's suspicions were true, claimant's circumstances were not grave. To the extent claimant was concerned about the work schedule beyond September 29 and September 30, she had the reasonable alternative of asking the employer whether she was being returned to work her normal schedule, and, if not, to ask the employer when and how long the employer expected her to return to work. To the extent claimant was concerned about her employment status, claimant had the reasonable alternative of asking the employer what her employment status was.

Regarding claimant's concerns about the COO or the COO's motives in what was, effectively, an involuntary suspension from work, or the COO's motive in returning to claimant to work when she did, claimant's circumstances were not grave. Claimant had never been subjected to workplace discipline throughout her employment, and, until she refused to return to work or communicate with the COO other than by email on September 26, was not suspected or accused of any wrongdoing in connection with her job performance, her complaints about the construction dust, or what had amounted to an involuntary suspension from work. Although claimant had reason to feel that her suspension was unfair, that her concerns had been misunderstood, and that the COO and owner had not listened to her with respect to her concern about the dust, she did not establish that the situation was of such gravity that no reasonable and prudent person would have returned to work for the employer when the employer offered to end her suspension and return her to work.

Claimant voluntarily left work without good cause. Claimant is disqualified from receiving unemployment insurance benefits because of her work separation.

DECISION: Hearing Decision 17-UI-75155 is affirmed.

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

DATE of Service: <u>February 15, 2017</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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