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BYE: 201729

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-0201

*Affirmed*
*No Disqualification*

**PROCEDURAL HISTORY:** On November 16, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant, but not for misconduct (decision # 132121). The employer filed a timely request for hearing. On January 27, 2017, ALJ M. Davis conducted a hearing, and on January 31, 2017 issued Hearing Decision 17-UI-75797, affirming the Department's decision. On February 21, 2017, the employer filed an application for review with the Employment Appeals Board (EAB).

The employer failed to certify that it provided a copy of its argument to the other parties as required by OAR 471-041-0080(2)(a) (October 29, 2006). Therefore, we did not consider the argument when reaching this decision.

**FINDINGS OF FACT:** (1) King Speed Oregon, LLC employed claimant as a warehouse operator from September 2015 to June 3, 2016.

(2) In April 2016, the employer's CEO traveled to China for an extended period of time. During the CEO's absence, she funneled all communication about the business through a single employee, her assistant, who was also claimant's ex-girlfriend. Transcript at 10. The CEO communicated messages to the assistant, who would then disseminate the information to whoever needed it, and the assistant communicated information about the business to the CEO. Transcript at 16, 22. The assistant was claimant's sole contact with the CEO, and was responsible for telling claimant and other employees "what to do and then when do we have day off, stuff like that." Transcript at 10. Although claimant had the CEO's contact information, claimant did not have direct contact with the CEO or the employer's co-owner during the CEO's absence. Transcript at 19-20.

(3) On June 3, 2016, claimant the assistant had an argument about personal matters at work in which claimant was "kind of like banging on the table" and "there was some contact" with the assistant. Transcript at 9, 14. A neighbor to the employer's business called police; police arrested claimant, charged him with domestic assault, and released him from custody the same day.

(4) After the incident, the assistant communicated with the CEO. The CEO watched surveillance video of the incident. The assistant then believed the CEO instructed her "not to let this person [claimant] work in the company anymore." Transcript at 13. The assistant sent a text message to claimant and left him a voicemail message in which she stated that the CEO did not want him to return to work. The assistant communicated to claimant, on the CEO's behalf, "that I don't have to go back to work, she just don't want me there anymore [* * *] she can't use me anymore." Transcript at 8. Another employee also sent claimant a text message, in which he stated that the assistant told the employee that the CEO did not want claimant to return to work.

(5) After being instructed by the assistant not to return to work on June 3rd, claimant never returned to the workplace or contacted the CEO or co-owner. The CEO did not contact claimant to ask why he had stopped reporting to work.

(6) Claimant subsequently pled guilty to the domestic assault charge.

**CONCLUSIONS AND REASONS:** We agree with the ALJ that claimant should not be disqualified from receiving benefits, but on the grounds that claimant voluntarily left work with good cause.

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) (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).

The ALJ concluded that claimant's work separation was a discharge, concluding that although "the CEO denied discharging claimant from work, the ex-girlfriend testified that she was told by the CEO that claimant was discharged. Claimant's and the ex-girlfriend's testimony was more persuasive than the employer's, and it established that the employer no longer had continuing work available for claimant. Thus, the work separation was a discharge." Hearing Decision 17-UI-75797 at 2. We disagree.

As a preliminary matter, the only two witnesses with firsthand testimony about what the CEO told the assistant about claimant's employment status were the CEO and the assistant. Absent a reason to disbelieve either witness, their testimony is equally balanced, and it is therefore just as likely as not that the CEO told the assistant claimant was not allowed to return to work as it is that the CEO told the assistant she would make the decision about claimant's employment status. Either way, the CEO was the only witness to testify at the hearing about whether or not the employer had continuing work available to claimant, and when asked if she told him not to return to work, replied, "No, I didn't" and that she would not have allowed anyone else to make such a decision on the employer's behalf. Transcript at 5-6. The distinction between a voluntary leaving and a discharge is, in essence, whether claimant could have continued working for the employer. It appears in this case that he could have, making the work separation a voluntary leaving, not a discharge.

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). 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 his employer for an additional period of time.

The question is, then, whether a reasonable and prudent person of normal sensitivity, exercising ordinary common sense, would have concluded he had any reasonable alternative but to leave work under the circumstances described in this case. We conclude he would not.

The CEO's assistant communicated to claimant that the CEO had discharged him. Although, as it turned out, the assistant was incorrect, she had the apparent authority to communicate decisions about claimant's employment to him because all of claimant's communication with the CEO occurred through the assistant, and had for months. The CEO gave the assistant instructions to relay to claimant and other employees, told them when to work and what to do, and communicated to the CEO on their behalf. Claimant did not customarily have direct contact with the CEO while the CEO was out of the country, and, despite the circumstances that caused claimant's arrest, it appears on this record that claimant had no reason to doubt the assistant when she communicated to claimant that he was not allowed to return to the workplace. Also notable was the fact that the assistant communicated the same thing to another employee, and that no one, including the CEO, ever contacted claimant to ask why he had stopped reporting to work.

The CEO testified at the hearing that she did give the assistant instructions to convey to other employees "for minor things," "[b]ut for important stuff like this to let someone go, I wouldn't let her do that." Transcript at 22-23. The CEO did not, however, explain how the assistant, claimant or the other employee would have known that the CEO would not communicate that type of work instruction through the assistant. It appears that all three employees, the assistant, claimant and the other employee, believed that the CEO had, in fact, given the assistant the instruction to discharge claimant, and believed that instruction had come from the CEO, making it more likely than not that even if the CEO would not have intended to give such an instruction through her assistant, claimant had no reason to know that.

A reasonable and prudent person of normal sensitivity, exercising ordinary common sense, who was told by an individual with apparent authority to communicate the CEO's work-related instructions to him that he was discharged, had no apparent reason to disbelieve the news, and knew the CEO had some basis for deciding to discharge him, would likely and reasonably conclude he had been discharged, a grave situation. Given those circumstances, it would not be reasonable to expect claimant to test what the assistant informed him about his employment status by directly contacting the CEO to confirm what the assistant told him, and his only alternative would be to accept the news of his discharge and act accordingly. We therefore conclude that claimant had good cause for voluntarily leaving work, and is not subject to disqualification from benefits because of this work separation.

**DECISION:** Hearing Decision 17-UI-75797 is affirmed.

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

**DATE of Service: <u>March 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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