

EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-0416

Reversed
Late Request for Hearing Allowed
No Disqualification

PROCEDURAL HISTORY: On November 22, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant voluntarily left work without good cause (decision # 144251). On December 12, 2016, decision # 144251 became final without claimant having filed a timely request for hearing. On February 7, 2017, claimant filed a late request for hearing. On February 13, 2017, ALJ Kangas issued Hearing Decision 17-UI-76771, dismissing claimant's late request for hearing subject to claimant's right to renew the request by responding to an appellant questionnaire by February 27, 2017. On February 20, 2017, claimant responded to the questionnaire. On March 1, 2017, the Office of Administrative Hearings (OAH) mailed a letter canceling Hearing Decision 17-UI-76771. On March 20, 2017, OAH mailed notice of a hearing scheduled for March 29, 2017. On March 29, 2017, ALJ Wyatt conducted a hearing at which the employer failed to appear, and on April 6, 2017, issued Hearing Decision 17-UI-80429, re-dismissing claimant's late request for hearing. On April 10, 2017, claimant filed an application for review of Hearing Decision 17-UI-80429 with the Employment Appeals Board (EAB).

EVIDENTIARY MATTER: In Hearing Decision 17-UI-80429, the ALJ stated that Exhibit 1, "record documents concerning the late hearing request" was admitted into evidence.¹ The record shows, however, that the ALJ did not admit any documents into the record, and no documents are marked as exhibits for the March 29, 2017 hearing. We have, therefore, admitted the following documents into evidence to complete the record: administrative decision # 144251, dated November 22, 2016; claimant's telephone request for hearing, dated February 8, 2017; Hearing Decision 17-UI-76771, the "dismissal with right to renew appeal"; claimant's request for hearing on decision # 141904; OAH letter to claimant on December 5, 2016; and claimant's 6-page response to the appellant questionnaire. A copy of EAB Exhibit 1 has been mailed to the parties with their copies of this decision. Any party that objects to our doing so must submit such objection to this office in writing, setting forth the basis of the objection in writing, within ten days of our mailing this decision. OAR 471-041-0090 (1), (3) (October 29, 2006). Unless such objection is received and sustained, the evidence will remain in the record as

¹ Hearing Decision 17-UI-80429 at 1.

EAB Exhibit 1. We have also marked administrative decision # 144251 and the Cancellation of Hearing Decision as record documents. These were not identified or marked at hearing, but are record documents.

FINDINGS OF FACT: (1) Steadfast Management Company, Inc. employed claimant from December 11, 2012 to October 4, 2016 as a community manager for a multi-family apartment complex.

(2) Since February 26, 2016, when claimant's assistant had quit, claimant had fallen behind in completing monthly documentation needed to support the tax credits for the 164 units she managed, despite working 45 to 55 hours per week since that time. Claimant worked 55 hours during the first week of each month because she had a limited amount of time to collect and submit rent from tenants. Claimant's duties also included managing two other employees, including a maintenance supervisor. Because the employer considered claimant to be a salaried employee, it did not pay her overtime.

(3) In June 2016, the employer decided it would not hire an assistant or otherwise provide claimant with assistance with helping claimant complete her duties. Claimant told her regional manager that she was dissatisfied with her workload and her inability to complete the documentation needed for the property in a timely manner.

(4) During 2016, the maintenance supervisor had begun to act in an "insubordinate" manner toward claimant. Audio Record at 39:18 to 39:21. If the maintenance supervisor disagreed with claimant, he complained for one to two weeks, causing a "subdued atmosphere," and "people walking on eggshells." Audio Record at 39:34 to 39:38. On multiple occasions, the maintenance supervisor took extended lunch breaks and arrived to work late. On one occasion, claimant called the maintenance supervisor and asked him to perform a task. He told claimant he was too busy. The next day, claimant viewed video tape of the maintenance supervisor performing no work during the time she had called him. Claimant documented the maintenance supervisor's conduct and reported multiple incidents to her regional manager. Claimant was not permitted to discipline the maintenance supervisor herself. The regional manager responded that the employer needed the maintenance supervisor because other maintenance staff had recently quit. The employer did not discipline the maintenance supervisor for his conduct.

(5) On July 27, 2016, the employer hired an assistant for claimant. The assistant had no property management or tax credit experience, so claimant had to commit additional time to training her. Although claimant's workload improved, she still had to work 45 hours per week. By October 2016, claimant still had documentation that was past due to complete for the property.

(6) Some time before October 4, 2016, the maintenance supervisor told claimant's regional manager that claimant was not following certain policies at the property. On October 4, 2016, the regional manager visited the property to meet with claimant and the maintenance supervisor to review the policies and procedures. The maintenance supervisor complained that claimant was allowing tenants to change their vehicle oil and tires in the parking lot, against policy. Claimant told the regional manager that the property management had allowed all tenants to do so for eight years. The regional manager began talking to other property managers on the telephone to confirm how they applied the parking lot policies. Claimant felt stressed because the meeting had continued for more than an hour and she had work to complete, and the maintenance supervisor continued to complain to claimant about her job performance. Claimant went to her desk, retrieved her keys, told the maintenance supervisor that he could do her job if

he felt he could do it better than her, and quit. Claimant was no longer able to work without support from the employer regarding the maintenance supervisor and her workload. The regional supervisor later told claimant that she felt like saying, “You go, girl!” when claimant quit. Audio Record at 53:50 to 53:57.

(7) The employer had no openings for a property manager in its other Oregon sites during 2016.

(8) On November 22, 2016, the Department sent claimant the administrative decision regarding her work separation, decision # 144251, by electronic mail. Claimant read the decision on November 23, disagreed with it, and understood that she had the right to appeal the decision within 20 days.

(9) On November 22, 2016, the Department mailed claimant a separate administrative decision regarding her work search activities. Claimant received that decision on November 29, 2016. Together with the decision was a hearing request form. Claimant did not notice that the hearing request form stated it was only to be used to request a hearing “on decision # 141904,” the work search decision. Exhibit 1. On December 1, 2016, claimant used that form to send a request for hearing to OAH by facsimile from a Department office, assuming she was requesting a hearing for all the decisions that were causing a denial of benefits, including the work search and work separation decisions.

(10) On December 5, 2016, the Department sent claimant a letter stating that OAH had received a request for a hearing regarding “a decision that the [Department] issued on November 22, 2016.” EAB Exhibit 1.

(11) Claimant received notice of a hearing for January 31, 2017. At the January 31, 2017 hearing, claimant learned that the form she had used on December 1 to request a hearing did not request a hearing regarding her work separation.

(12) On February 7, 2017, claimant went to a Department office and told an employee there that she wished to request a hearing regarding the decision that was causing her benefits to be denied. The employee told claimant she would have to call the Department to request a hearing. On February 8, 2017, claimant called the Department and again stated that she wanted a hearing regarding “the very reason [she] was denied unemployment.” EAB Exhibit 1.

CONCLUSIONS AND REASONS: We disagree with the ALJ. Claimant has shown good cause to extend the filing deadline in this matter a reasonable time and her late request for hearing is allowed. Claimant voluntarily left work with good cause.

Late Request for Hearing. ORS 657.269 provides that the Department’s decisions become final unless a party files a request for hearing within 20 days after the date it is mailed. The deadline to request a hearing on decision #144251 was December 12, 2017. Because claimant filed her request on February 7, 2017, it was late. However, ORS 657.875 provides that the 20-day deadline may be extended a “reasonable time” upon a showing of “good cause.” OAR 471-040-0010 (February 10, 2012) provides that “good cause” includes factors beyond an applicant’s reasonable control or an excusable mistake, and defines “reasonable time” as seven days after those factors ceased to exist. OAR 471-040-0005(2)(b) (July 14, 2011) provides that a request for hearing may be filed in person at any publicly accessible Department office in Oregon. OAR 471-040-0005(1) (July 14, 2011) provides that an

individual may use a form provided by the Department to request a hearing, but that use of the form is not required “provided the party specifically requests a hearing or otherwise expresses a present intent to appeal.”

The ALJ found as fact that claimant filed her request for hearing on the work separation issue, decision #144251, on February 8, 2017.² Based on that finding, the ALJ concluded that, although claimant made an excusable mistake by assuming she had requested a hearing for the work separation issue on December 1, she did not file her hearing request within the reasonable time period of seven days after the circumstances that prevented a timely filing ceased to exist. We agree with the ALJ that there was good cause to extend the hearing deadline, but disagree that claimant failed to file her request within a reasonable time after she learned she had not requested a hearing on decision # 144251.

There is good cause to extend the hearing request deadline because claimant made an excusable mistake in believing she had appealed both November 22, 2016 decisions on December 1, 2016. Claimant’s mistake was also excusable because OAH sent claimant a letter on December 5, 2016 stating that her request for hearing for the November 22, 2016 decision, without specifying which decision, was received by OAH and that a hearing would be scheduled. Since claimant had no reason to suspect she had made a mistake and her filing was confirmed by OAH, her mistake was excusable and good cause has been shown to extend the hearing deadline a reasonable time.

Claimant realized she had made a mistake in requesting a hearing at her hearing on January 31, 2017. From that time, claimant had seven days to request a hearing. *See* OAR 471-040-00010(3). Claimant went to a Department office within seven days of January 31, on February 7, 2017, and told a Department employee that she wanted to appeal the decisions that were causing the denial of her benefits. EAB Exhibit 1. However, the Department employee did not accept claimant’s request for hearing that day and told claimant that she needed to call the Department and request a hearing. EAB Exhibit 1. Claimant called the Department on February 8 and her request for hearing was accepted.

OAR 471-040-0005(2)(b) provides that an individual may file a request for hearing “[i]n person at any publicly accessible Employment Department office in Oregon.” There is no dispute that claimant was at a publicly accessible Employment Department office in Oregon when she attempted to request a hearing. OAR 471-040-0005(1) provides that an individual has requested a hearing if she “specifically requests a hearing or otherwise expresses a present intent to appeal.” It is more likely than not that claimant expressed to the Department employee on February 7 that she disagreed with the work separation decision, decision # 144251, and wanted to appeal that decision. We therefore conclude that claimant’s February 7, 2017 conversation with the Department employee was sufficient to show claimant’s “present intent to appeal” decision # 144251. February 7, 2017 was the date claimant filed her request for hearing in person at a publicly accessible Employment Department office; February 7, 2017 was within 7 days of the date the circumstances that had prevented claimant from filing a timely request for hearing ceased to exist, and was, therefore, a reasonable time. Thus, because good cause was shown to extend the filing deadline, and claimant filed her hearing request regarding decision #144251 within a reasonable time on February 7, 2017, claimant’s request for hearing regarding her work separation is allowed.

² Hearing Decision 17-UI-80429 at 2.

Voluntary Quit. 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 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 quit work because the employer failed to support her in her position, resulting in claimant having to work months of overtime for no additional compensation and to manage a maintenance worker without discipline for multiple performance issues. The employer knew claimant’s assistant had quit, yet waited seven months to hire a replacement, leaving claimant to perform the duties of both positions for no additional compensation. At the same time, claimant had to manage a maintenance supervisor who was insubordinate, refused to do the work she requested, and lied to her. Claimant complained to the employer about her workload and the maintenance supervisor, but the employer ignored claimant’s complaints for months and did not discipline the maintenance supervisor. Claimant’s frustration was understandably compounded when the employer held a meeting on October 4, 2016 in response to complaints from the maintenance worker about claimant.

Claimant faced a grave situation at work because the employer failed to provide her with the support she needed to perform her duties. Claimant’s supervisor said, “You go girl,” when claimant quit, suggesting that the supervisor recognized the poor conditions claimant endured at work and that the employer was unlikely to take action to improve claimant’s working conditions further. There were no open property manager positions available with the employer, thus transfer was also unlikely. Based on the poor working conditions and unlikelihood they would improve and the uncompensated overtime for a long period of time, it is more likely than not that a reasonable and prudent person would have had no reasonable alternative but to quit work. Thus, claimant quit work for good cause and is not disqualified from receiving benefits based on her work separation from the employer.

DECISION: Hearing Decision 17-UI-80429 is set aside, as outlined above.³

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

DATE of Service: May 4, 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

³ This decision reverses a hearing decision that denied benefits. Please note that payment of any benefits owed may take from several days to two weeks for the Department to complete.

'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.