

EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-0666

Affirmed
Disqualification

PROCEDURAL HISTORY: On April 11, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant voluntarily left work without good cause (decision # 71053). Claimant filed a timely request for hearing. On May 11, 2017, ALJ SgROI conducted a hearing, and on May 12, 2017 issued Hearing Decision 17-UI-83218, affirming the Department's decision. On June 1, 2017, claimant filed an application for review with the Employment Appeals Board (EAB).

With her application for review, claimant requested that EAB contact three individuals to obtain information relevant to this decision. EAB reviews hearing records, and does not conduct its own inquiries or initiate *ex parte* contact with witnesses. *See* ORS 657.275(2). EAB therefore did not contact claimant's witnesses. Claimant also provided some new information about her employment. However, EAB may only consider a party's new information if the party establishes that factors or circumstances beyond the party's reasonable control prevented her from providing the information into evidence during the hearing. OAR 471-041-0090(2) (October 29, 2006). Claimant did not establish that she was prevented from offering her new information at the hearing, and her request is therefore denied. To the extent portions of claimant's argument were not based on new witnesses or new information, we also note that claimant did not certify that she provided a copy of the argument to her former employer, as required under OAR 471-041-0080 (October 29, 2006). EAB therefore did not consider the remainder of claimant's argument, either.

FINDINGS OF FACT: (1) Safeway Stores, Inc. employed claimant as a deli clerk from May 5, 2016 to May 15, 2017.

(2) The employer had concerns about claimant's ability to complete her job duties during her shifts. In November 2016, claimant was too busy with customers while working alone to complete her duties. The employer issued claimant a written warning for failing to complete her job duties on that occasion. Claimant erroneously believed that any additional warnings would cause the employer to fire her.

(3) Thereafter, claimant occasionally needed to work overtime to complete her duties. On March 14, 2017, the employer told claimant she needed to finish her duties by the end of her scheduled shift without working overtime. Claimant tried to comply but the deli was far too busy for her to be able to complete all her work. When claimant realized she would not be able to finish her duties she asked for help prioritizing which tasks to finish and which to leave for the following day but did not receive help. Claimant left work at the end of her scheduled shift without having finished the dishes or trash.

(4) On March 15, 2017, the employer met with claimant about her failure to complete her duties the night before. Claimant was unhappy because she felt her shift was chronically understaffed, she had done her best to keep up with the workload, and she did not like the way the employer questioned her. Claimant told the employer the duties she had finished, and the employer responded that she was being "defensive." Audio recording at ~ 20:00. Claimant saw what she thought was a written warning on the employer's desk. She assumed she was going to get another warning, was afraid of being fired because she did not want a discharge on her employment record, and quit her job, effective immediately.

(5) At the time claimant quit, the employer had not told claimant that the employer was considering discharging her, intended to discharge her, and, in fact, did not intend to discharge her because of the events of March 14th.

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

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 to avoid being fired. An individual who quits work to avoid a discharge or potential discharge for misconduct has quit without good cause. OAR 471-030-0038(5)(b)(F). That rule does not apply to claimant's quit, though, because the record fails to show that any discharge or potential discharge based upon her failure to complete her work on March 14th would have been for misconduct. "Misconduct" means, in part, a willful or wantonly negligent violation of the standards of behavior the employer had the right to expect of claimant. OAR 471-030-0038(3)(a). Although claimant's failure to complete her duties before the end of her shift appears to have violated the employer's expectations, the record shows that claimant made a concerted effort to complete her work and sought help to prioritize her work when it became apparent to her that she would not be able to do so, meaning that any violation

of the employer's expectation on March 14th was not attributable to claimant as willful or wantonly negligent conduct. Because any discharge or potential discharge based on the claimant's March 14th conduct would not have been for misconduct, OAR 471-030-0038(5)(b)(F) does not disqualify claimant from receiving unemployment insurance benefits.

Individuals who quit work to avoid being discharged, when the discharge is not for misconduct, may under limited circumstances establish good cause for having quit work. In order to do so, the individual must show, for example, that the discharge was imminent, and that being discharged would be a "kiss of death" or would otherwise have a uniquely or particularly damaging effect on the individual's future career prospects, for example, because of the type of career the individual had, or because of the size of the individual's community. *See e.g. McDowell, supra*. In this case, claimant has not shown that her discharge was imminent; in fact, the employer did not have any plans to discharge claimant on March 15th, did not tell her she was going to be discharged, and, at the time she quit, claimant had not asked if she was about to be discharged. Likewise, while claimant was afraid of having a discharge on her employment record, and as a matter of common sense having a discharge on one's employment record can be challenging to a future job search, claimant did not assert or show what, if any, particularly or uniquely damaging effect a discharge might have on her ability to secure work elsewhere as a deli clerk in particular, in the grocery or food industry generally, or in her labor market.

In sum, claimant quit work because she erroneously assumed, based on her misunderstanding about the effect of a November 2016 warning, that the employer intended to discharge her on March 15th. Rather than quit based upon an erroneous assumption, claimant had the reasonable alternative of asking the employer whether the employer intended to discharge her on that date, thus finding out that her assumption was incorrect. A reasonable and prudent person of normal sensitivity, exercising ordinary common sense, would not conclude that an unconfirmed assumption constituted a situation of such gravity that she had no reasonable alternative but to quit because of it. Claimant therefore left work without good cause, and is disqualified from receiving unemployment insurance benefits because of her work separation from the employer.

DECISION: Hearing Decision 17-UI-83218 is affirmed.

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

DATE of Service: June 22, 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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