

EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-0841

Affirmed
Disqualification

PROCEDURAL HISTORY: On May 16, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant voluntarily left work without good cause (decision # 95655). Claimant filed a timely request for hearing. On June 28, 2017, ALJ Janzen conducted a hearing, and on June 29, 2017, issued Hearing Decision 17-UI-86875, affirming the Department's decision. On July 14, 2017, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant's written argument contained information that was not offered into evidence during the hearing, did not explain why she was unable to present the information at that time or otherwise show, as required by OAR 471-041-0090 (October 29, 2006), that factors or circumstances beyond her reasonable control prevented her from doing so. She also failed to certify that she provided a copy of her written argument to the other parties as required by OAR 471-041-0080(2)(a) (October 29, 2006). Accordingly, under ORS 657.275(2), OAR 471-041-0080 and OAR 471-041-0090, EAB only considered the hearing record when reaching this decision.

FINDINGS OF FACT: (1) Scio Animal Clinic employed claimant as a receptionist from January 1, 2017 to April 24, 2017. Claimant had worked for the prior owner of the clinic since 2014 and continued to work for the clinic after an ownership change on January 1, 2017. The new owner (D) had an office manager whose job, in part, was to receive and attempt to resolve employee concerns and complaints.

(2) In December 2016, D held a meeting and asked employees what their employment plans were after January 1, 2017 so he could fulfill staffing needs. Because claimant appeared older, he asked her if she was planning to retire. She replied that she was not. After January 1, 2017, claimant and D occasionally engaged in casual conversations in which claimant's age came up. In one such conversation, claimant commented that that she was old enough to be D's mother. D responded, "You're older than my mother." Transcript at 31.

(3) Claimant usually went by the name Sandy. D had another employee named Sandy and he and other staff often referred to claimant and the other employee by their last names. Some clients pronounced

claimant's last name similar to the term for French bread, "baguette." D occasionally shortened that word and referred to claimant as "baugay," what he believed was a French derogation of the word baguette. Transcript at 21-22. However, claimant believed he was referring to her as "baggy" and eventually took offense to it. When claimant told D to stop calling her that, he did.

(4) One service D provided to customers was artificial insemination of dogs. With that procedure, after the male dog ejaculated, D, as a trained veterinarian, massaged a gland at the base of the dog's penis to diminish its erection. When D asked a technician to assist him, she declined. D responded, "I'm sure you would be able to do this," without intending to be lewd. Transcript at 11. After the technician continued to refuse, D performed the procedure himself. After the technician told claimant about her exchange with D, claimant became offended and concluded D's intent was inappropriate.

(5) As a result of the age, name and insemination procedure incidents, claimant believed D thought claimant was too old to work for the employer and that D occasionally was inappropriate and offensive.

(6) On Saturday morning, April 22, 2017, D asked claimant if she had contacted the owners of pets which had surgery scheduled for the following Monday to remind them of the scheduled procedures. Claimant replied that she had not. At approximately 11:30 a.m., D again asked claimant if she had made the calls and claimant replied that she would make the calls after the office closed at noon. D told claimant that he would have other employees do it because they did not have anything to do. Claimant replied, "You can't give my job to somebody else," to which D replied, "I can ask anyone to do a task that needs to be done anytime it needs to be done." Transcript at 20. Claimant then said to D, "You just can't figure out what you want around here and that's why, you know, no one listens to you." *Id.* D raised his voice and replied, "I don't appreciate you talking to me that way. You can go home for the day if . . . you're gonna have a problem with that." Transcript at 21. Claimant stayed the remainder of her shift but was visibly upset.

(7) On Monday April 24, 2017, claimant dropped off her keys and quit because D had raised his voice to her on April 22 and claimant believed D was inappropriate and thought claimant was too old.

CONCLUSIONS AND REASONS: We agree with the Department and ALJ. Claimant voluntarily left work without good cause.

A claimant who leaves work voluntarily is disqualified from the receipt of benefits unless she (or he) 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 P2d 722 (2010). A claimant who quits work must show that no reasonable and prudent person would have continued to work for the employer for an additional period of time.

As a preliminary matter, claimant's testimony about the facts concerning the artificial insemination discussion, which was based on hearsay, differed from D's testimony, who was a participant in the discussion. In the absence of evidence demonstrating that D was not a credible witness, his first hand testimony was at least as persuasive as claimant's hearsay. Where the evidence is no more than equally

balanced, the party with the burden of persuasion – here, claimant – has failed to satisfy its evidentiary burden. Consequently, on this matter, we based our findings on the employer’s evidence.

Claimant left work because D had raised his voice to her on April 22 and she believed he was inappropriate and thought she was too old. Both claimant and D testified about the events in question and although they had differing interpretations of the incidents, they described the incidents similarly. Although claimant interpreted the incidents negatively and believed D had been rude or had targeted her, she failed to bring her concerns to the employer’s office manager before abruptly quitting, even though D had taken steps to positively respond to claimant’s direct complaints to him in the past. Under the circumstances, claimant failed to establish that her concerns constituted reasons of such gravity that a reasonable and prudent receptionist of normal sensitivity, exercising ordinary common sense in claimant’s circumstances, without first bringing her concerns to the employer’s office manager, would conclude she had no reasonable alternative but to quit work when she did and become unemployed.

Claimant had the burden to show that she quit work when she did with good cause as defined under OAR 471-030-0038(4). *Young v. Employment Department*, 170 Or App 752, 13 P3d 1027 (2000). Claimant failed to meet that burden and is disqualified from receiving unemployment insurance benefits until she has earned at least four times her weekly benefit amount from work in subject employment.

DECISION: Hearing Decision 17-UI-86875 is affirmed.

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

DATE of Service: August 9, 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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