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State of Oregon
Employment Appeals Board
875 Union St. N.E.
Salem, OR 97311

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EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-0869

Reversed
No Disqualification

PROCEDURAL HISTORY: On July 17, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant voluntarily left work with good cause (decision # 84257). The employer filed a timely request for hearing. On July 17, 2017, ALJ Meerdink conducted a hearing, and on July 18, 2017 issued Hearing Decision 17-UI-88214, concluding claimant voluntarily left work without good cause. On July 21, 2017, claimant filed an application for review with the Employment Appeals Board (EAB).

CREDIBILITY DETERMINATION: The ALJ concluded that because of claimant's demeanor during the hearing her version of events was "highly improbable" and disregarded her testimony in its entirety. Hearing Decision 17-UI-88214 at 2. The ALJ explained,

> Here, the employer's owners testified that claimant spoke loudly, talked over the top of others, and generally displayed disrespect and insubordination during her final day of work. Conversely, claimant testified that the employer's owners were "psycho" and "crazy", while she maintained a calm and collected demeanor right up until the employer discharged her. During the hearing, it was obvious that claimant had significant difficulties restraining herself from making comments and interrupting the testimony of the other witnesses, while [the employer's witnesses] had little challenge in following instructions and maintaining calm. It is highly improbable that someone who has such calm and control during extremely stressful situations (as described by claimant) would suddenly develop difficulty restraining themselves in a formal proceeding with a judge (such as this hearing). And the converse is true: that someone who lacks self-control would suddenly develop and acute ability to remain calm. Based upon the demeanor of the witnesses and the inherent improbability of sudden and drastic personality changes, I find the employer's witnesses more persuasive in their testimony.

Id. Based upon that analysis, the ALJ found facts in accordance with the employer's evidence when the evidence was in dispute.

Under ORS 657.275(2), EAB is required to "perform de novo review on the record," and may "enter its own findings and conclusions." The statute also states, in pertinent part, "When there is evidence in the record both to make more probable and less probable the existence of any basic fact or inference, the board need not explain its decision to believe or rely on such evidence *unless the administrative law judge has made an explicit credibility determination regarding the source of such facts or evidence*." *Id.* (emphasis added). Because we disagree with the ALJ's explicit credibility determination in this case, we offer the following explanation why we considered the parties' evidence of equal reliability.

As a preliminary matter, we note that the ALJ conducted the July 17th hearing in this matter by telephone. Therefore, when making his demeanor-based credibility determination, the sole source of the ALJ's observation of claimant's demeanor and behavior was her voice over the telephone. When conducting our *de novo* review on the record, we therefore listened to the audio recording of the telephone hearing and were in the same position as the ALJ to observe claimant's behavior and vocal demeanor, and to draw conclusions therefrom about her reliability as a witness.

The ALJ wrote that claimant claimed "she maintained a calm and collected demeanor right up until the employer discharged her," which was contrary to her behavior during the hearing, and that her volatile behavior during the hearing made it less likely that claimant was, in fact, calm at work. The logical flaw in that analysis is that claimant never claimed during the hearing to have been calm, and actually testified that she was so upset on the day of her work separation that she had to take a break from her work and sit "out back . . . for awhile [*sic*]. . . contemplating, okay let's just relax," she described herself as "pissed" after a confrontation with the co-owner almost immediately before the work separation to the extent she decided she was going to quit her job if the other owner did not rectify matters, and she testified that as she left work that day she "just basically gave him [the other owner] what I was feeling" and "told him exactly what was on my mind." Transcript at 9, 12. Given claimant's testimony, the record fails to show that claimant claimed to have been "calm and collected" at work and then "suddenly develop[ed] difficulty restraining [herself] during the hearing." Rather, it appears that claimant's behavior during the hearing was consistent with her behavior at other times, and consistent with the behavior the two owners attributed to claimant on her final day of work. Claimant's behavior during the hearing is, therefore, not a basis upon which to conclude she was not credible.

It appears on review that both parties failed to maintain a professional or calm demeanor during the hearing and chose to use the hearing forum as an opportunity to speak out of turn, name-call and disparage each other's character. Both parties made interrupted or made commentary during each other's testimony. *Compare* Transcript at 21, 23; Transcript at 6, 17. Both parties made personal remarks or called each other names during the hearing. *Compare* Transcript at 12, 17, 21; Transcript at 26, 27-28, 34, 44. Both parties talked over the ALJ. *Compare* Transcript at 10, 11, 14; Transcript at 20, 27-28, 42, 57. The ALJ had to admonish both parties controlled their behavior. *See* Transcript at 22, 23-24, 46, 56-57. The employer also corroborated claimant's allegations about their own erratic behavior, with one employer witness admitting to talking loud at work, admitting that she and the other owner yelled at each other at work, and admitting that she frequently used foul language. Transcript at 38-40. For those reasons, we disagree with the ALJ that there was a reason on this record for considering claimant's testimony less credible than that offered by the employer, or vice versa. Therefore, we conclude that claimant's and the employer's witnesses' testimony was of equal reliability.

EVIDENTIARY MATTERS: During the hearing, claimant referenced some text messages one of the employer's owners sent to her the day of her work separation. Transcript at 55. Claimant asked if there was any way she could submit the text messages to the ALJ, and the ALJ responded that claimant would have had to submit the texts to him prior to the hearing. Transcript at 56. The ALJ did not ask claimant if she had the messages with her at the hearing, ask her how many messages there were or how long it would take her to read them, or offer or allow her the opportunity to read the text messages into the record, thereby failing to develop a full hearing record as required under ORS 657.270. With her written argument, claimant submitted copies of the text messages to EAB. Although the relevance of the text messages is marginal, and they were without effect on this decision, since claimant offered them into evidence and the ALJ's refusal to allow her to read them into evidence was a circumstance beyond claimant's control, the text messages are hereby admitted into evidence as EAB Exhibit 1. 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 (October 29, 2006). Unless such objection is received and sustained, EAB Exhibit 1 will remain in the record.

Claimant also submitted a variety of other documents with her written argument, all of which are excluded from evidence. The copy of page one of decision # 84257 is excluded because that document is already in the record, and is not evidence relevant to our decision. The July 13th letter from the employer to the Department, the two-page additional information questionnaire dated May 28th, the two-page typed phone call notes, the craigslist job ad for "Controller (NW Portland)", the six-page handwritten notes beginning April 27, 2017 and ending May 24, 2017, and the phone number for "Ozzie" are all excluded from evidence because claimant did not offer them into evidence during the hearing or mention them with any specificity, and she did not establish that factors or circumstances beyond her reasonable control prevented her from offering those pieces of information into evidence at the hearing as required under OAR 471-041-0090 even if the documents themselves were not admitted. We therefore considered claimant's argument and EAB Exhibit 1 when reaching this decision, but did not consider the remaining documents.

FINDINGS OF FACT: (1) Collision Rebuilders, Inc. employed claimant as controller and receptionist from April 24, 2017 to May 24, 2017.

(2) Claimant had a variety of concerns about her working conditions and the owners' behavior, which the owners reciprocated. She and the owners considered each other unprofessional and disrespectful. In early May 2017, claimant and the co-owner reached agreement to treat each other with respect.

(3) During a disagreement on May 24, 2017, the co-owner "moved me [claimant] in my chair so that she could squeeze on the right side of me." Transcript at 8-9. Claimant was upset by the disagreement and because she had never had someone move her in her chair before and felt the owner was "getting physical." Transcript at 9. Claimant took a break from work to relax and think about the situation.

(4) During claimant's break, she saw the other owner outside and approached him. She was concerned about doing so because she thought the co-owner might feel like she was "go[ing] behind her back," but felt like it was her only option at that point because she had spoken with the co-owner before without success. Transcript at 9. The other owner agreed to intervene and an argument between the owners ensued. The co-owner left, and claimant resumed work.

(5) Some time later, the co-owner admonished claimant for not following instructions and going "behind my back," and suggested claimant leave if she did not want to work there. Transcript at 11-12. As the co-owner preceded claimant through a door the door closed on claimant's arm. Claimant believed the co-owner had "deliberately" "slammed the door on my arm" and felt "pissed." Transcript at 12. Claimant felt that "this is it" and she was "done" working for the employer unless the other owner intervened on her behalf, in which case she would not quit. *Id.*

(6) The two owners talked, and subsequently the other owner approached claimant and said, "Well I guess you made your decision" and "You'd rather be on unemployment." Transcript at 12, 16. Claimant said she did not know what he was talking about. The other owner said, "You don't wanna be here so you should just leave." Transcript at 12. Claimant agreed, gathered her belongings and left. As she left she "told him a few things" about how to run his business and treat people and "just basically gave him what I was feeling." *Id.*

CONCLUSIONS AND REASONS: We disagree with the ALJ and conclude that claimant voluntarily left work with good cause.

The first issue in this case is the nature of the work separation. 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).

Although the parties disputed the nature of the work separation, the ALJ concluded without explanation that claimant quit work. Hearing Decision 17-UI-88214 at 2. We agree with the ALJ that claimant voluntarily left work, however. According to the co-owner, although she perceived many deficiencies in claimant's character, behavior, attitude and work performance, she testified at length about whey she would rather have had claimant continue working, with all her perceived problems, than have to hire and train a new person. *See e.g.* Transcript at 35-36. In the final moments of claimant's employment, the other owner approached claimant and presented her with the conclusion that she had quit work. At that time, claimant had already decided to quit if that owner did not intervene with the co-owner on her behalf, and, when it appeared he would not intervene on her behalf and instead presented with the idea that she had quit, she gathered her belongings and left. If she did not want to quit, she had choices, including not leaving, telling the owner(s) she had not quit, and asking to be allowed to continue working, making the choice to leave one that was attributable to claimant. Because continuing work more likely than not remained available to her at that time, and claimant testified that she had essentially decided to quit, we conclude that the work separation was a voluntary leaving.[1]

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

[1] We note for the sake of argument that the outcome of this decision would remain the same if the employer discharged her. The employer's co-owner vehemently testified that she did not consider claimant's work performance, attitude or behavior grounds for discharging her, so it therefore appears more likely than not that any discharge would have been premised upon the employer's owners' mistaken belief that claimant had quit work. The employer's mistaken belief is not misconduct attributable to claimant. ORS 657.176(2)(a), OAR 471-030-0038(3)(a). Nor, on this record, would we conclude that claimant's behavior would amount to misconduct given the parties' mutually bad behavior.

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.

The ALJ concluded that claimant voluntarily left work without good cause, reasoning, "Claimant quit for unknown reasons," and although "she [] attempted to establish facts that would support good cause for quitting" the ALJ had already determined that her testimony was not credible and therefore disregarded all of claimant's testimony. Hearing Decision 17-UI-88214 at 3. For reasons already explained herein, we expressly disagree with the ALJ's credibility determination as unfounded and unsupported by the preponderance of the evidence. We also disagree with the ALJ's conclusion that claimant voluntarily left work without good cause.

Claimant considered the employer's owners both liars. Transcript at 21, 48, 50, 51. She thought they were "psycho, crazy people and they are just unbelievably pretty much frightening" and "absolutely nuts." Transcript at 12, 17. She thought the co-owner was "never, ever fair to me," left without letting claimant have her lunch break, did not appreciate her hard work, once threatened to slap her, was "toxic," abrasive to everyone, and acted "crazy" and like "somebody who doesn't have it all upstairs and just needs help." Transcript at 50, 51, 54. She also thought the co-owner had intentionally tried to hurt her by slamming a door on her arm. Transcript at 12. Also at the time claimant quit work, the employer considered her lazy, thought she had a poor attitude, made errors in her work, did not listen, argued with "everything somebody asks her," wasted time, only took the job with the employer to "work the system" by getting the employer to fire her so she could collect unemployment insurance benefits, "never would take direction," was "very loud, obnoxious, and irritated," and "there wasn't an employee in here that wasn't thankful that she . . . finally decided to go." Transcript at 23, 26, 35, 36, 43

Based upon the parties' use of the hearing as a forum for annihilating each other's characters to the extent that each made allegations of potentially criminal behavior against the other, it is apparent that the employment relationship between claimant and the employer had mutually devolved to the point that it was toxic and irreconcilable, which presented claimant with a grave situation. No reasonable and prudent person would continue working for the employer for an additional period of time under the circumstances, and there were no reasonable alternatives claimant could have explored that would have repaired the employment relationship to the point that she could have continued working for an additional period of time. We therefore conclude that claimant voluntarily left work with good cause, and she is not disqualified from receiving unemployment insurance benefits because of her work separation.

DECISION: Hearing Decision 17-UI-88214 is set aside, as outlined above.[2]

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

[2] 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.

DATE of Service: August 16, 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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