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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-0935

Modified
Disqualification, Effective Week 15-17

PROCEDURAL HISTORY: On June 12, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that the employer discharged claimant, but not for misconduct (decision # 100854). The employer filed a timely request for hearing. On July 10, 2017, the Office of Administrative Hearings (OAH) issued notice of a hearing scheduled for July 19, 2017. On July 19, 2017, ALJ Janzen conducted a hearing at which claimant failed to appear, and on July 20, 2017, issued Hearing Decision 17-UI-88425, concluding that claimant voluntarily left work without good cause. On August 1, 2017, claimant filed an application for review with the Employment Appeals Board (EAB).

With her application for review, claimant included a written argument in which she provided information regarding her work separation and asked for a new hearing. Claimant's request is considered a request to have EAB consider new information under OAR 471-041-0090(2), which allows EAB to consider new information if the party presenting the information demonstrates that circumstances beyond the party's reasonable control prevented the party from offering the information at the hearing. In support of her request, claimant stated that "I missed my appeal due to not being able to access my mailbox because of a lost mail box key." Claimant's Argument at 5. The record shows that notice of the July 19 hearing was issued by the OAH on July 10; it is probable that claimant received the hearing notice anywhere from a week to five days prior to the hearing. Given these circumstances, we infer from claimant's statement that she had no access to her mail box for several days. Claimant presented no details regarding the loss of her mail box key and any difficulties she may have encountered in attempting to replace it or otherwise gain access to her mail. Without such details we cannot conclude that claimant's inability to access her mail box was a circumstance beyond her reasonable control. Claimant's request to present new information is therefore denied.

FINDINGS OF FACT: (1) Brookdale Emeritus Senior Living employed claimant as residential care coordinator from December 12, 2016 until April 11, 2017.

(2) On March 1, 2017, claimant provided her supervisor with a note from her doctor stating that claimant needed to stop working due to her high risk pregnancy. Claimant's supervisor told claimant to contact Sedgwick, the company that processed requests for leave under state and federal laws, such as the Family and Medical Leave Act (FMLA) and the Oregon Family Leave Act (OFLA).

(3) March 1 was last day that claimant performed services for the employer. After claimant left work on March 1, the employer allowed her to take all paid leave for which she was eligible. Audio recording at 20:10.

(4) On March 12, 2017, claimant applied for a leave of absence under the FMLA and OFLA through Sedgwick. Sedgwick notified claimant that she needed to submit medical certification to justify her leave request on or before March 29, 2017. Sedgewick also notified the employer that claimant had applied for leave, and told the employer it would be notified when a decision was made on claimant's leave request. Claimant never submitted the requested medical certification.

(5) Sometime between the end of March and middle of April 2017, claimant called her supervisor and asked if the employer was willing to rehire her. Claimant's supervisor told her that the employer was willing to rehire her. Claimant had no contact with the employer after this telephone call.

(6) By letter dated April 11, 2017, Sedgwick notified claimant and the employer that claimant's leave request was denied.

(7) On May 1, 2017, the employer filled the position that claimant had vacated. As of July 19, 2017, the employer had not terminated claimant's status as an employee in its system, however, and remains willing to have claimant return to work for it.

CONCLUSION AND REASONS: Claimant voluntarily left work for the employer without good cause on April 11, 2015, and is disqualified from the receipt of benefits, effective the week of April 9 through 15, 2017 (week 15-17).

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.

While we agree with the ALJ's conclusion that claimant voluntarily left work for the employer, we disagree with his finding that this work separation occurred on March 29, 2017. Although the ALJ provided no explanation for deciding that claimant quit her job on that date, the record shows that March 29 was the date by which claimant was expected to submit medical certification to support her application for a FMLA and OFLA leave. Although claimant never submitted any documentation to support her leave request, claimant's leave request was not denied until April11, 2017. On that date,

claimant knew or should have known that a leave of absence under FMLA or OFLA that protected her right to return to her job was not available to her, and that she needed to contact the employer regarding her employment status. Claimant's failure to contact the employer about the April 11 letter indicates that she was unwilling to continue working for the employer.[1]

We next consider whether claimant demonstrated good cause for quitting her job. Because claimant did not participate in the hearing, we have no first-hand information about the reasons why she voluntarily left work for the employer. Based on this record, it is reasonable to infer that claimant quit because she had learned that she did not qualify for protected leave under FMLA or OFLA.[2] While her inability to qualify for FMLA or OFLA leave may have created a grave situation for claimant, she had the reasonable alternative of contacting the employer to ask about other leave options, such as a period of unpaid leave after which she could return to work for the employer. A reasonable and prudent person, who had been denied protected FMLA and OFLA leave and who was interested in maintaining her employment, would have asked the employer what other leave might be available to her before concluding she had no reasonable alternative but to quit her job.

Claimant voluntarily left work without good cause on April 11, 2017. She therefore is disqualified from the receipt of unemployment benefits, effective week 15-17.

DECISION: Hearing Decision 17-UI-88425 is modified as outlined above.

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

DATE of Service: <u>August 18, 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.

[1] 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 record is unclear when claimant called her supervisor – whether it was before or after she received the April 11 letter denying her leave request --claimant did not indicate a willingness (or ability) to continue working for the employer during that phone call. Instead, claimant asked her supervisor if the employer was willing to rehire her, suggesting that claimant was interested in working for the employer at some future date, possibly after she gave birth.

[2] Although the employer's witness testified that claimant was denied FMLA and OFLA leave because she failed to provide medical certification to support her leave request, we note that claimant did not qualify for these leaves. To qualify for FMLA, claimant needed to have worked at least 12 months for the employer. *See* 29 CFR §825.110(a)(1). To qualify for pregnancy disability leave under OFLA, claimant needed to have worked for the employer for an average of 25 hours per week during the 180 days preceding the date on which the leave began. OAR 839-009-0210(6)(b) (June 24, 2015). Because claimant began work for the employer on December 12, 2016, she had not worked for the employer for the required length of time to qualify for either FMLA or OFLA leave.

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