EO: 200
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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-1330

Affirmed
Disqualification

PROCEDURAL HISTORY: On September 28, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant voluntarily left work without good cause (decision # 120027). Claimant filed a timely request for hearing. On October 30, 2017, ALJ Hall conducted a hearing, and on October 31, 2017 issued Hearing Decision 17-UI-95807, affirming the Department's decision. On November 16, 2017, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant did not 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). Claimant's written argument also contained information that was not part of the hearing record, and she did not assert or show that factors or circumstances beyond her reasonable control prevented her from offering the information during the hearing as required by OAR 471-041-0090 (October 29, 2006). For these reasons, EAB considered only information received into evidence at the hearing when reaching this decision.

FINDINGS OF FACT: (1) Gold Coast Security, Inc. employed claimant in its office as an operator from August 2016 until August 24, 2017.

(2) Claimant had impairments, including back problems, several fused vertebrae and knee problems.

(3) As of August 20, 2017, claimant earned $10.00 per hour. Sometime before or around August 20, claimant learned that a newly-hired employee was earning $10.25 per hour. Claimant spoke with the owner about the difference between her wage and that of the new employee. Claimant thought that she should earn more than the new employee earned. However, the new employee was receiving a higher wage than claimant because she had bookkeeping experience that claimant did not have and could perform office work that claimant was not able to perform.

(4) On Sunday, August 20, 2017, while at work, claimant was stamping some paperwork. Claimant suddenly turned to walk away from where she was working and almost walked into the employer's owner. The owner commented to claimant that claimant had almost run over her.

(5) Claimant was scheduled to work on August 21 and 22, 2017 but notified the employer that she was going to be absent and did not report for work on either day. August 23 and 24, 2017 were claimant's regularly scheduled days off from work.

(6) On August 23, 2017, claimant called in the evening and left a voicemail message for the employer's owner. In that message, claimant told the owner that she was not going to return to work unless her pay was raised to $10.50 per hour. The owner replied by text message to claimant, stating that she was unable to meet the wage claimant demanded and, in light of claimant's message, the owner concluded claimant had quit. Claimant did not receive this message because she did not have her cell phone.

(7) Sometime after August 23, 2017, claimant left a voicemail message for the owner stating that she assumed she was discharged because the owner had not called her in response to the message in which she made the ultimatum.

CONCLUSIONS AND REASONS: Claimant voluntarily left work without good cause.

The first issue this case presents is the nature of the work separation. If claimant could have continued to work for the same employer for an additional period of time, the work separation was a voluntary leaving. OAR 471-030-0038(2)(a) (August 3, 2011). If claimant was willing to continue to work for the same employer for an additional period of time but was not allowed to do so by the employer, the separation was a discharge. OAR 471-030-0038(2)(b).

While claimant initially testified she did not quit, she did refer to having "walked off the job." Transcript at 5. Claimant and the employer's witness agreed that the employer's owner never told claimant she was discharged. Transcript at 12, 25. Claimant also did not dispute that she told the owner in a phone message she left for the owner sometime after August 20, 2017, which she later did not dispute occurred on August 23, 2017, that she was going to quit if the owner did not agree to raise her wage to $10.50 per hour, although she contended that her statement was "taken out of context" since she would have returned to work even if that demand was not met. Transcript at 10, 11. However, given the plain meaning of what claimant told the owner in the message, she objectively manifested an intention to leave work if her demand was not met. That the owner was unable and unwilling able to meet claimant's demand rendered claimant's intention to quit unconditional regardless of the fact that claimant did not receive the text message in which the owner communicated the employer's position to claimant. Claimant's work separation was a voluntary leaving on August 23, 2017, the date of the phone message in which she issued to the employer's owner the ultimatum that she was going to quit if her wage was not raised.

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). Claimant had back, spine and knee conditions, which from claimant's description appear to have been permanent or long-term "physical or mental

impairments" as defined at 29 CFR §1630.2(h). A claimant with those impairments who quits work must show that no reasonable and prudent person with the characteristics and qualities of an individual with such impairment would have continued to work for her employer for an additional period of time.

At hearing, claimant alluded to having left work because she perceived that the employer's owner had ridiculed her due to her impairments and because the owner often scheduled claimant for more than 20 hours of work per week, which reduced the Social Security benefits to which claimant was entitled. The statement of the owner that claimant cited as "making fun of my disability" was the owner commenting to claimant "you almost ran over me again," when claimant was "extremely busy" at work and almost collided with the owner. Transcript at 8, 9. Accepting claimant's account as accurate, it is difficult to see how the owner's statement was one of ridicule or mocked claimant's impairments. It is not plausible that claimant actually construed the cited statement of the owner as "making fun of my disability." In connection with the work hours, the owner testified that claimant did not often work more than 20 hours in a week and, when she did so, she wanted to work those hours despite the owner's reservations. Transcript at 21, 25. There is no reason to question the accuracy of either party's testimony or to prefer the testimony of one over the other. Because the evidence on the issue of claimant's work hours is evenly balanced, we must accept the owner's testimony, since claimant was the party with the burden to persuasion. *See Young v. Employment Department*, 170 Or App 752, 13 P3d 1027 (2000). Claimant did not meet her burden to show that the employer required her to work in excess of 20 hours per week, and therefore did not show such a requirement motivated her to leave work.

The remaining circumstance for which claimant left work was her dissatisfaction with the $10 per hour wage she was receiving as compared to the $10.25 per hour that a newly hired employee was making. That the employer made a business decision to pay the new employee more than claimant due to the new employee having bookkeeping skills that claimant did not have was not undertaken to inflict harm on claimant. Many employees earn less than some of their coworkers, and recognize that if it is due to the coworker having skills or experience that they do not have, it does not give rise to grave circumstances. A reasonable and prudent person having claimant's impairments would not have considered it good cause to leave work when a more qualified coworker earned 25 cents per hour more than she did.

Claimant did not show good cause for leaving work when she did. Claimant is disqualified from receiving unemployment benefits.

DECISION: Hearing Decision 17-UI-95807 is affirmed.

J. S. Cromwell and D. P. Hettle.

DATE of Service: <u>December 19, 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.

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