

EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-1356

Affirmed
Disqualification

PROCEDURAL HISTORY: On September 12, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant voluntarily left work without good cause (decision # 71920). Claimant filed a timely request for hearing. On October 17 and November 1, 2017, ALJ Murdock conducted a hearing, and on November 3, 2017 issued Hearing Decision 17-UI-96193, affirming the Department's decision. On November 21, 2017, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant submitted a written argument in which she presented new information and emphasized that the ALJ's findings of fact in Hearing Decision 17-UI-96193 were incorrect. In response, the employer submitted a written argument in which it offered new information in support of its position and in rebuttal to the new information and argument that claimant offered. However, because claimant did not show that factors or circumstances beyond her reasonable control prevented her from offering her new information during the hearing as required by OAR 471-041-0090(2) (October 29, 2006), EAB did not consider the information that claimant sought to present when reaching this decision. Because EAB declined to consider claimant's new information, no rebuttal to it was necessary and accordingly EAB also did not consider the new information that the employer offered. EAB considered only evidence received into the hearing record when reaching his decision.

FINDINGS OF FACT: (1) Baker County employed claimant as a court operations specialist in its justice court from May 2010 until August 2, 2017.

(2) In December 2013, the employer hired a new trial court administrator. The trial court administrator was claimant's supervisor. Claimant disliked taking direction from the trial court administrator because claimant thought he lacked management and supervisory experience and was not familiar with the operations of the justice court. Claimant was sensitive to perceived slights from the trial court administrator.

(3) During claimant's employment, the trial court administrator thought that claimant often overreacted to communications from him. As a result, the trial court administrator tried to adopt a flat or emotionless tone of voice when communicating with claimant and was careful about what he said to her to avoid being misinterpreted. However, claimant construed the trial court administrator's hesitant manner of communicating with her as "giving [her] the silent treatment a lot," and being "demeaning" and "disrespectful" as well as being "very short in his remarks when he answered me" and "cryptic with his tone." Transcript of October 17, 2017 Hearing (Transcript 1) at 16, 26. Claimant worked in close quarters with the trial court administrator in a small workspace and sometimes the trial court administrator would need to back up against a wall to allow claimant to pass by him. Claimant interpreted this action from the trial court administrator as offensive "non-verbal behavior" and "bullying behavior." Transcript 1 at 25, 26.

(4) On December 10, 2015, claimant became overwhelmed at work. The trial court administrator noticed that claimant appeared in distress that day and asked claimant if she was all right. When claimant seemed unable to respond to him, the trial court administrator arranged for emergency services to be called. Claimant was transported by ambulance to a hospital emergency department. During this episode, claimant thought that her blood pressure was elevated, had shortness of breath, a rapid heartbeat and thought she might be having a stroke or a heart attack. Transcript 1 at 19. A physician later determined that stress had led to this episode. As a result of this episode, claimant was off work for approximately two weeks before returning to work.

(5) As part of her job, claimant provided services to members of the public who had dealings with the justice court. The customers to whom claimant provided services were often upset, angry, emotionally reactive and difficult to satisfy. Over the course of her employment, several complaints were made about the customer service that claimant provided, including that she had been rude. On occasion, the trial court administrator would inform claimant that someone had called to complain, but would not have specifics about the complaint since it had not yet been investigated. As of August 2017, only two such customer service complaints had led to disciplinary actions against claimant. One resulted in claimant receiving a five day suspension, which she served by receiving a reduced salary for six months, and the other resulted in a verbal warning that was removed from claimant's personnel file after one year.

(6) During her employment, claimant sometimes told the trial court administrator that she was unhappy with her job. Since claimant was 68 years-old, the trial court administrator asked her if she was thinking about retiring in light of her unhappiness. Once, the trial court administrator told claimant that if she would let him know within five days if she was seriously thinking about resigning he would prepare a severance package to offer to her. When claimant expressed an interest, he did so and claimant was given 21 days to decide if she was going to retire and accept the offered severance. Claimant decided not to retire.

(7) On August 2, 2017, early in the work day, the employer's human resources manager sent claimant by email an audio recording of a telephone conversation in which a female caller accused an unidentified justice court employee of recently treating her son rudely when he tried to pay a court fine. The human resources manager had intended to send the audio to the trial court administrator, but had mistakenly sent it to claimant. Upon receiving the audio, although claimant did not recall the incident the caller referred to, claimant assumed the human resources manager was accusing her of having treated a member of the public rudely and provided poor customer service. Shortly after having received the

audio, claimant asked the trial court administrator about it and he told claimant he knew nothing about it, but would look into it and get back to her. The trial court administrator asked claimant to forward the audio to him.

(8) On August 2, 2017, very shortly thereafter, before the trial court administrator had an opportunity to review the audio or determine why it had been sent to claimant, claimant entered the trial court administrator's office and told him she was going to submit a written resignation at the end of the work day due to having received the emailed audio. Claimant then left the trial court administrator's office. After claimant left, the trial court administrator determined that the court employee referred to in the audio was claimant's coworker and not claimant. The trial court administrator called both claimant and the coworker to his office and explained that the audio had been mistakenly sent to claimant and the coworker was the employee being accused of rudeness. At that point, the trial court administrator asked claimant if she still wanted to resign in light of this information and give "a two week thing or what?" Transcript 1 at 9. Claimant told the trial court administrator that she still was going to resign and that the notice period "was up to him." Transcript 1 at 9. The trial court administrator then told claimant that she would be paid through the end of August 2, 2017, which claimant construed as having been the date he selected for her last day. Claimant did not object to that as her last day. Had claimant changed her mind about quitting at that meeting, the trial court administrator would have allowed her to rescind her resignation and continue working. Transcript at November 1, 2017 Hearing (Transcript 2) at 17.

(9) After the meeting with both the trial court administrator and her coworker on August 2, 2017 in which claimant learned she was not the subject of the incident reported in the audio, claimant's coworker asked her if she still intended to resign. Claimant stated that she did. Also after that meeting, the trial court administrator told the human resources manager that claimant was quitting because she thought the audio the manager had sent her was directed at her and accusing her of something. Later that day, claimant rode in the same elevator as the human resources manager and the manager told claimant that she had not been accusing claimant of anything by sending the audio to her by mistake.

(10) At the end of the workday on August 2, 2017, claimant sent an email to trial court administrator stating she was resigning as of that day.

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

While the employer contended claimant quit work on August 2, 2017, claimant contended the employer discharged her that day, reasoning that she would have worked for a longer notice period but for the trial court administrator's decision that August 2, 2017 would be her final day. Transcript 1 at 4. The first issue this case presents is the nature of the work separation. If claimant could have continued to work for the employer for an additional period of time at the time of the work separation, separation was a voluntary leaving. OAR 471-030-0038(2)(a) (August 3, 2011). If claimant was willing to continue to work for the 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).

Claimant did not dispute that she told the trial court administrator that she was quitting, and tendered a written resignation at the close of the business day on August 2, 2017. Claimant also stated that, in response to the trial court administrator's inquiry as to her last day of work, she told him that the notice period "was up to him" and claimant did not object when he told her that August 2, 2017 should be the

effective date of her resignation. Transcript 1 at 9, 10. Where a claimant has expressed an intention to resign and claimant and the employer mutually agree on the last day of employment, the separation is characterized as a voluntary leaving. See accord *Employment Department v. Shurin*, 154 Or App 352, 959 P2d 637 (1998); *J. R. Simplot Co. v. Employment Division*, 102 Or App 523, 795 P2d 579 (1990). “Mutual agreement” to a separation date may be inferred when, as in this case, claimant did not express disagreement with the separation date that the employer selected or delegated to the employer the discretion to choose the separation date. See accord *Westrope v. Employment Department*, 144 Or App 163, 925 P2d 587 (1996); *J. R. Simplot v. Employment Division*, 102 Or App 523, 795 P2d 579 (1990). On the facts in this record, claimant’s work separation was a voluntary leaving on August 2, 2017.

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). The standard is objective. *McDowell v. Employment Department*, 348 Or 605, 612, 236 P3d 722 (2010). Based on claimant’s testimony, it is inferred that claimant had an anxiety condition, which presumably is a permanent or long-term “physical or mental impairment” as defined at 29 CFR §1630.2(h). A claimant with that impairment 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.

While claimant cited many events, circumstances and behaviors of her supervisors that she disliked and found objectionable, it does not appear that she left work when she did as a result of them. Rather, the proximate cause of claimant’s decision to leave work was her receipt of the audio on August 2, 2017 that the human resources manager mistakenly sent to her. It is understandable that claimant might have been concerned that, by receiving the audio, she was being accused of providing poor customer service and possibly would be disciplined for an event that she could not recall. However, when claimant asked the trial court administrator about the audio, he stated he knew nothing, which should reasonably have allayed claimant’s concerns or at least alerted her to the possibility that her receipt of the audio was not a cause for immediate alarm, since it would be expected that her immediate supervisor would know if she was to be accused or disciplined based on the audio. In addition, when claimant spoke for the second time that day to the trial court administrator, he told her that her coworker was the subject of the audio, not her, and the audio had been mistakenly sent to her, which should have quelled any residual concerns she had about receiving it. The manager who mistakenly sent the audio to claimant that day also informed claimant that she had done so by mistake. Claimant did not dispute that during their second conversation that day, the trial court administrator would allowed her to rescind her resignation at that time had she decided to do so in light of learning that the audio was not an accusation directed at her and that it had mistakenly been sent to her. On these facts, a reasonable and prudent person with an anxiety condition would not have considered her receipt of the audio to be a grave circumstance that left her no reasonable alternative other than to leave work.

Claimant did not show she had good cause to leave work when she did. Claimant is disqualified from receiving unemployment insurance benefits

DECISION: Hearing Decision 17-UI-96193 is affirmed.

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

DATE of Service: December 28, 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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