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BYE: 201837

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

3803
VQ 005.00

EMPLOYMENT APPEALS BOARD DECISION
2018-EAB-0036

Affirmed
Disqualification

PROCEDURAL HISTORY: On October 31, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant voluntarily left work without good cause (decision # 70422). Claimant filed a timely request for hearing. On December 13, 2017, ALJ Wyatt conducted a hearing at which the employer did not appear, and on December 20, 2017 issued Hearing Decision 17-UI-99413, affirming the Department's decision. On January 8, 2018, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant submitted three written arguments, one on January 8, 2018, one on February 1, 2018 and another on February 12, 2018. Claimant's arguments include information that claimant did not present during the hearing. Claimant's third written argument of February 12, 2018, was filed after the deadline for submission of arguments in this matter, which was February 5, 2018, and is a rebuttal to the employer's written argument, which the EAB did not consider for the reasons stated below. Claimant's two first written arguments are principally about her financial condition had she continued to work part-time for the employer rather deciding to leave work when she did. EAB did not consider claimant's new information because claimant did not explain why she was unable to present this information at the hearing or otherwise show as required by OAR 471-041-0090(2) (October 29, 2006) that factors or circumstances beyond her reasonable control prevented her from doing so. In addition, the new information that claimant sought to present by way of her written arguments is not material to the issues before EAB since, although it indicates that claimant's financial circumstances was worsened by the employer's decision to reduce her hours, it fails to show that the cost of claimant's continuing to work would have exceeded the remuneration she received or would have substantially interfered with claimant's return to full time work, which is the standard that must be met to show good cause for leaving work due to a reduction in hours. *See* OAR 471-030-0038(5)(e) (August 3, 2011). For this second reason, EAB also would not have considered claimant's new information when reaching this decision.

The employer submitted a written argument on February 5, 2018, which was after the deadline for submission of argument in this matter. The employer contended that its untimely submission was the result of its failure to receive claimant's submission until February 5, 2017 and its desire to respond to that submission. As did claimant, the employer sought to introduce information in its argument that was not presented during the hearing, presumably as a consequence of the employer's failure to appear at the hearing. The employer did not explain why it did not appear for the hearing scheduled on December 13, 2017 or show that its failure to participate and offer evidence on its own behalf during that hearing was the result of factors or circumstances beyond its reasonable control as required by OAR 471-041-0090(2). For that reason, EAB did not consider the new information that the employer offered by way of its written argument.

FINDINGS OF FACT: (1) Columbia River Peoples' Utility District employed claimant from approximately 2009 or 2010 until September 22, 2017, last as an administrative assistant for energy services. Before September 22, 2017, claimant earned $33 per hour and worked 40 hours per week. Claimant's gross yearly income was approximately $68,640.

(2) Sometime in approximately 2016, a full-time employee in the energy services department retired. Thereafter, the employer was unable to attract job applicants who were qualified to take over the duties of that retired employee. As a result, claimant assumed some duties that were formerly performed by that employee, even though those duties were typically performed by an energy expert. Sometime in approximately 2017, claimant asked to meet with her supervisor or other employer representatives because the responsibilities of the job she was actually performing had come to exceed those set out in her formal job description and she wanted the description for her position re-evaluated and revised to reflect her enhanced job responsibilities.

(3) Also in 2016, the employer authorized an intermittent leave for claimant under the Family Medical Leave Act (FMLA) to allow her to accompany her father to cancer treatment and chemotherapy appointments. Claimant's FMLA Leave was re-authorized in 2017 for the same purpose. Claimant usually took her intermittent FMLA leave in increments of one or two hours on the days that her father received treatment, and she made up that time by going into work early or staying late on those days. In total, claimant missed only approximately two days of work time every 90 days under the intermittent FMLA leave that was authorized. Claimant's supervisor mentioned on one occasion that it was "difficult" for him to schedule other employees around claimant's schedule when she taking intermittent leave. Audio at ~16:58. Around this time, claimant asked some employer representatives what exactly a FMLA leave protected. The employer told claimant that FMLA protected her employment-related benefits, such as health insurance. Claimant did not understand the employer to tell her that an intermittent FMLA also protected her job.

(4) Sometime in 2017, claimant wanted more information from the employer about FMLA. Claimant asked an employer representative about how to obtain copies of employer documents about FMLA using a public records request. In response, claimant learned that the employer's policy on public records requests had changed and when claimant asked for "clarification," she was told that such requests were not in her job description. Audio at ~19:23. Based on this interaction, claimant suspected the employer did not want her to discover all FMLA protections to which she was entitled.

(5) Sometime in approximately August 2017, claimant's supervisor asked her why she was regularly clocking in before the scheduled time her shift started at 8:00 a.m. Claimant had been clocking in around 7:45 a.m. in order to use the restroom or get a glass of water. When claimant explained to her supervisor what she had been doing, the supervisor stated, "Just want to make sure [what you're doing]." Audio at 19:45. Based on the supervisor's inquiry and comment, claimant thought the employer was monitoring her behavior in order to take adverse actions against her.

(6) On September 22, 2017, claimant was called into a meeting with employees from the employer's human resources office and her supervisor. Claimant thought the meeting was going to be about the re-evaluation of her job description that she had requested. Instead, a representative from the human resources office told claimant that her work hours were going to be reduced from 40 hours to 20 hours each week due to a "business decision" and that "this has nothing to do with you [personally or professionally]." Audio at ~14:09. Claimant questioned the employer representatives about the basis for the employer's decision to reduce her hours, but the representatives would only repeat that it was a "business decision." Audio at ~14:09. Since the employer received a performance payment from the Bonneville Power Authority (BPA) that covered some of the employer's expenses, including claimant's salary, and the amount that BPA had paid was $80,000 over the employer's projections for fiscal year 2017, claimant believed the employer could have no budgetary or business reasons for reducing her hours. The only employee affected by employer's reduction in hours was claimant and claimant believed the employer had never before involuntarily reduced the work hours of any employee.

(7) As the meeting between claimant and the employer representatives progressed, claimant was told that her job duties would not change, which claimant interpreted to mean that she would be required to perform in 20 hours per week the same tasks that she had been performing in 40 hours. Claimant asked the employer representatives how her 20 hours of work would be allocated to the days in a work week and they told claimant they did not know and "we can work it out." Audio at ~23:00. Based on these employer comments, claimant believed that "really no thought process" had been involved in the decision to reduce her hours, and that the employer had actually reduced her hours as a "personal slap-down for being the employee who asks a multitude of questions" and, in particular, as retaliation for having taken intermittent FMLA leave. Audio at ~19:02, ~22:03. Claimant also thought she would suffer financial hardship from the reduction to her income that would be caused by working fewer hours. During that meeting, claimant told the employer representatives that she was quitting work immediately.

(8) On September 22, 2017, claimant voluntarily left work.

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

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). If an individual leaves work due to a reduction in hours, the individual has let work without good cause unless continuing to work substantially interferes with return to full time work or unless the cost of working exceeds the amount of remuneration. OAR 471-030-

0038(5)(e). 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.

Claimant testified she left work because at the September 22, 21017 meeting employer representatives abruptly announced that her weekly work hours were going to be reduced from 40 to 20. Audio at ~6:37. The grave circumstances that the claimant contended arose from this employer action were essentially two-fold: a significant worsening of claimant's personal finances due to the resulting decrease in income and the employer's action was taken in retaliation for claimant's exercise of rights under FMLA and, presumably, may have violated FMLA. Audio at ~16:58, ~19:16, ~28:52, ~29:34, ~29:56, ~30:36, ~30:56; Claimant's January 8, 2018 Written Argument; Claimant's February 1, 2018 Written Argument.

With respect to claimant's worsened financial circumstances that would have resulted from her working reduced hours, we infer that claimant would nonetheless have still received $660 per week gross income from the employer for working 20 hours. It is difficult to see how quitting work and eliminating all income would have benefitted claimant or otherwise averted a grave situation, or how continuing to work half-time and earning $660 would give rise to a grave situation. While claimant testified that if she continued to work 20 hours per week for the employer, rather than 40, she would have lost employer paid health insurance and a school tuition reimbursement, OAR 471-030-0038(5)(e) provides that good cause to leave work due to a reduction in hours does not exist *unless* continuing to work would substantially interfere with the return to full-time work or the cost of working exceeds the amount of remuneration received. Audio at ~29:39, ~30:36. Here, there was insufficient evidence to establish that continuing to work 20 hours per week would have significantly impeded claimant's return to full-time work. There also was no evidence that the cost to claimant of continuing to work for 20 hours per week would have exceeded the $660 in remuneration she would have received, and there is nothing in the record suggesting that claimant incurred unusual costs in working that could have approached $660 per week. On this record, it does not appear that claimant's worsened financial condition due to the diminished income she would receive from working only 20 hours per week was good cause to leave work.

With respect to claimant's contention that the employer reduced her hours principally in retaliation for her prior exercise of her rights under FMLA, we likely would consider such retaliation to have been good cause for claimant to leave work if she demonstrated that such animus had actually motivated the employer, either because, viewed alone, it created a grave circumstance or because it was unlawful discrimination under FMLA. *See* 29 USC §2615(a)(2); 29 CFR §825.220(a)(2). However, while claimant was correct that FMLA is generally thought to protect an individual's right to be reinstated to his or her prior job after returning from a leave authorized under FMLA, FMLA does not necessarily protect an individual who is on a FMLA leave from all actions that adversely affect him or her or his or her job. FMLA does not entitle an individual to greater rights, benefits or conditions of employment than he or she would have received if not on leave during the FMLA leave period, and if the employer would have taken an otherwise adverse employment-related action had claimant not been on FMLA leave, the employer does not violate FMLA if it takes that action in connection with an individual is on a FMLA leave. 29 CFR §825.216(a)(2); U.S. Wage and Hour Division, Fact Sheet #28A Employee Protections under the Family and Medical Leave Act, Limitations to FMLA Protections (September 2012). To show that the employer's reduction to her hours was a grave situation claimant must show

that some causal link existed between the employer's action and claimant's exercise of her FMLA rights.

Claimant failed show that the employer likely would not have taken the action that it did on September 22, 2017, to reduce her hours, if she had not been on leave. Claimant testified that the only explanation she ever received from the employer about the reduction was that it was a "business decision," and that no employer representative ever stated otherwise or suggested that the reduction was undertaken to penalize claimant. Audio at ~24:03. While claimant implied that a retaliatory motive was inferable since the reduction in hours was limited to her and the employer had never before made a similar involuntary reduction of any other employee's hours, these factors, without more, merely show the employer's action was unusual, but not necessarily that it was based on hostility toward claimant. Audio at ~9:22. Claimant also implied that since the BPA performance payment, which the employer apparently used to cover claimant's salary, had already been received for 2017 and exceeded the employer's revenue projections, the employer could not have been motivated by legitimate fiscal or budgetary concerns when it reduced claimant's hours and income, its doing so could not have been the result of a neutral business factors, and that the reduction must have been undertaken to penalize, harm or retaliate against claimant. Audio ~14:42, ~15:50, ~23:30. However, claimant did not present evidence showing that the employer was required to spend all or even part of the BPA performance payment on claimant's salary and the employer would lose part of that payment if it reduced claimant's hours. Nor did claimant suggest or show that there was no benefit to the employer's business operations or financial position or that the employer did not in good faith believe that it would eliminate inefficiencies or waste by cutting claimant's hours and using the funds that otherwise would have been spent on claimant's salary for other needed purposes. Claimant also did not show that that the employer would not achieve a cost savings or some type of operational economies by reducing claimant's hours. In sum, claimant presented insufficient evidence to show that her hours were reduced for other than neutral business reasons, or that they were reduced because she had taken or was on a FMLA leave or for some reason related to her exercise of her FMLA rights. Claimant did not show that the employer's actions were taken for retaliatory reasons.

Claimant did not meet her burden to show that grave circumstances caused her to leave work when she did. Claimant is disqualified from receiving unemployment insurance benefits.

DECISION: Hearing Decision 17-UI-99413 is affirmed.

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

DATE of Service: <u>February 12, 2018</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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