

EMPLOYMENT APPEALS BOARD DECISION
2018-EAB-0437

Affirmed
Disqualification
Overpayment Assessed

PROCEDURAL HISTORY: On February 5, 2018, the Oregon Employment Department (Department) served notice of an administrative decision concluding that claimant voluntarily left work without good cause (decision # 94010). On February 12, 2018, the Department served notice of an administrative decision replacing decision # 94010 and concluding that claimant voluntarily left work and assessing an overpayment of \$3,624.00 that claimant was liable to repay (decision # 120616). Claimant filed a timely request for hearing. On April 11, 2018, ALJ M. Davis conducted a hearing, and on April 12, 2018 issued Order No. 18-UI-107208, affirming decision # 120616. On April 30, 2018, claimant filed an application for review with the Employment Appeals Board (EAB).

EAB considered claimant's written argument when reaching this decision.

FINDINGS OF FACT: (1) On September 22, 2017, claimant filed an initial claim for unemployment insurance benefits. Claimant's claim was determined valid with a weekly benefit amount of \$604.

(2) On November 3, 2017, Paramount Sewing & Vacuum hired claimant as a salesperson. After claimant's hire, the employer agreed that she would work only part-time. During her employment, claimant consistently worked on Monday and Wednesdays, 16 hours per week.

(3) During claimant's employment, the employer's owner thought "she was great" and "had no issue with her." Audio at ~30:46. The employer never issued any disciplinary warnings to claimant.

(4) On Wednesday, December 13, 2017, claimant reported for work a few minutes late. The owner made a comment about her late arrival that claimant perceived as hostile. Claimant was upset by the

owner's comment. Claimant asked the store manager if she could go home. The manager and the owner agreed that she could go home.

(5) On Friday, December 15, 2017, a day when claimant did not usually work and was not scheduled to work, claimant visited the workplace and spoke to the owner. Claimant told the owner she was "stressed out," "had a lot going on" and "could not work [for the employer] anymore." Audio at ~50:15, ~51:20. Claimant told the owner she was quitting work. The owner asked claimant if, despite her desire to quit, she would work on her usually scheduled day of Monday, December 18, 2017 since the owner could not cover her absence that day. Claimant agreed to do so. Also on December 15, 2017, the owner spoke with his co-owner, who was responsible for the employer's employment-related matters, about what claimant had told him that day. Based on that conversation, the co-owner prepared a memorandum for claimant's personnel file, which stated, "[Claimant] verbally resigned 12/15/17 to Brad [the other owner] saying that she liked us but was too stressed out to work." Audio at ~55:06.

(6) On December 18, 2017, claimant reported for work and did not report for work thereafter. On that day, claimant voluntarily left work.

(7) Claimant claimed benefits for the weeks of December 17, 2017 through January 27, 2018 (weeks 51-17 through 04-18), the weeks at issue. Claimant received a total of \$3,624 in benefits for those weeks. In the claims she made for those weeks, claimant did not report to the Department that she had quit work for the employer.

(8) On approximately February 3, 2018, claimant and her son visited the workplace and claimant spoke with the owner. Claimant had received the administrative decision concluding that she was disqualified from benefits as a result of her work separation from the employer. Claimant wanted the owner to change how the employer had characterized her work separation to the Department. The owner told claimant he would contact the other co-owner to address her request since she handled the employer's employment matters. The owner did so.

CONCLUSIONS AND REASONS: Claimant voluntarily left work without good cause on December 18, 2017. Claimant was overpaid \$3,624 in benefits that she is liable to repay to the Department or to have deducted from future benefits otherwise payable to her.

The Work Separation. At hearing, claimant contended that she did not quit work, but that the employer's owner discharged her during the conversation their conversation on December 15, 2017, the discharge being effective as of December 18, 2017. Audio at ~22:49. In contrast, the owner denied that he discharged claimant, contending that she stated on December 15, 2017 that she was quitting, but agreed to stay through December 18, 2017. In light of the parties' disagreement, 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 the work separation occurred, the 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 is not allowed to do so by the employer, the separation is a discharge. OAR 471-030-0038(2)(b).

While claimant contended that she was discharged on December 15, 2017 because she was hired only as a seasonal employee and the employer had hired two new employees who would start work during the

week of December 18, 2017, she did not directly dispute the owner's testimony that in he had never hired seasonal employees, or that the two new employees he hired actually started work on December 26, 2017 and January 18, 2018. Audio at ~31:20, ~31:47, ~34:23. Notably, claimant did not testify that the owner actually told her she was discharged, fired or terminated when the owner cross-examined her in detail about their conversation on December 15, 2017, when she would have been expected to recall such a statement if the owner had made it. Audio at ~48:20. As well, claimant and the owner agreed that claimant became very upset and cried about the owner's comment about her late arrival on December 13, 2017. Audio at ~45:55, ~46:56, ~50:36. Claimant never adequately explained why she visited the workplace to speak to the owner on December 15, 2017, a day she did not usually work and was not scheduled to work, other than that she "wanted to talk with [the owner]." Audio at ~45:55. The sequence of events suggests that a likely reason claimant went to the workplace on December 15, 2017 was to speak with the owner in reaction to their December 13, 2017 conversation, which given how upset she makes it plausible that she would say that she was quitting on December 15, 2017. In addition, it makes no sense that the owner would discharge claimant on December 15, 2017 and then ask her immediately thereafter to continue to work one more day for the employer, until December 18, 2017, rather than waiting to discharge her until December 18, 2017. Given the undisputed facts and sequence of events, the most logical and plausible explanation of what actually transpired on December 15, 2017 is that claimant expressed that she was quitting work, rather than that the employer discharged her.

While claimant presented a written statement from her son alleging that the owner agreed with them on February 3, 2018 that the employer had hired claimant to work only until he hired more full-time employees and that it had made a mistake in characterizing the work separation to the Department, the credibility of this statement is subject to doubt both because of the son's possible bias in support of his mother's position, and because the conversation occurred long after the work separation, when claimant likely knew that the employer was reporting her separation as a disqualifying quit. In addition, the weight of the son's statement does not overcome the force of the sequence of events, described above, indicating that claimant, most likely, quit work. The weight of the evidence shows that claimant's work separation was a voluntary leaving on December 18, 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). 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.

Since claimant contended she did not voluntarily leave work, she did not provide any reasons for doing so. The only reason discernable on this record for why she might have decided to quit work was that she was upset over the owner "snapping" at her on December 13, 2017. Audio at ~46:56. Nothing that claimant described about the owner's statement established that it would give rise to a situation of gravity such that a reasonable and prudent person would have considered that she had no alternative other than to quit work. Claimant did not have good cause for voluntarily leaving work when she did and she is disqualified from receiving unemployment insurance benefits.

The Overpayment. A claimant who voluntarily leaves work without good cause is disqualified from receiving unemployment insurance benefits. ORS 657.176(2). An individual who is disqualified from benefits under any section of ORS chapter 657 is not eligible to receive benefits. ORS 657.155(1)(d). An individual who receives any benefits to which the individual is not entitled because the individual, *regardless of the individual's knowledge or intent*, made or caused to be made a false statement or misrepresentation of material fact or failed to disclose a material fact is liable to repay the benefits or to have the amount of the benefits deducted from any future benefits otherwise payable to the individual. ORS 657.310(1) (emphasis added).

Here, claimant's work separation on December 18, 2017 disqualified her from receiving benefits beginning week 51-17 and continuing thereafter until she requalified for benefits with sufficient work and/or earnings in subject employment. Claimant did not dispute that she received \$3,624 in benefits for weeks 51-17 through 04-18 nor that she would not have received those benefits if she had informed the Department that she had voluntarily left work without good cause as of December 18, 2017. While claimant might not have believed that her work separation was disqualifying, she received benefits for the weeks at issue based on her error or mistake in failing to report the correct nature of that work separation. Because ORS 657.310(1) requires claimant to pay back the \$3,624 in benefits she received or to have \$3,624 in benefits deducted from future benefits payable to her, regardless of her in knowledge or intent failing to accurately report the work separation to the Department, claimant is required to do so.

DECISION: Order No. 18-UI-107208 is affirmed.

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

DATE of Service: June 4, 2018

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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