

EMPLOYMENT APPEALS BOARD DECISION
2018-EAB-0682

Reversed
No Disqualification

PROCEDURAL HISTORY: On May 23, 2018, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant quit working for the employer without good cause (decision # 165133). Claimant filed a timely request for hearing. On June 19, 2018, ALJ Scott conducted a hearing, and on June 20, 2018 issued Order No. 18-UI-111636, affirming the Department's decision. On July 6, 2018, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant's argument contained information that was not part of the hearing record, and claimant failed to show that factors or circumstances beyond her reasonable control prevented her from offering that information during the hearing as required by OAR 471-041-0090(2) (October 29, 2006). For that reason, EAB considered claimant's argument only to the extent it was based information received into evidence at the hearing when reaching this decision.

FINDINGS OF FACT: (1) S & K Lodging, LLC employed claimant as a general manager at a hotel from April 16, 2018 until April 30, 2018.

(2) Claimant lived in a house in Klamath Falls, Oregon and was hired to work at the employer's hotel in Albany, Oregon. Claimant accepted a position with the employer because she could not find a job in the Klamath Falls area. Klamath Falls was approximately 200 miles from Albany. It was not practical for claimant to commute between Klamath Falls and Albany, and before receiving some paychecks, claimant could not afford to rent a residence in the Albany area. Claimant arranged to stay rent-free with a friend in Eugene. Eugene was approximately 30 miles from the employer's hotel in Albany and claimant planned to commute to work from there.

(3) Shortly before claimant began working for the employer, claimant's living arrangements in Eugene fell through. Because claimant did not have a place to stay while working in Albany, claimant slept in her car at a highway rest area on Interstate 5 between Albany and Eugene during work weeks after she was hired. Claimant went home to Klamath Falls on weekends to shower, pick up clean clothes and check on her house.

(4) The employer's owner knew that claimant's usual residence was in Klamath Falls and that she would need to make living arrangements in the Albany area. Claimant did not inform the employer's owner that her living arrangements had not worked out or that she was sleeping in her car at a highway rest area. Although claimant asked other employees for advice on living arrangements that she could afford, none was forthcoming. It was not mentioned to claimant, and she was not aware that the owner sometimes allowed employees to stay at hotels he owned free of charge or at discounted rates if they needed temporary lodging and the hotel had available rooms. If claimant had known of this practice, she would have taken advantage of it in preference to sleeping in her car at the rest area.

(5) The employer's pay periods ran from the 1st through the 15th and the 16th through the last day of the month. The employer's payday were on the 5th and the 20th of each month. Very shortly after she was hired, claimant understood that an employee who had been hired only a few days before her and who had worked during the pay period of April 1 through April 15, 2018 had not received a paycheck on April 20, 2018 because the employer had failed to submit all required paperwork to the company that prepared its payroll. Claimant became concerned that she would not receive a paycheck on May 5, 2018 if the owner had not provided all of her new hire paperwork to the payroll company and, if she did not, she would be required to continue sleeping in her car at the highway rest area. Claimant was aware that the owner had not asked her to complete a federal form I-9, which she thought might preclude her from receiving a paycheck on May 5, 2018.

(6) On Monday, April 30, 2018, claimant was in her car en route to Albany for a work shift that was scheduled to start at 3:00 p.m. after having spent the weekend in Klamath Falls. Between 12:15 p.m. and 12:24 p.m., claimant and the owner exchanged text messages about whether the owner had submitted the necessary paperwork to enable the employee who had not received a paycheck on April 20, 2018 to receive one on May 5, 2018 and miscellaneous other work-related matters. The owner texted claimant that he thought he had submitted the paperwork, told claimant to contact a representative at the payroll company for confirmation and briefly addressed other matters, including that he did not want a new employee to be working without supervision. Claimant did not respond to the owner's final text in this thread, which was sent at 12:24 p.m. At 3:37 p.m., not having heard from claimant, the owner sent claimant a text message stating, "Are you going in today[?]" Exhibit 1.

(7) When the owner had not received a reply to his 3:37 p.m. text by 5:14 p.m., which was approximately five hours after the last communication he received from claimant at 12:19 p.m., the owner concluded that claimant had decided not to report for work and had quit. At 5:14 p.m., the owner sent the following text message to claimant, "You could pick up your final check at the front desk. And please bring the filing cabinet key." Exhibit 1. At approximately 5:30 p.m., claimant replied to the owner's message, acknowledging that she was not coming in to work and giving the location of the key. Claimant further stated that she had not come in to work that day because she did not think she was going to receive a paycheck on May 5, 2018 since she had not completed an I-9 and "I don't work for free or illegally." Exhibit 1.

(8) By the text messages exchanged and her actions, claimant voluntarily left work on April 30, 2018.

CONCLUSIONS AND REASONS. Claimant voluntarily left work with good cause.

At hearing, it was not clear at times from the testimony of either party whether they contended that the employer discharged claimant or that claimant voluntarily left work. In Order No. 18-UI-111636, although the ALJ concluded that claimant voluntarily left work, she did not provide reasons for reaching this conclusion. As detailed below, we agree with the ALJ's conclusion.

OAR 471-030-0038(2) (January 11, 2018) supplies the standard for the proper characterization of a work separation. 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) (January 11, 2018). 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).

In this case, neither party contended that the other unequivocally stated their intentions with respect to the employment relationship. However, claimant testified that during her drive from Klamath Falls to Albany on April 30, 2018, she was "debating" whether she would quit work due to uncertainty over receiving a paycheck on May 5, 2018. Audio at ~21:55. Claimant's behavior in abruptly discontinuing her participation in the text message exchange with the owner for nearly five hours also tends to suggest that she was considering whether, or deciding during that time that she would quit. The five hours that claimant remained incommunicado was far longer than would reasonably be accounted for by a dead zone on Highway 58 between Klamath Falls and Albany, which claimant asserted was the cause of the lengthy interruption in communications. Audio at ~22:13.

In addition, if it was not claimant's intention to quit work when she stopped communicating with the owner, she logically would have clearly informed the owner in her response to his text message of 5:14 p.m. that the sudden disruption in her communications was inadvertent, due to having entered a dead zone, and should not have been construed as signifying an intention end the work relationship. Instead, by acquiescing to the owner's text message of 5:14 p.m. and neither expressing that her intentions had been misunderstood or voicing a willingness to continue working, claimant was showing that, more likely than not, the owner had correctly construed her behavior in suddenly becoming and remaining incommunicado as manifesting her intention to end the work relationship. The preponderance of the evidence shows that claimant's work separation was a voluntary leaving on April 30, 2018.

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) (January 11, 2018). 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.

The ALJ concluded that in Order No. 18-UI-111636, that claimant voluntarily left work without good cause. The ALJ reasoned that claimant left work on April 30, 2018 due to uncertainty over whether she would receive a paycheck on May 5, 2018 and, since she did not show grounds for reasonably believing that the owner had failed to submit the paperwork needed for her to receive that check, she did not show that her situation was objectively grave. Order No. 18-UI-111636 at 3. The ALJ also reasoned that, even

if claimant's situation was grave, she did not show that she pursued reasonable alternatives to quitting, including asking the owner for a pay advance or asking for assistance in locating housing. Order No. 18-UI-111636 at 4. We disagree.

While claimant's testimony at hearing focused on her concern about whether she would receive a paycheck on May 5, 2018, that concern arose from the fact that, by necessity, she was staying in her car at a highway rest area because she could not afford other accommodations. Assuming that claimant could expect to receive a paycheck on the next payday of May 5, 2018, it can be reasonably inferred that claimant's living arrangements until she received that paycheck were also a reason motivating her decision to leave work on April 30, 2018. As a matter of common sense, that claimant needed to live and sleep in her car at a highway rest area for significant periods of time during work weeks when she was off duty, at night, constituted a grave situation. The hazards of staying alone and sleeping at such a place and in such a way are obvious and well known.

It does not appear that reasonable, practicable alternatives existed that would have allowed claimant to avoid quitting work when she did. Commuting 200 miles to her house in Klamath Falls after the end of each shift was not reasonably feasible for claimant given the distance and travel time. The pay advance from the employer that the ALJ cited as reasonable alternative that claimant should have pursued was, at best, an unverified, hypothetical alternative that was not supported by hearing testimony from the owner that it was or would be available to claimant. In addition, it cannot be concluded that all reasonable individuals would have known that such an option was available, particularly when claimant testified that it had not occurred to her. Audio at ~14:35.

As well, while the owner testified that he offered several times to assist claimant in finding housing that she could afford in Albany, it does not seem that claimant could have afforded any such housing until she had received at least one paycheck. Audio at ~27:48. In addition, it does not make sense that, if the owner had indeed made such an offer and it was a feasible option, claimant would have rejected it in preference to staying in her car at the rest area. Moreover, while the owner testified generally that he sometimes allowed employees to stay at his hotel free of charge or at a discounted rate if the hotel were not full and that claimant should have known of this practice, claimant testified that she was not aware of it. Audio at ~28:46, ~29:15, ~29:50, ~45:50. As above, it does not make sense that if claimant was indeed aware of this alleged practice, she would have passed it up in favor of staying in her car at the highway rest area. Finally, accepting at face value the owner's testimony as to this alleged practice of supplying free or discounted rooms to needy employees, it appeared to be contingent on the hotel not otherwise being fully booked with paying customers. Audio at ~28:50, ~29:03, ~29:36. However, to constitute a reasonable alternative in claimant's situation of need, the housing that she needed was immediate, affordable and reliably available to her for every night during that time, none of which was guaranteed under the employer's alleged practice as described by the owner. On this record, there is insufficient evidence to support that reasonable alternatives existed for claimant's leaving work when she did.

Claimant showed that she had good cause for leaving work on April 30, 2018. Claimant is not disqualified from receiving unemployment insurance benefits.

DECISION: Order No. 18-UI-111636 is set aside, as outlined above.

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

DATE of Service: August 9, 2018

NOTE: This decision reverses an order that denied benefits. Please note that payment of any benefits owed may take from several days to two weeks for the Department to complete.

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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