

EMPLOYMENT APPEALS BOARD DECISION
2018-EAB-0924

Affirmed
Disqualification

PROCEDURAL HISTORY: On August 3, 2018, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant voluntarily left work without good cause (decision # 81444). Claimant filed a timely request for hearing. On September 6, 2018, ALJ Shoemake conducted a hearing, and on September 13, 2018 issued Order No. 18-UI-116521, affirming the Department's decision. On September 21, 2018, claimant filed an application for review with the Employment Appeals Board (EAB).

EAB considered claimant's written argument to the extent it was relevant and based upon the record. Claimant included with her argument a letter from her family counselor, however, which was new information. EAB may consider new information that is not part of the record if the party offering the information shows that the information is relevant and material to EAB's determination and the party offering the information demonstrates that circumstances beyond the party's reasonable control prevented it from offering the information at the hearing. OAR 471-040-0090 (October 29, 2006). Claimant did not make such a showing. The family counselor's letter is therefore excluded from evidence, and EAB did not consider it when reaching this decision.

FINDINGS OF FACT: (1) Close to Home, Inc. employed claimant as a night-shift caregiver from approximately May 2016 to June 27, 2018.

(2) Between May 2016 and June 2018, claimant had full time employment with another employer. She sought and accepted employment with the employer to earn additional income to pay off a truck. Claimant worked 28 hours per week for the employer in addition to her 40-hour per week job elsewhere. Working for the employer required that claimant spend approximately two nights per week away from her family.

(3) Sometime prior to June 2018, claimant and her husband paid off the truck. Claimant continued to work for the employer, but found that working two jobs was tiring and stressful, and being away from her family placed strain on her family. Claimant discussed the matter with her family counselor, and

ultimately decided that since she no longer needed the extra income to make the truck payment, it was important for her to stop working.

(4) On June 12, 2018, claimant submitted a resignation letter. She wrote in the letter that she was resigning for health and mental health reasons, but was willing to continue filling in for emergencies sometimes if she was available. The employer accepted her resignation.

(5) Claimant continued working for the employer after June 12, 2018. Sometime between June 12, 2018 and June 27, 2018, claimant lost her full time job with her other employer. She missed a couple of shifts with the employer, and did not ask the employer to allow her to rescind her resignation or otherwise ask the employer to keep her on as an employee.

(6) Claimant last worked for the employer on June 27, 2018. The employer did not schedule her to work after June 2018. Although the employer had trouble finding coverage for all its available work, claimant had told the employer she was resigning due to her health and mental health, and the employer therefore did not offer the shifts to claimant.

(7) At all relevant times, claimant was not advised by her family counselor to quit work. Had claimant not paid off the truck she would have continued working for the employer until the truck was paid off, notwithstanding the stress, strain, and tired feelings she experienced.

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

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).

Claimant initially prompted the work separation in this case by giving notice on June 12th of her intent to resign effective June 27th. Although she offered to continue to fill in for emergencies, if available, after June 27th, her resignation established her intent to end the regular 28-hour per week employment relationship she had with the employer for the previous two years. Notably, claimant did not ask the employer to rescind her resignation, or otherwise offer to continue working, when, between the date she submitted her resignation and its effective date, she lost her regular 40-hour per week employment, which suggests that she did not wish to continue having a regular employment relationship with the employer after June 27th. The fact that the employer did not invite claimant to return to work after the effective date of her resignation to work on an on-call or emergency basis did not suggest that the employer would not have had continuing work available to claimant had she not chosen to resign, and does not change the work separation from a voluntary leaving to a discharge. On this record, it is more likely than not that claimant voluntarily left work.

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.¹

Claimant resigned from her job in this case because it was her second job, it was stressful, straining and tiring to have two jobs, and she no longer needed the extra income. However, she continued to work for the employer for another 15 days after submitting her resignation. The time to analyze for purposes of determining whether claimant had good cause for quitting her job therefore is not June 12th when she submitted her resignation, but rather June 27th, the date she actually quit.²

Claimant's circumstances changed significantly between the date of her resignation and the date she quit. At the time she resigned, for instance, she was working 68 hours per week in two jobs, and experiencing stress, family strain and tiredness from doing so. She had fulfilled the financial obligation that had prompted her to get the second job in the first place, and, since she no longer needed that income, decided to end the stress, strain and tiredness she felt from having a second job. At the time she actually quit the job, however, she had lost her full time job and was working only for the employer. As such, she would no longer be working 68 hours per week, and it is more likely than not that the reduction in claimant's work hours would have caused the stress and strain of working excessive hours at two jobs to dissipate.

Under those circumstances, while the negative effects of working two jobs, without a financial incentive to continue doing so, might have amounted to a grave situation at the time claimant gave notice, the changed circumstances by the time she ultimately quit her job were not grave, and made it reasonable for claimant to have attempted to rescind her resignation. At a minimum, a reasonable and prudent person in claimant's position would likely have discussed her changed circumstances – and the likely-to-change health and mental health effects of the second job – with the employer in an effort to retain some employment despite the loss of her full time job. Although the employer was not under any legal obligation to allow claimant to rescind her resignation, the employer was understaffed at the time, claimant was qualified and experienced in the kind of work the employer needed her to perform, and the only apparent barrier to claimant's continued employment was her resignation for health and mental health reasons. Claimant alluded in her written argument to having a personal relationship with the employer's owners, which further suggests that the employer might have considered allowing claimant to rescind her resignation when she lost her full time job. For the reasons explained, it appears more likely than not that attempting to retain her job with the employer was a reasonable alternative to quitting work on June 27th.

¹ Claimant was seeing a family counselor around the time of her work separation in this case, but did not assert or show that she was seeing the counselor for treatment of a health condition that was, more likely than not, a permanent or long-term "physical or mental impairment" as defined at 29 CFR §1630.2(h). We therefore analyzed claimant's decision to quit work using the standard of a reasonable and prudent person without such impairment.

² See e.g. *Early v. Employment Dep't.*, 247 Or. App. 321, 360 P.3d 725 (2015) (so stating); accord *J. A. W. (Werth I) v. Employment Dep't.*, 237 Or. App. 520, 240 P.3d 86 (2010); *Constantine v. Employment Dep't.*, 200 Or. App. 677, 117 P.3d 279 (2005).

Because claimant's situation at the time she quit was not grave and she had a reasonable alternative to quitting, claimant voluntarily left work without good cause. Claimant therefore is disqualified from receiving unemployment insurance benefits because of her work separation.

DECISION: Order No. 18-UI-116521 is affirmed.

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

DATE of Service: October 25, 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.

Please help us improve our service by completing an online customer service survey. To complete the survey, please go to <https://www.surveymonkey.com/s/5WQXNJH>. If you are unable to complete the survey online and wish to have a paper copy of the survey, please contact our office.