EO: 200
BYE: 201926

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

133
VQ 005.00

EMPLOYMENT APPEALS BOARD DECISION
2018-EAB-0953

Affirmed
Disqualification

PROCEDURAL HISTORY: On August 10, 2018 the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant voluntarily left work without good cause (decision # 161859). Claimant filed a timely request for hearing. On September 6, 2018, ALJ Murdock conducted a hearing, and on September 13, 2018 issued Order No. 18-UI-116510, affirming the Department's decision. On October 2, 2018, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant submitted a written argument that contained some evidence not offered during the hearing. Claimant did not show, as required by OAR 471-041-0090(2) (October 29, 2006) that factors or circumstances beyond her reasonable control prevented her from offering this additional evidence at the hearing. For this reason, EAB did not consider claimant's additional evidence when reaching this decision. However, EAB considered claimant's written argument to the extent it was based on evidence offered and received during the hearing.

FINDINGS OF FACT: (1) Schlesinger & deVilleneuve employed claimant as a legal assistant from May 1, 2018 until July 2, 2018. Claimant was assigned to work with one of the employer's attorneys, SS.

(2) On June 25, 2018, SS asked claimant by email if claimant was "willing/able to call in" for her at a telephonic trial scheduling conference set for July 2, 2018 at 10:30 a.m. because SS had an out of office appointment at that time. Exhibit 8 at 1. In the email, SS stated that she had called in at such conferences for attorneys in the office when she previously had worked as a legal assistant. *Id.* SS attached the court notice of the scheduling conference to the email. Claimant replied that she would do so and was "comfortable" doing so since she had done so before for other attorneys. *Id.*

(3) On July 2, 2018, claimant failed to call in for the scheduling conference. A legal assistant from the office of the opposing counsel called claimant to advise her that the scheduling conference had been rescheduled to August 13, 2018 since SS and no one on her behalf had appeared at the scheduling conference that day. On July 2 at 11:01 a.m., claimant sent an email to SS advising her, among other things that she had missed the July 2 scheduling conference. At 11:33 a.m, SS responded and asked claimant if she had called in for the conference. Claimant immediately replied, at 11:34 a.m., that she had not because "I did not know I was supposed to." Exhibit 8 at 2. SS responded by forwarding to claimant copies of the emails they had exchanged about the scheduling conference on June 25 to demonstrate that claimant should have known that SS expected her to cover the July 2 scheduling conference. SS did not accompany the forwarded emails with an explanatory message to claimant.

(4) On July 2 at 11:42 a.m., claimant sent an email to SS in which she wrote, "[B]ecause of our very different organizational ways, it's obvious I do not meet your needs. I will resign effective immediately, if you will give me some severance pay and lay me off so I can draw my unemployment." Exhibit 8 at 1. Upon receiving claimant's email, SS went to the office of a managing partner to inform him that claimant had resigned and to determine if the employer was willing to provide severance pay to claimant. The managing partner told SS it was unlikely that claimant would be given severance pay.

(5) Sometime before noon on July 2, after speaking with the managing partner, SS went to claimant's office. At that time, claimant was gathering together her personal belongings and appeared to be in the process of drafting an email on her office computer. SS asked claimant if she was leaving and claimant told SS that she was. SS then told claimant that she needed claimant's office keys and agreed to unlock a side door if claimant needed to use it to exit with her belongings. After claimant gave SS the keys and agreed not to disturb the files that remained in her office, claimant told SS she was going to leave as soon as she completed the email she was drafting. SS then departed from claimant's office, turned over claimant's office key to the managing partner and told the managing partner that claimant was preparing to leave.

(6) On July 2 at 12:14 p.m, claimant sent an email to the managing partner. In the email, claimant set out at length her dissatisfactions with SS and her management style. Exhibit 9 at 1. Claimant concluded the email by stating that she had informed SS, "I would like to resign effective immediately, however, I would like some type of compensation so that I can cover my finances until I find another job. In addition to severance pay, I requested that she lay me off so I can collect unemployment. If that is acceptable to you [the managing partner], please let me know." Exhibit 9 at 1. Claimant said nothing in the email about SS having discharged or laid her off earlier that day and nothing about an angry outburst by SS. Around the time claimant sent this email to the managing partner, claimant left the workplace

(7) On July 2, sometime before 4:59 p.m., claimant made an inquiry of the Oregon State Bar (OSB) about whether, as she had understood what she had been asked to do in connection with the July 2 trial scheduling conference, it had been ethical for SS to ask her, a legal assistant, to appear on her behalf in court at a hearing. Transcript at 13. An OSB representative told claimant that it was impermissible for a non-attorney legal assistant to attend a telephonic court hearing on behalf of a licensed attorney.

(8) On July 2 at 4:59 p.m., claimant sent an email to the managing partner from her personal email account. Claimant informed the managing partner of what she had been advised by OSB. Claimant went on to state that she wanted a month of severance pay, a satisfactory job reference from the managing

partner, no defamation of her by SS, and that "you use the term 'laid off' on my final disposition which will ensure that I can draw my unemployment." Exhibit 10 at 1-2. In return, claimant agreed "not to press this [ethical violations] and other illegal employment practices (there are others . . .) against [SS]." *Id*. Claimant said nothing in this email about SS having discharged or laid her off earlier that day and nothing about an angry outburst by SS.

(9) On July 2 at 6:41 p.m., the senior partner responded to claimant's email of 4:59 p.m. He apologized for claimant's dissatisfactions with her employment, and asked for more detailed information about them and SS's allegedly poor treatment of her as well as the "illegal employment practices" to which she had referred so he could take necessary corrective action. He reassured claimant that a legal assistant's attendance at a trial scheduling conference was not practicing law without a license if the particular judge allowed it and many local judges did so. In response to her request that he characterize her work separation as a layoff, he stated that it was his understanding that such a characterization was "not true." Exhibit 10 at 1. He went on to ask claimant, "Did you quit today or did [SS] terminate your employment?" *Id*. Claimant did not reply to the managing partner's email. Claimant did not state that she considered the employer or SS to have discharged her or to have involuntarily terminated her employment. Nor did claimant state that SS engaged in an angry outburst that day or provide any further detail about SS's allegedly poor treatment of her.

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

Claimant contended that after she told SS in the email of July 2 at 11:42 a.m. that she was resigning, SS promptly appeared in her office, refused to accept the resignation, told her she was laid off and then began throwing things and engaging in an angry outburst. Transcript at 5, 7-11, 22, 43-44. SS denied having refused to accept claimant's resignation and acting out in front of her on July 2. Transcript at 60-63. Given these contradictory accounts of the work separation, the first issue presented by this case is whether claimant was discharged or she voluntarily left work. If claimant could have continued to work for the same employer for an additional period of time the time the employment ended, the work separation was a voluntary leaving. OAR 471-030-0038(2)(a) (January 11, 2018). If claimant was willing to continue to work for the same employer for an additional period of time but was not allowed to do so by the employer, the separation was a discharge. OAR 471-030-0038(2)(b).

The conflicting testimony of the parties about the work separation is irreconcilable. The documentary evidence in the form of the emails exchanged on July 2 is available, however, to corroborate or not corroborate the account that each party presented. While SS could theoretically have refused to accept the resignation that claimant tendered in the email to SS at 11:42 a.m., it makes no sense that claimant would not have mentioned that occurrence in her emails of 12:14 p,m. and 4:59 p.m, to the managing partner in which she sought severance benefits if, in fact, she had been laid off. As well, in those emails, in which claimant was generally excoriating the behavior of SS, it makes no sense that she would not have pointed out to the managing partner an allegedly angry outburst that accompanied SS's supposed refusal to accept her earlier resignation, if both events had actually happened. Finally, claimant's failure to reply to the query from the managing partner at 6:41 p.m., when he expressed concern over her request to characterize the work separation as a layoff and asked her directly whether she had quit or if SS had discharged her is strong evidence that SS had not discharged her, but that she had quit. The weight of this independent evidence supports the accuracy of the employer's account of the work separation and not claimant's.

In claimant's written argument, she contends that because SS asked her to turn over her keys when SS visited claimant in claimant's office after receiving the email of 11:42 a.m., it should be inferred that SS discharged her during that meeting. However, it does not appear remarkable that an employer would ask an employee who had just resigned to turn over her keys, and merely doing so should not operate to convert a work separation from a voluntary leaving to discharge after a claimant has already expressed an intention to leave. The EAB decisions that claimant cited to support the proposition that an employer asking an employee to turn in the employee's work keys may evidence an employer's intention to discharge claimant all involved situations in which claimant had not previously expressed a clear and unambiguous intention to leave work and the only objective manifestation of either party's intention was the employer's instruction to turn in the work keys. *See* EAB Decision 2016-EAB-0887 (August 26, 2016); EAB Decision 2016-EAB-0359 (April 28, 2016); EAB Decision 2014-EAB 0664 (May 21, 2014). These cases are not apposite on the facts presented here since claimant expressed an unambiguous intention to leave work before the employer requested her keys and, despite her contentions to the contrary, the weight of the evidence in the record supports that she intended to leave work. On this record, the preponderance of the evidence shows that claimant's work separation was a voluntary leaving on July 2, 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.

Because claimant contended that she was discharged, she did not present any reasons for leaving work. From the record, it can be discerned that she might have left work as result of missing the trial scheduling conference on July 2, her belief that participating in the scheduling conference would cause her to practice law without a license, her contentions about SS's angry outburst on July 2 or her general displeasure at working with SS. With respect to missing the conference, claimant did not contend or show that the employer was likely to sanction her for doing so. With respect to claimant's concerns over ethical violations if she participated in the scheduling conference, it does not appear that she raised those concerns with SS or the managing attorney prior to quitting. From the tenor, seriousness, content and detail of the managing attorney's response to claimant's concerns in his email to her from 6:41 p.m. on July 2, a reasonable and prudent person's concerns should reasonably have been assuaged. Exhibit 10 at 1. Furthermore, there was no indication in the record that had claimant's concerns in this matter persisted the employer would have required her to participate in such scheduling conferences in the future despite those concerns. In addition, as discussed above, claimant did not demonstrate, more likely than not, that SS engaged in an angry behavior directed at claimant on July 2. Finally, with respect to claimant's general objections to SS's management style set in her email to the managing partner from 12:14 p.m. on July 2, claimant did not show that SS's behavior was sufficiently egregious that a reasonable and prudent legal assistant would have considered her situation grave and would have left work as a result of those objections. *See* Exhibit 9 at 1. As well, from the substance of the managing attorney's inquiry into the basis of claimant's displeasure with SS, it may be inferred that in lieu of

quitting work, claimant had the reasonable alternative of raising her concerns with him and it would not have been futile to seek redress of those concerns through him. On this record, claimant did not show that a reasonable and prudent legal assistant in her circumstances would have left work when she did for the reasons that she did.

Claimant did not show good cause for leaving work when she did. Claimant is disqualified from unemployment insurance benefits.

DECISION: Order No. 18-UI-116510 is affirmed.

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

DATE of Service: November 5, 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.