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

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EMPLOYMENT APPEALS BOARD DECISION
2018-EAB-1057-R

Affirmed On Reconsideration
Disqualification

PROCEDURAL HISTORY: On September 25, 2018, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant quit working for the employer without good cause (decision # 111635). Claimant filed a timely request for hearing. On October 25, 2018, ALJ Snyder conducted a hearing, and on November 1, 2018 issued Order No. 18-UI-119068, affirming the Department's decision. On November 8, 2018, claimant filed an application for review with the Employment Appeals Board (EAB). On December 11, 2018, EAB issued Employment Appeals Board Decision 2018-EAB-1057, adopting Order No. 18-UI-119068. On January 9, 2019, claimant filed a petition for judicial review with the Oregon Court of Appeals. On June 4, 2019, claimant filed an opening brief with the Oregon Court of Appeals. On June 20, 2019, EAB filed a notice of withdrawal of order for purposes of reconsideration pursuant to ORS 183.482(6) and ORAP 4.35.

FINDINGS OF FACT: (1) Beaverton Dental Group PC employed claimant as office manager from September 24, 2015 to August 7, 2018.

(2) In approximately June 2018, a doctor who had previously worked for the employer acquired ownership of the business. The doctor had communicated to claimant during his prior employment that he needed to work on anger issues.[1] Claimant perceived that staff were "hesitant" about working with the doctor.[2] Claimant thought the doctor began second-guessing her. Claimant felt staff were "walking on eggshells" because the doctor bought the business.[3]

[1] Transcript at 5. Duplicate page numbers were assigned to the first 12 pages of the transcript; all transcript page citations in this decision are to the page numbers assigned to the parties' testimony, not the preliminary proceedings.
[2] Transcript at 12.
[3] Transcript at 9.

(3) The doctor reviewed the business's financial records, including employees' paid time off and time clock records. In mid-July 2018, the doctor observed that claimant's records showed she had exceeded what he thought were her paid time off accruals, and had submitted time clock entries for three days he believed she had not worked. The doctor asked claimant about her paid time off usage, and she explained that she had unused days from the previous year that had rolled over into the current year. The doctor asked claimant about the three time clock entries for days she had not worked, and claimant explained that she did not know what had happened but would look into the matter and let him know.

(4) On approximately August 2, 2018, the doctor learned of an $8,000 receivables discrepancy. Claimant attributed the discrepancy to a computer problem that affected some collection reports. The doctor decided to review some financial reports because of the discrepancy.

(5) On August 3, 2018, claimant left deposit and collection reports on her desk when she left work. On the morning of August 4th, the doctor collected the paperwork and began to review it at his own desk. Claimant reported to work on August 4th while the doctor was away from his desk, intending to finish her work from the day before. When she arrived, she observed that the paperwork she had left on her desk was missing, found it on the doctor's desk, and observed that the doctor had gone through it and made notations. Claimant felt that the doctor was double-checking her work because he did not trust her.

(6) Claimant collected the paperwork and returned to her desk so she could finish working on it. The doctor observed that claimant had taken the paperwork from his desk and spoke to claimant; she told the doctor that she needed to finish with it. The doctor observed that claimant did not look at him when she spoke and told claimant he did not like how claimant was talking to him. During the same general period of time, the doctor perceived claimant stamped checks in an unusually hard and loud manner.

(7) Claimant finished with the paperwork and took it back to the doctor's office. He told her to enter his office and shut the door. Claimant felt the doctor's tone was "abrupt" and told the doctor that she did not want him to speak to her that way; the doctor told claimant not to disrespect him, and claimant told the doctor she was very respectful and he should not disrespect her.[4] Claimant's voice and body shook, she felt she could hardly speak and felt like she was about to cry; she thought the doctor could tell how upset she was.[5] Claimant said, "I cannot work for somebody that does not trust me."[6] The doctor told claimant that it was not a trust issue, and that he wanted to see how much he was getting paid for each procedure.[7] Claimant did not think that was possible to know. The doctor stated that, as owner, he had the right to double-check things because it was ultimately his responsibility and his money. Claimant replied that she understood but it was not a good feeling for her if he did not trust her and double-checked her work.

(8) On August 6, 2018, claimant sent a text message to the doctor that stated,

> I just want you to know that I've been thinking a lot this weekend about you and your office, and my heart is really hurting. I always thought that you would believe in me, and have trust in me and the fact that you're questioning me to other employees about - about

[4] Transcript at 9.
[5] Transcript at 10.
[6] Transcript at 10.
[7] Transcript at 7.

> payroll and putting the icing on top of the cake, you have (inaudible) talked to Chris, who is one my friends. I am super upset. I would like to talk to you on Wednesday after work. Like I said before, I was the only one that was there for you and when you decide to come back, I had to talk to everybody more than once to make sure they were okay because everybody was hesitant, and this is what I get.[8]

The doctor responded,

> After our incident on Saturday I thought about what would be ideal for our future relationship. I came up with three possible options that you can choose from. The first option is to apologize for the disrespect towards me and continue to work for me. The section - second option is to give you two weeks to find another job, and the third option is to quit immediately.[9]

(9) Claimant responded, "I've been thinking about it and could you please clarify option number two?"[10] The doctor replied, "You will work two more weeks for me, that way you . . . will have time to find another job." Claimant replied, "[D]oes that mean you're firing me after two weeks[?]" The doctor responded, "[Y]es" and "By the way, the third option is terminate immediately."

(10) Claimant felt that she had not done anything that warranted an apology and decided not to select option one. Claimant perceived that the doctor did not trust her, even though he had assured her that he did not have a trust issue with her, and felt she could not continue working for him if he did not trust her.

(11) The doctor wanted claimant to apologize the disrespect he had perceived and was prepared for the possibility that the employment relationship would end if she did not apologize. Although the doctor had concerns about claimant's time sheets, and wanted to review paperwork related to the business's financials and the collection report discrepancies, he was not considering firing claimant for those reasons, and still considered her his "most trusted staff" whom he trusted to handle his money.[11]

(12) On August 7, 2018, claimant arrived at the workplace, gave the doctor her office key, packed her belongings, and told staff she was leaving. Prior to leaving, claimant did not tell the doctor she did not think she had been disrespectful toward him, ask him to clarify what he thought she had done that was disrespectful, or discuss what he had considered disrespectful. Claimant had not met with the doctor to report that she generally did not like how he treated her or to discuss how she or other staff were "walking on eggshells" because of him, or ask him to change his behavior toward her or staff.

CONCLUSIONS AND REASONS: On reconsideration, Order No. 18-UI-119068 is affirmed; claimant voluntarily left work without good cause.

ORS 657.176(2)(a) requires a disqualification from unemployment insurance benefits if the employer discharged claimant for misconduct connected with work; ORS 657.176(2)(c) requires a disqualification from benefits if claimant voluntarily left a job without good cause. However, ORS 657.176(7) states,

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[8] Transcript at 12.
[9] Transcript at 12-13.
[10] All quoted testimony in this paragraph is located in the transcript at 13.
[11] Transcript at 20.

"For purposes of applying subsection (2) of this section, when an employer has notified an individual that the individual will be discharged on a specific date and it is determined that: (a) The discharge would not be for reasons that constitute misconduct connected with the work; (b) The individual voluntarily left work without good cause prior to the date of the impending discharge; and (c) The voluntary leaving of work occurred no more than 15 days prior to the date of the impending discharge, then the separation from work shall be adjudicated as if the voluntary leaving had not occurred and the discharge had occurred. However, the individual shall be ineligible for benefits for the period including the week in which the voluntary leaving occurred through the week prior to the week in which the individual would have been discharged."

The first issue is whether or not ORS 657.176(7) potentially applies to this case, which is only the case if the record establishes that the employer notified claimant that she "will be discharged on a specific date." Claimant testified at the hearing that the doctor sent her a text message on August 6, 2018 that set forth three options: (1) apologize; (2) be fired in two weeks; or (3) terminate immediately. The content of the doctor's text message is undisputed, and establishes that ORS 657.176(7) does not apply for two reasons. First, the doctor did not establish "a specific date" upon which claimant's discharge – had she selected option two – would have occurred.[12] Although "two weeks" could mean 14 days from August 6th, the date of the text, it could also have meant two work-weeks from that date, two work- or calendar-weeks from the date that claimant notified the doctor that she wanted to select option two, two work- or calendar-weeks from the last date she worked, or even two work- or calendar-weeks from the next date claimant was scheduled to work. The record is therefore unclear what "two weeks" meant, and fails to establish the "specific date" element of ORS 657.176(7) was met.

Second, even if "two weeks" should be considered a "specific date" despite that ambiguity, ORS 657.176(7) alternatively does not apply because the doctor did not state or indicate to claimant that she "will" (or would) be discharged on that date. The doctor's statement was conditioned upon claimant choosing option two instead of option one, under which she might have continued working indefinitely, or option three, under which her employment would terminate immediately. The discharge therefore was conditional, and ORS 657.176(7) does not apply when the discharge is conditional. Rather, the plain text indicates that the statute applies when the record shows that the claimant "*will* be discharged." (Emphasis added.) The most applicable common usage definitions of the word "will" in this context is that "will" is "used to express simple futurity" or "used to express inevitability."[13] In other words, to conclude that a discharge "will" occur, the evidence must show that the discharge was set to occur or inevitable. Because any potential discharge in this case was conditional, rather than the result of a statement of what would inevitably occur in the future, the record fails to show that the employer notified claimant that she "will be discharged," and ORS 657.176(7) does not apply to this case.

Turning next to the nature of the work separation, claimant and the employer agreed at the hearing that claimant quit her job.[14] However, the nature of the work separation is still at issue because claimant alleged she only quit because the doctor forced her to do so, suggesting that her leaving was not

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[12] The ORS 657.176(7) analysis is confined to option two because option one did not involve a work separation of any type, and option three was not a discharge; therefore, although "immediately" would likely be considered a "specific date" under ORS 657.176(7) for the reasons described herein, it was not a date upon which claimant "will be discharged."
[13] *See* Webster's 3rd New Int'l Dictionary at 2616 (2002).
[14] *See* Transcript at 4, 17.

voluntary.[15] The applicable rules state that 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; 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. *See* OAR 471-030-0038(2).

At the time of the work separation claimant had last worked on August 4th and would normally have returned to work on Wednesday, August 8th. On August 6th, however, the doctor offered claimant the choice of three options: apologize and continue working; work two weeks so she had time to find another job; or terminate immediately. Claimant clarified with the doctor that option two would mean the doctor would fire her in two weeks, and he agreed it would. The undisputed facts are therefore that claimant had options to continue working indefinitely or for two weeks. She chose to leave on August 7, 2018 instead. Because claimant could have continued to work for the employer for an additional period of time, the work separation was a voluntary leaving.

There is no dispute that claimant's continued employment, whether for two weeks or indefinitely, came with conditions, and given her rejection of both options it is reasonable to infer from this record that she found both conditions – apologizing or being fired in two weeks – unacceptable. OAR 471-030-0038(2)(a) is phrased simply, however, so as long as the conditions of continuing work did not obviate the availability of some amount of continuing work, even a finite amount, the work separation remains a voluntary leaving despite the presence of conditions. Claimant therefore voluntarily left work.

In the case of a voluntary leaving, claimants who leave work voluntarily are disqualified from the receipt of benefits unless they prove, by a preponderance of the evidence, that they had good cause for leaving work when they did. ORS 657.176(2)(c); *Young v. Employment Department*, 170 Or App 752, 13 P3d 1027 (2000). "Good cause . . . is such that a reasonable and prudent person of normal sensitivity, exercising ordinary common sense, would 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 the employer for an additional period of time.

To the extent claimant quit her job because the doctor questioned or second-guessed her, or reviewed her time sheets, use of accrued leave time, the daily and monthly collection reports, and the $8,000 discrepancy, she did not establish good cause. Although the doctor's actions subjectively signaled to claimant that the doctor did not trust her, the doctor had the right to examine his accounts and financial records pertaining to his business, particularly given that he had just acquired ownership of the business, and because of the identified discrepancies. The doctor appears to have tried to alleviate claimant's concerns that he did not trust her by explaining to her that he was responsible for the business, and it was his money. When claimant expressed concern to the doctor on August 4th that he did not trust her, the doctor specifically told claimant that it was not a trust issue, and testified at the hearing that claimant remained his "most trusted staff." In that context, claimant's perception that the doctor did not trust her was not an objectively grave situation. The doctor's decision to question claimant's time and leave records, the daily and monthly collection reports, and the $8,000 discrepancy was not of such gravity that claimant had no reasonable alternative but to quit work on August 7th.

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[15] *See* Transcript at 4, 6.

Nor did claimant establish good cause to quit work because she perceived the doctor had been disrespectful. No claimant is required to tolerate an abusive or oppressive workplace for fear that abandoning the job will disqualify her from unemployment benefits.[16] The record is clear that the events of August 4th and August 6th were emotionally significant for claimant, as symbolized by her description of having a physical reaction to being upset at work and the text message she sent describing her feelings. However, claimant did not testify at the hearing specifically what it was about the doctor's behavior toward her on August 4th and August 6th that she considered disrespectful or upsetting, and did not show that her working conditions were otherwise abusive or oppressive. Objectively considered, the doctor's behavior, as claimant described at the hearing, did not create a grave situation for claimant.

Specifically, claimant's testimony described the doctor as having previously indicated he was working on anger issues, the general perception that staff was unhappy with the doctor's acquisition of the business, the doctor's statement to claimant on August 4th that he did not like the way she spoke to him, the doctor's "abruptness" when he asked her to close the door for a conversation on August 4th, and claimant's feeling that he did not trust her. Although claimant told the doctor on August 4th and implied in her first text message on August 6th that the doctor had been disrespectful, claimant did not establish by a preponderance of the evidence what it was that the doctor did that she considered disrespectful, much less so disrespectful that she had no reasonable alternative but to quit over it. In fact, the most consistent theme of claimant's testimony, as well as her communications to the doctor on August 4th and August 6th, was that she believed the doctor did not trust her, and she felt she could not work for someone who did not trust her. In sum, claimant did not describe objectively disrespectful behavior by the doctor (for example, yelling, name-calling, accusations, intimidating body language, threats, foul or abusive language, slurs based upon her membership in a protected class, etc.), nor did she show that he used other hostile or oppressive words, tones, or actions. Claimant did not allege or show that the doctor ever displayed inappropriate or uncontrolled anger toward her, much less that he did so during their interactions about work on August 4th, August 6th, or August 7th. Claimant did not meet her burden to show that the doctor engaged in behavior that was objectively disrespectful to her, nor did she prove that her perception that the doctor was abrupt, disrespected, or did not trust her was of such gravity that no reasonable and prudent person would have continued to work for the employer for an additional time.

Claimant also did not show that she had good cause to quit work because of the options the doctor texted to her on August 6th. Although two of the options involved terminating the employment relationship, termination was not the inevitable outcome in this case because the doctor also presented claimant with a third option, to apologize for being disrespectful and continue working indefinitely. Although claimant did not feel an apology was warranted under the circumstances as she perceived them, and in some cases requiring an employee to admit to or apologize for a wrongdoing they do not think they committed might be considered unreasonable, this case is different. After the doctor sent claimant the text containing the three options, claimant questioned the doctor about what option two meant. As a result of claimant's question, the doctor provided additional information to claimant and explained what he meant by both option two and option three. Notably, while the doctor testified that he had observed claimant speak to him without looking at him and stamping checks in an overly loud manner, this record does not otherwise establish what incident or incidents, specifically, the doctor considered disrespectful about

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[16] *See accord McPherson v. Employment Division*, 285 Or 541, 591 P2d 1381 (1979) (claimants need not "sacrifice all other than economic objectives and, for instance, endure racial, ethnic, or sexual slurs or personal abuse, for fear that abandoning an oppressive situation will disqualify the work from unemployment benefits"; the law "does not impose upon the employee the one-dimensional motivation of Adam Smith's 'economic man'").

claimant's behavior, or what date(s) he thought the disrespect had occurred. Nor, on this record, does it appear that the doctor ever explained to claimant what it is she did that he perceived as disrespectful or that warranted an apology. In sum, it does not appear that claimant knew or had reason to know what she did that the doctor considered disrespectful. Despite that fact, claimant apparently concluded the doctor's request for an apology was unreasonable, without ever asking the doctor to explain what he thought was disrespectful about her behavior or why he thought she should apologize.

Although claimant did not ask the doctor about option one, and there is a corresponding lack of direct evidence about what might have happened if she had, it is reasonable to infer, given the doctor's willingness to answer claimant's questions about option two, that if claimant had asked the doctor for more information about option one, such as to identify what she did that he considered disrespectful, the doctor would likely have provided that information. It is also likely that asking such a question might well have led to a discussion or text exchange between the doctor and claimant about the doctor's perception of claimant's allegedly disrespectful conduct and claimant's intent at the time of the conduct, thereby providing claimant and the employer with the opportunity to resolve their differences short of forcing claimant to make an unwarranted apology, be fired, or quit her job. Asking the doctor for more information about option one, and attempting to resolve the dispute between the doctor and claimant short of ending the employment relationship, was therefore a reasonable alternative to leaving work. On this record, nothing about the events of August 4th, the August 6th text exchange, or their interaction on August 7th suggests that the relationship between claimant and the doctor was so damaged by their recent interactions that a continued employment relationship was no longer possible.[17]

For the reasons explained, and under the circumstances described at the hearing, the record fails to show that no reasonable and prudent person would have continued to work for the employer for an additional period of time. Claimant therefore voluntarily left work without good cause, and must be disqualified from receiving unemployment insurance benefits under ORS 657.176(2)(c) from August 5, 2018 until she has requalified for benefits.

DECISION: On reconsideration, Order No. 18-UI-119068 is affirmed.

J. S. Cromwell, D. P. Hettle, and S. Alba.

DATE of Service: July 24, 2019

NOTE: This decision on reconsideration will be filed with the Oregon Court of Appeals as required by ORS 183.482 and ORAP 4.35.

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[17] Claimant described hearing post-employment rumors suggesting that the owner had accused her of financial improprieties and claimed that he fired her. Transcript at 14-15. Those allegations do not affect the outcome of this decision. First, there is only second-hand evidence about the rumors, and evidence in the record suggests that the doctor probably did not make the allegedly "slanderous" statements, particularly not in the manner the rumors attributed to him. Second, the rumors occurred after the employment relationship ended; while events occurring post-employment can in some circumstances be relevant to the work separation itself, the sort of post-employment rumors lacking reliability described in this case have no probative value as far as suggesting claimant's or the doctor's state of mind on August 7th, or suggesting that it is more likely than not that the employment relationship was irremediably broken at the time the work separation occurred on that date.