EO: 200
BYE: 201434

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

755
VQ 005.00

EMPLOYMENT APPEALS BOARD DECISION

2014-EAB-0590

Reversed
Disqualification

PROCEDURAL HISTORY: On January 28, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer voluntarily left work without good cause (decision # 144553). Claimant filed a timely request for hearing. On April 3, 2014, ALJ Seideman conducted a hearing and issued Hearing Decision 14-UI-14242, concluding claimant voluntarily left work with good cause. On April 10, 2014, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Golden State Foods Corp. employed claimant as a delivery driver from September 24, 2013 to January 6, 2014.

(2) Claimant's job duties included delivering wholesale restaurant and coffee shop supplies to a retail outlet. Claimant felt the items he was required to deliver were too heavy for him and the work was too physical. Claimant experienced physical problems as a result, including numb hands and pain in his back, shoulders and arms. The pain he experienced kept him from sleeping at night.

(3) Claimant knew he could notify the employer of his physical ailments or file a worker's compensation claim, but did not want to do so because, in his claimant's experience, employers generally did not like it when employees file worker’s compensation claims, and he feared retaliation. However, the employer's practice was to send injured employees for medical treatment and allow them light duty and time off work when ordered by a physician.

(4) In approximately December 2013, claimant privately sought medical treatment. One doctor told him he had torn a muscle in his shoulder and sent claimant to physical therapy. Claimant thought about his circumstances for a few days and decided to quit his job.

(5) On approximately January 6, 2014, claimant told his supervisor that he quit work because the work was too heavy and physical, and he could not do it anymore.

(6) Prior to leaving work, claimant never told the employer that he experienced physical pain associated with his delivery duties, had injured himself, required medical treatment, needed light duty or reassignment, or needed time off work for medical treatment or to heal from an injury. The employer, historically, sent injured employees to doctors and provided time off work or light duty when ordered by a physician, and had never laid off an employee just because he or she needed time off or light duty.

(7) After leaving work, claimant continued to do physical therapy exercises and obtained a delivery job delivering lighter-weight freight items.

CONCLUSIONS AND REASONS: We disagree with the ALJ, and conclude that claimant voluntarily left work without good cause.

A claimant who leaves work voluntarily is disqualified from the receipt of benefits unless he proves, by a preponderance of the evidence, that he had good cause for leaving work when he 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) (August 3, 2011). The standard is objective. *McDowell v. Employment Department*, 348 Or 605, 612, 236 P2d 722 (2010). A claimant who quits work must show that no reasonable and prudent person would have continued to work for his employer for an additional period of time.[1]

Claimant quit work because he felt physically incapable of continuing to perform physically demanding work for the employer, having injured his shoulder and experienced pain or numbness in his hands, arms, shoulders and back that he attributed to his work for the employer, and having been advised by a doctor to seek less demanding work. The ALJ reasoned that claimant had good cause for quitting work, finding as fact that claimant's doctor recommended he quit, and claimant was not aware he could have filed for worker's compensation or had time off work. Hearing Decision 14-UI-14242 at 2. We disagree.

While claimant showed he had good reasons for needing to stop performing such physically demanding work, he did not show that he had good cause for quitting work with the employer because, had he but reported his physical symptoms and injury to the employer, the employer would more likely than not have had light duty work available to him. The employer was also willing to provide claimant with time off to recover from his injury if medically necessary. Put another way, claimant did not show that he had to quit his job with the employer, which he professed he liked and wanted to keep, in order to find lighter-duty work. A reasonable and prudent person under similar circumstances would not have quit without at least notifying the employer of his need for light duty, and giving the employer the opportunity to respond to his request. Notably, claimant's continued employment as a delivery driver,

[1] Claimant had an injured shoulder and other symptoms associated with physical ailments. However, the record fails to show that they were permanent or long-term "physical or mental impairments" as defined at 29 CFR §1630.2(h), as opposed to short-term or situational problems. Even if we had concluded claimant had long-term or permanent impairments, and applied the relevant standard, the outcome of this decision would remain the same, as, for the reasons explained, claimant did not show that no reasonable and prudent person with the characteristics and qualities of an individual with such impairments as he had would have continued to work for his employer for an additional period of time.

occupied delivering lighter-weight items than he had delivered for the employer, is anecdotal evidence that having some time off and working light duty were both reasonable alternatives to quitting given claimant's physical problems performing work at full capacity for the employer.

Claimant argued that he did not notify the employer of his pain or injury because he liked his job and wanted to keep working. He averred he was afraid he would be discharged if he reported his physical problems to the employer and, in any event, he did not believe the employer would allow him any time off. *See* audio recording ~15:00. He also averred he had a basis for those fears after observing how the employer responded to other situations over his three months of employment. *Id.* at ~15:20. However, claimant did not specify what, if any, situations he experienced or observed where the employer had denied time off work to an injured employee, nor did he establish a factual basis for believing the employer would do so, aside from a generalized allegation about employers disliking worker's compensation claims. The employer's witness testified, unrefuted, that she had two employees she permitted time off or light duty, and had never laid off an employee for those reasons. *Id.* at ~18:40. The preponderance of the evidence fails to show that claimant had a factual basis for believing that the employer would discharge or retaliate against him had he filed a worker's compensation claim or otherwise reported his shoulder injury or physical pain to the employer and sought accommodation.

No reasonable and prudent person suffering on-the-job injuries or pain he attributed to his working conditions would quit work under the circumstance claimant described without, at a minimum, reporting his symptoms and injury to the employer and giving the employer the opportunity to address the problem. Under the circumstances in this case, having failed to do so, or, in the alternative, show that doing so would be unreasonable or futile, claimant has failed to prove by a preponderance of the evidence that he had good cause for quitting work. He is, therefore, disqualified from receiving unemployment insurance benefits until such time as he requalifies by earning four times his weekly benefit amount from work in subject employment.

DECISION: Hearing Decision 14-UI-14242 is set aside, as outlined above.

Susan Rossiter and Tony Corcoran;
D. E. Larson, not participating.

DATE of Service: **<u>May 6, 2014</u>**

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 website at http://courts.oregon.gov/OJD/OSCA/acs/records/Appellate CourtForms.page.
Note: the above link may be broken due to unannounced changes to the Court of Appeals website, in which case you may contact the Appellate Records at (503) 986-5555.