

EMPLOYMENT APPEALS BOARD DECISION

2014-EAB-0705

Affirmed
Disqualification

PROCEDURAL HISTORY: On January 31, 2014 the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant but not for misconduct (decision # 125732). The employer filed a timely request for hearing. On April 2, 2014, ALJ Frank conducted a hearing, and on April 11, 2014 issued Hearing Decision 14-UI-14951, concluding claimant voluntarily left work without good cause. On April 28, 2014, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant submitted a written argument in which he disagreed with the ALJ's findings and conclusions and presented information to support his position that was not offered into evidence at the hearing. However, claimant failed to show that factors or circumstances beyond his reasonable control prevented him from offering the new information during the hearing as required under OAR 471-041-0090 (October 29, 2006). Therefore, under ORS 657.275(2) and OAR 471-041-0090 (October 29, 2006), EAB considered only information received into evidence at the hearing when reaching this decision.

FINDINGS OF FACT: (1) Residential Assistance Program employed claimant as a community support specialist from September 17, 2012 until January 11, 2014.

(2) Claimant worked in the supported living program, which required him to attend to clients in their homes. Sometime after he was hired, claimant started working shifts of over 24 hours in clients' homes. The employer required claimant to stay on the clients' premises during eight hour sleep periods that were not paid unless claimant was asked to perform some service for the client during the sleep period. The employer interpreted OAR 839-020-0042(2) (January 9, 2002) to allow it not to pay for such sleep periods. Until approximately August 2013, claimant was scheduled for shifts that had three unpaid sleep periods during each week. After August 2013, claimant was scheduled for a 42 hour shift each week that included two unpaid sleep periods. In approximately January 2014, claimant learned that the employer intended to schedule him for work in such a way that his shifts would again include a third

unpaid sleep period. Claimant thought that the employer was "basically trying to get a third overnight out of me for free." Transcript at 20.

(3) Sometime between January 7, 2014 and January 9, 2014, claimant had a meeting with the employer's executive director, a supervisor and his team leader to raise his concerns that, by implementing a third unpaid sleep period, the employer was violating OAR 839-020-0042(2) and an "implicit agreement" to compensate him for his sleep periods. Transcript at 18. The employer's management explained the employer's interpretation of the regulation and why it thought the employer's practice was lawful. The executive director stated, however, that the employer wanted to look into the matter further, determine whether it could formulate a "plan of trying to address [claimant's] concerns" and to meet again with claimant on January 17, 2014 to continue the discussion. Transcript at 8-9. After the employer's management had presented its interpretation of the rule, claimant became "pretty upset" and one of the management representatives showed claimant a copy of the text of the rule. Transcript at 11. Claimant stated his disagreement with management's interpretation and also stated that he "could no longer work without us paying [him for] that sleep time." Transcript at 26. Claimant told management that, in light of what had been said, he was giving two weeks' notice of his resignation. Transcript at 9, 10, 26, 35.

(4) Claimant was scheduled to work a shift at a client's house starting at 1:00 p.m. on Friday, January 10, 2014 that was scheduled to end sometime on Monday, January 13, 2014. This was the first shift in which the employer implemented its change in policy to require claimant to stay for a third eight hour sleep period that was not paid. On Saturday afternoon, January 11, 2014, claimant sent an email and a text message to his team leader informing her that she needed to look at his email. In the email, claimant stated that he was "very uncomfortable" with his current schedule and that he was "reluctant" to work Sunday night, January 12 to 13, 2014 because he thought that requiring him to stay for an unpaid eight hours of sleep time violated an "implied agreement" that he had with the employer. Transcript at 18. The email further stated that if the employer did not adjust the ending time of claimant's shift, then "any other scenario will require payment for [the sleep hours] between 10:00 p.m. Sunday [January 12, 2014] through 6:00 a.m. Monday [January 13, 2014]." Transcript at 18. After she read the email, the team leader called the executive director to confer. The executive director told the team leader that the employer was not going to adjust claimant's work schedule and was not going to compensate claimant for the sleep period on January 12-13, 2014. The executive director sent an email to claimant telling him that the employer was not going to pay for the sleep period and that if claimant left his shift early the employer would consider that he had quit work. Transcript at 12. The team leader called claimant and also told him he was not going to be paid for his sleep period and, if he left before the scheduled end of his shift, the employer would consider it job abandonment. Transcript at 30. Claimant told the team leader that if he was not going to be paid for the sleep period he would end his shift at 10 p.m. on Sunday. The team leader asked claimant if he was "walking away." Transcript at 32. Claimant said that he was, and the team leader understood that claimant had decided to quit work. The team leader told claimant that she would arrive at the worksite within the hour to relieve him.

(5) On January 11, 2014, the team leader and the executive director arrived at the client's house where claimant was assigned to work. When the team leader relieved him, claimant left the workplace and did not return. Claimant voluntarily left work on January 11, 2014.

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

The first issue this case presents is the nature of claimant's work separation. If claimant could have continued to work for the employer for an additional period of time, the work separation was a voluntary leaving. OAR 471-030-0038(2)(a) (August 3, 2011). If claimant was 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 testified that during his January 2014 meeting with management, he did not say that he was resigning and that he did not walk off the job on January 11, 2014. Transcript at 16, 22, 23, 24. Claimant's denial that he stated an intention to quit at the meeting with management was outweighed by the first-hand testimony of all three management witnesses who were at the meeting, who all consistently stated that claimant had clearly expressed his intention to resign. Transcript at 9, 10, 26, 27, 35. Claimant was also unable to provide any explanation for why all three managers would conspire to fabricate evidence that he had quit. Transcript 17. More likely than not, claimant told management at that meeting he was going to resign. Because claimant's testimony about the statements he made during that meeting was not reliable, his further contention that the executive director discharged him on January 11, 2014 is also suspect. Although claimant denied that the executive director sent him an email and denied that the team leader spoke with him, both of them telling him that if he left his shift before its scheduled end the employer would consider it as a decision to quit his job, it is likely that they would respond to claimant's preemptory email of January 11, 2014 and warn him of the consequences of walking off the job. In light of the employer's position in the recent discussion with claimant about the employer's compensation requirements, it is also unlikely that the executive director and the team leader would not at least have informed claimant that the employer did not intend to compensate him for his sleep period on January 12-13, 2014. Because, on the evidence in the record, the testimony of the employer's witnesses was more consistent with the undisputed facts, it provides the more likely explanation for claimant's behavior on January 11, 2014. More likely than not, despite being warned that the employer would consider him to have quit, claimant left his shift early on January 11, 2014 after learning the employer was not going to compensate him for a scheduled sleep period. By his behavior in leaving his shift early after he was warned, claimant evidenced an unequivocal unwillingness to continue working for the employer. Claimant's work separation was a voluntary leaving on January 11, 2014.

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 P3d 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.

Because claimant insisted that the employer discharged him, he did not emphasize his reasons for leaving work. We infer from the record that claimant left work because he thought the employer's policy about unpaid sleep period was contrary to OAR 839-020-0042(2) or some "implied agreement" with the employer to compensate him for a third sleep period during a weekend shift. See Transcript at 18. Claimant presented insufficient evidence about the employer's actual compensation policy and how

the employer scheduled claimant for work to enable us to determine whether those policies might have violated the applicable regulation. Claimant also did not present sufficient evidence about the basis for his assertion that he had an implied compensation agreement with the employer, or the particulars of that agreement to enable us to determine whether the employer made such an agreement. However, claimant did not dispute that the employer first became aware of his position that OAR 839-020-0042(2) did not required the employer to compensate him for his sleep periods around the time of the January 2014 meeting. Claimant also did not dispute that the employer intended to look its compensation and scheduling policies to try to determine whether it could arrange a schedule more acceptable to claimant, and that the executive director told him during the meeting that the employer would report back to him on January 17, 2014. Claimant conceded that, rather than a management rejection of his concerns, the results of that meeting were "inconclusive." Transcript at 16. A reasonable and prudent community support specialist, exercising ordinary common sense, who had recently met with management to discuss the lawfulness of the employer's compensation and scheduling policies, would have allowed management an opportunity to look into the employer's policies and to determine whether they were lawful before deciding to quit his job. Because claimant did not show that the employer's policies were unlawful and did not show that the employer, after it became aware of claimant's objections, intended to continue to enforce unlawful policies on an ongoing basis, claimant did not show that he had good cause for leaving work when he did.

Claimant did not demonstrate good cause for leaving work. Claimant is disqualified from receiving unemployment insurance benefits.

DECISION: Hearing Decision 14-UI-14951 is affirmed.

Susan Rossiter and J.S. Cromwell;
Tony Corcoran, not participating.

DATE of Service: June 3, 2014

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/AppellateCourtForms.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.