

EMPLOYMENT APPEALS BOARD DECISION

2014-EAB-0714

Affirmed
Disqualification

PROCEDURAL HISTORY: On March 5, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant quit work without good cause (decision # 100037). Claimant filed a timely request for hearing. On April 14, 2014, ALJ Triana conducted a hearing, and on April 16, 2014 issued Hearing Decision 14-UI-15236, affirming the Department's decision. On April 28, 2014, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Oregon Medical Group employed claimant as an x-ray technologist from May 29, 2001 to December 12, 2013.

(2) During the last two years of claimant's employment, the employer required him to perform additional duties, including cleaning machines and ordering supplies. In August 2013, claimant refused to perform the additional duties because he believed they jeopardized his x-ray technologist license by taking time away from patients. The employer responded by having claimant escorted from work. Claimant took an approved personal leave of absence from work through November 7, 2013 due to "grief" following the death of a family member. Transcript at 7.

(3) While on leave, claimant searched for other work because he believed the employer would discharge him when he returned to work for having refused to clean machines and order supplies. In October 2013, however, claimant's supervisor informed him he would not have to perform those duties when he returned to work.

(4) On November 8, 2013, the employer notified claimant in writing that although he had exhausted it had decided to extend his leave of absence through December 11, 2013. The employer informed claimant that he was required to provide it with a fitness for duty certificate from his physician prior to returning to work, and that the employer would provide him the appropriate form before the conclusion of his leave of absence. The employer instructed claimant to contact the employer's human resources

manager via email or telephone if he was able to return to work before December 11, stating that the human resources manager would send him the fitness for duty form for his physician to complete. The employer informed claimant that his employer sponsored health insurance would end on November 30, 2013. The employer stated that if the employer did not receive the completed fitness for duty certificate form by December 11, 2013, his employment would be terminated on December 12. The employer concluded by instructing claimant to contact the human resources manager if he had any questions.

(5) Claimant was able to return to work for the employer. However, he did not inform the human resources manager. On Friday, November 29, 2013, claimant received the fitness for duty certificate form from the employer. However, claimant's employer sponsored health insurance was expiring on November 30, and he did not want to pay his physician to complete the form. He did not believe he should have been required to provide a fitness for duty certificate in order to return to work, and still believed he would be discharged when he returned to work for having refused to clean machines and order supplies in August 2013. Claimant therefore did not have his physician complete the fitness for duty certificate form.

(6) Claimant did not inform the human resources manager that he was unwilling to provide a fitness for duty certificate. Nor did he report for work on December 12, 2013. The employer notified claimant in writing that his employment was terminated.

CONCLUSIONS AND REASONS: We agree with the Department and the ALJ that claimant quit work without good cause.

The first issue in this case is the nature of the work separation. OAR 471-030-0038(2)(b) (August 3, 2011) provides that 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. If the employee could have continued to work for the same employer for an additional period of time, the work separation is a quit. OAR 471-030-0038(2)(a). "Work" means "the continuing relationship between an employer and an employee." OAR 471-030-0038(1)(a) (August 3, 2011).

At hearing, claimant testified that he was willing to continue working for the employer, and telephoned the employer's human resources manager on a weekly basis from November 8 through December 12, 2013 but that the human resources manager was never available. Transcript at 25, 28. However, claimant admitted that he never left a message for the human resources manager stating that he was able to return to work before December 11, stating that he was willing to return to work but unwilling to provide a fitness for duty certificate, asking the human resources manager to return his call, or even stating that he had called. Transcript at 21. Claimant also admitted that he made no attempt to email the human resources manager. Transcript at 21-22. More likely than not, claimant did not inform the human resources manager that he was able to return to work, provide the fitness for duty certificate by December 11, and report for work on December 12 because he was unwilling to continue to work for the employer. The employer did not prevent claimant from continuing to do so. Because claimant could have continued to work for the employer by providing the certificate and reporting for work, the work separation is a quit.

A claimant who quits work is disqualified from the receipt of benefits unless he proves, by a preponderance of the evidence, that he had good cause for quitting 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 quit 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.

More likely than not, claimant quit work because he believed he would be discharged when he returned to work from his leave of absence for having refused to clean machines and order supplies in August 2013. In October 2013, however, claimant’s supervisor informed him he would not have to perform those duties when he returned to work. On November 8, 2013, the employer allowed claimant to extend his leave of absence, and stated that he would be allowed to return to work on or before December 12 if he provided a fitness for duty certificate by December 11. Claimant failed to show by a preponderance of evidence that the employer intended to discharge him when he returned. Absent a showing that claimant’s discharge was reasonably certain and likely imminent, claimant failed to establish that no reasonable and prudent person would have returned from his leave of absence and continued working for the employer for an additional period of time.

We therefore conclude that claimant quit work without good cause. Claimant is disqualified from the receipt of benefits.

DECISION: Hearing Decision 14-UI-15236 is affirmed.

Tony Corcoran and J.S. Cromwell, *pro tempore*;
Susan Rossiter and D.E. Larson, not participating.

DATE of Service: May 29, 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.