

EMPLOYMENT APPEALS BOARD DECISION

2014-EAB-0742

*Affirmed
Disqualification*

PROCEDURAL HISTORY: On February 11, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant voluntarily left work without good cause (decision #152206). Claimant filed a request for hearing on March 6, 2014. On March 13, 2014, ALJ Kangas issued Hearing Decision 14-UI-12413, dismissing claimant's request for hearing as untimely, subject to claimant's "right to renew" the request by submitting a response to the "Appellant Questionnaire" attached to the hearing decision within 14 days of the date the decision was mailed. On March 17, 2014, the Office of Administrative Hearings (OAH) received claimant's response. On April 3, 2014, OAH issued a notice of hearing scheduled for April 17, 2014. On April 17, 2014, ALJ S. Lee conducted a hearing, and on May 1, 2014 issued Hearing Decision 14-UI-16673, allowing claimant's request for hearing, and affirming decision #152206. On May 3, 2014, claimant filed an application for review with the Employment Appeals Board (EAB).

No adversely affected party applied for review of that portion of Hearing Decision 14-UI-16673 allowing claimant's request for hearing. We therefore confine our review of Hearing Decision 14-UI-16673 to the issue of whether claimant voluntarily left work with good cause.

FINDINGS OF FACT: (1) Salem-Keizer Public Schools employed claimant from June 1989 to December 13, 2013 as a custodian.

(2) As a result of repeated attendance violations, on September 30, 2013, claimant signed a last chance agreement with the employer stating, "You understand that should you be absent in excess of the district policy standards, or fall into lost pay, you will be disciplined in accordance with this Agreement, by termination of your employment." Transcript at 37. Claimant agreed to waive his right to file any grievance over a termination that was based on a violation of the terms of the agreement.

(3) On December 12, 2013, claimant did not report to work because he felt tired and “emotionally drained.” Transcript at 29. Claimant realized after he failed to report to work that he did not have any paid leave available to use for December 12, 2013, and that the employer would probably consider his failure to report to work that day as a “fall into lost pay,” which was prohibited by the last chance agreement.

(4) On Friday, December 13, 2013, claimant did not report to work because he assumed the employer had discharged him for his failure to report for work on December 12, 2013.

(5) Had claimant reported to work on December 13, 2013, there was continuing work available.

(6) On Monday, December 16, 2013, claimant did not report to work. He called and left a message for his supervisor, stating, “I’m mailing my badge and keys in. Good-bye.” That day, the employer mailed claimant a letter stating, “This is to acknowledge and accept the verbal resignation you gave [your supervisor]. Your resignation is effective December 12th, 2013. Please return your district ID badge and keys to the custodial department as soon as possible. If you have any questions, please contact [the employer] at [telephone number].” Transcript at 38 to 39. Claimant mailed the employer his keys and badge.

(7) The employer and claimant did not communicate again after the employer mailed the letter to claimant on December 16, 2013.

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

The first issue is the nature of the work separation. 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. OAR 471-030-0038(2)(a) (August 3, 2011). 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. OAR 471-030-0038(2)(b). “Work” means “the continuing relationship between an employer and an employee.” OAR 471-030-0038(1)(a).

Claimant testified that he believed the employer discharged him because he violated a term of his last chance agreement by missing work on December 12, 2013 without having any paid leave available. Transcript at 18 to 19, 29 to 30. However, the record fails to show that the employer severed the employment relationship on that date. It was reasonable for the employer to assume claimant was no longer willing to work for the client because he did not report to work for three consecutive days, left a voicemail message stating he would turn in his badge and key, and did not respond when the employer sent claimant a letter in which it accepted his resignation. Claimant made no attempt to clarify that he was not quitting or that he was willing to continue working for the employer. The work separation occurred because claimant failed to report to work or communicate to the employer his willingness to return to work. Because the record shows claimant could have continued to work for the employer for an additional period of time, the work separation was a quit.

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.

Claimant quit because he mistakenly assumed that the employer had discharged him because he violated a term of his last chance agreement, and could not grieve the matter through his union under the last chance agreement. Transcript at 30-31. Thus, the issue is whether no reasonable and prudent person would have contacted the employer to confirm he was willing to work once he was able to return to work. The employer did not tell claimant he was discharged. Rather than abandoning his job, claimant had the reasonable alternative of contacting his supervisor to explain that he had missed work because he did not feel well, that he mistakenly believed he had paid leave available before he took the day off from work, and that he was willing to return to work. Claimant failed to show that no reasonable and prudent person would have contacted the employer to clarify why he missed work, and explain that he had not quit and was willing to continue working for the employer.

We therefore conclude that claimant quit work without good cause, and that he is disqualified from the receipt of unemployment insurance benefits based on this work separation.

DECISION: Hearing Decision 14-UI-16673 is affirmed.

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

DATE of Service: June 9, 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.