

EMPLOYMENT APPEALS BOARD DECISION

2014-EAB-1206

*Affirmed
Disqualification*

PROCEDURAL HISTORY: On June 3, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant voluntarily left work without good cause (decision # 93333). Claimant filed a timely request for hearing. On June 23, 2014, ALJ Frank conducted a hearing, and on July 1, 2014 issued Hearing Decision 14-UI-20701, affirming the Department's decision. On July 15, 2014, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant submitted two written arguments, the first on July 15, 2014 and the second on July 22, 2014. The first argument contended that claimant was denied a fair hearing because he faxed certain documents he intended to offer into evidence at the hearing to an incorrect phone number and, since the ALJ had not received those documents, the ALJ was unable to consider them when reaching his decision. In the second argument, claimant submitted to EAB the documents that the ALJ did not receive and which could not be entered into evidence at the hearing. In connection with claimant's submission of new information to EAB, if claimant had carefully read the Notice of Hearing mailed to him on June 10, 2014, he would have seen on page one that he needed to fax the documents to the ALJ at the Office of Administrative Hearings (OAH) and that the phone number for OAH was listed on the certificate of service attached to that notice. Record Document, June 10, 2014 Notice of Hearing. Because it was within claimant's reasonable awareness to fax the documents to the phone number where the ALJ could receive them, claimant did not show that factors or circumstances beyond his reasonable control prevented him from offering those documents during the hearing as required by OAR 471-041-0090 (October 29, 2006). EAB therefore did not consider those documents when reaching this decision. In connection with claimant's contention that he was denied a fair hearing when the ALJ made his decision without reviewing those documents, the ALJ made clear to claimant during the hearing that he could testify about the contents of the documents and invited claimant on several occasions to do so, which he did. Audio at ~ 6:00, ~22:50, ~23:30, ~25:37, ~26:50. EAB reviewed the hearing record in its entirety and it shows that claimant was not prejudiced by the ALJ's failure to receive the documents from him. The record further shows that the ALJ inquired fully into the matters at issue and gave all parties an opportunity for a fair hearing as required by ORS 657.279(3) and OAR 471-040-0025(1)

(August 1, 2004). Under the circumstances, it does not appear that claimant was denied a reasonable opportunity to present evidence on his own behalf.

FINDINGS OF FACT: (1) Hull-Oakes Lumber Company employed claimant from September 14, 2012 until May 14, 2014. Claimant was last employed performing fire watch and security rounds as well as clean-up duties.

(2) For several years, claimant has experienced post-traumatic stress disorder (PTSD). On and off over those years, claimant has received treatment for PTSD symptoms. During his employment, Claimant was not in treatment for PTSD.

(3) Claimant worked a swing shift, from approximately 4:00 p.m. until midnight. There were only a few employees working during swing shift at the mill. When claimant performed security rounds, he was unaccompanied by other employees.

(4) On Thursday, May 8, 2014 at approximately 10:00 p.m., claimant spoke with a coworker and told the coworker that the coworker was neglecting his work duties. The coworker became upset. A physical altercation resulted and the coworker approached claimant with a pipe and took out a knife. Claimant was not hurt. The coworker left the mill premises on foot and did not remove his car from the employer's parking lot. After the altercation, claimant called the mill superintendent to report the incident, but did not call emergency services or the police for assistance. The mill superintendent called emergency services and went to the workplace to meet with the responding officers. Shortly after, the mill superintendent received a voicemail message from claimant's coworker telling him that it was claimant who had attacked him earlier in the evening. After the responding officers interviewed claimant, claimant remained at the workplace and finished his shift in May 8, 2014. Claimant did not tell the superintendent that he was afraid to work or ask for any days off. The superintendent was most concerned about whether one of claimant's female coworker's thought that she was safe.

(5) After the altercation, claimant worked his normal shifts on Friday, Saturday and Sunday, May 9 through May 11, 2014. On approximately May 9, 2014, claimant spoke with the mill superintendent about obtaining legal representation for himself after the police arrested the coworker. Claimant also asked if he could take over the coworker's position, which was also on the swing shift swing shift. Claimant did not ask for a transfer to a different shift to avoid the coworker, or to the day shift where he might feel safer working. Had claimant specifically requested a transfer to the day shift because of concerns for his physical safety, the employer would have made authorized it. Audio at ~33:20, ~33:31. Had claimant requested a leave of absence to obtain treatment for an aggravation of PTSD symptoms or to allow a resolution of the coworker's legal situation, the employer would have authorized it. Audio at ~35:32.

(6) Sometime before May 14, 2014, claimant learned that the employer had discharged the coworker with whom he had the altercation. Claimant also learned that, although the employer had forbidden the coworker from entering the mill premises, the employer was going to allow the coworker to return at some point to remove his car from the parking lot. On claimant's next scheduled workday, Wednesday, May 14, 2014, claimant reported for his normal shift and called the mill superintendent at approximately 9:00 p.m. In that call, claimant told the superintendent that he could not "handle what's going on right now." Audio at ~33:51. Claimant then tried to discuss a situation that had taken place off-duty and

away from the mill between himself and the former coworker in which claimant thought that the former coworker had "harassed" him. Audio at ~39:08. The superintendent told claimant that since the coworker was no longer employed and the alleged incident did not take place at the mill, there was nothing he could do about it. Claimant then told the superintendent that he wanted to use his two accrued vacation days and not return to the mill after Friday, May 16, 2014. The superintendent asked claimant if he was quitting work and claimant said that he was. The superintendent asked claimant if he was sure that he wanted to quit, and claimant said that he was, but that he would finish his shift.

(7) On May 14, 2014, claimant quit work and did not return to the workplace.

CONCLUSIONS AND REASONS: 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). Claimant had PTSD, a permanent or long-term "physical or mental impairment" as defined at 29 CFR §1630.2(h). A claimant with that impairment who quits work must show that no reasonable and prudent person with the characteristics and qualities of an individual with such impairment would have continued to work for his employer for an additional period of time.

Claimant contended at hearing that he left work because he was in "fear of my life" after the altercation with the coworker and that the altercation had triggered latent PTSD symptom. Audio at ~9:20, ~13:54. Claimant's stated fear was based on a belief that his former coworker might return to the workplace and physically attack him when he was alone on security rounds during the swing shift. Audio at ~9:20, ~12:33. However, claimant's fears are belied by his actions after the fight. . Not only did claimant not call emergency services after the incident on May 8, 2014, but he finished out his shift on that day, did not call in sick on subsequent days and worked his normal shifts for four more workdays. These are not the actions that would be expected of a person so emotionally traumatized by an event that he needs to leave work. While claimant contended that he told the mill superintendent on May 8, 2014, May 9, 2014 and May 14, 2014 that he was too fearful to continue working swing shift and wanted to be transferred to the day shift or to take a leave of absence to deal with his PTSD symptoms, the mill superintendent disputed this and stated that claimant had not done so. Audio at ~15:26, ~16:11, ~20:26, ~20:44, ~33:05, ~33:51, ~35:21, ~36:48. The superintendent also testified that the employer would have authorized a transfer or a leave of absence for claimant had claimant requested it based on his emotional reaction to the May 8, 2014 incident. Audio at ~33:05, ~33:20, ~33:31, ~35:32. Both parties testified with apparent sincerity and there is no reason in the record to believe or disbelieve either party's testimony, or to prefer it that of the other. Where the evidence on a disputed issue is evenly balanced, we are required to resolve the uncertainty against claimant, who was the party who carried the burden to persuasion in this matter. See *Young v. Employment Department*, 170 Or App 752, 13 P3d 1027 (2000). On this record, it is more likely than not that claimant did not ask the employer for a transfer to another shift or for a leave of absence and did not reasonably inform the employer that his PTSD symptoms had

become debilitating as a result of the fight on May 8, 2014. It is also more likely than not that the employer would have accommodated any such requests that claimant made them.

On the facts we have found, a reasonable and prudent person with PTSD, exercising ordinary common sense, would not have quit work as a result of fearing an attack at night in the workplace from a former employee until he had determined that the employer was unwilling or unable to transfer him to a day shift where he felt safer. A reasonable and prudent person with PTSD, who was aware, as claimant was, that his symptoms might lessen over time and become more "processable," also would not have quit work as a result of the May 8, 2014 fight until he sought a leave of absence from the employer obtain treatment for the exacerbation of his PTSD symptoms or to determine whether the symptoms were going to abate during a reasonable time away from work. Audio at ~ 18:04. Because claimant left work before taking the actions of a reasonable and prudent person, he did not show good cause for leaving work when he did.

Claimant did not establish, more likely than not, that he had good cause for leaving work at the time that he quit. Claimant is disqualified from receiving unemployment insurance benefits.

DECISION: Hearing Decision 14-UI-20701 is affirmed.

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

DATE of Service: August 14, 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 court.oregon.gov. Once on the website, click on the blue tab for "Materials and Resources." On the next screen, click on the tab that reads "Appellate Case Info." On the next screen, select "Appellate Court Forms" from the left panel. On the next page, select the forms and instructions for the type of Petition for Judicial Review that you want to file.

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