

EMPLOYMENT APPEALS BOARD DECISION

2014-EAB-1227

*Affirmed
Disqualification*

PROCEDURAL HISTORY: On June 18, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant voluntarily left work without good cause (decision # 102208). Claimant filed a timely request for hearing. On July 14, 2014, ALJ Buckley conducted a hearing at which the employer did not appear and issued Hearing Decision 14-UI-21448, affirming the Department's decision. On July 17, 2014, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Rick Franklin Corporation employed claimant as a general laborer from February 27, 2012 until May 21, 2014. As part of its business, the employer constructed bridges from recycled metal.

(2) In approximately February 2014, claimant was assigned to use a portable cutting torch, with a liquid oxygen tank, to cut metal for a bridge. A second component to the portable torch was a propane tank. Claimant observed that the regulators to the liquid oxygen tank were freezing and breaking, which caused the tanks to leak the liquid oxygen on the ground and on the propane tank. Liquid oxygen is volatile and explosive, particularly when it makes contact with a petroleum-based product like propane. At approximately that time, claimant told his supervisor and the employer's general manager at a safety meeting and on a few other occasions that the liquid oxygen tanks were leaking and causing a safety risk. In response, the employer replaced the broken regulators to the oxygen tanks but the oxygen tanks still leaked.

(3) For approximately a month after claimant first complained about the oxygen tanks, claimant was assigned to perform work that did not require him to use the portable cutting torch. Sometime in March 2014, claimant started again using the portable torch. At approximately the time that he was assigned to this work, claimant asked the employer's vice-president if the problem with the leaking oxygen tanks had been fixed. The vice-president told claimant that he did not know. The next day the vice-president

spoke with the general manager and claimant learned that the general manager had told the vice-president that the problem had not been solved, but he was "looking into getting it fixed." Audio at ~7:43. The tanks still continued to leak liquid oxygen.

(4) Shortly after claimant made his second complaint about the leaking oxygen tanks, he was again assigned to work that did not require him to use the portable cutting torch. On approximately May 20, 2014, claimant's work duties changed and he needed to use the cutting torch. That day, claimant observed that the tanks were still leaking and thought it was unsafe to use the torch. Claimant informed the general manager that the tanks continued to leak and asked if any steps had been taken to solve the problem. The general manager told claimant that he did not know because he had been out of town. Claimant concluded that, by his failure to take active measures to resolve the problem of the leaking oxygen tanks, the general manager did not consider employee safety a serious matter. Claimant told the general manager that he was quitting work due to the risk of injury if he used the cutting torch with the liquid oxygen tanks in their present condition. The general manager asked claimant to reconsider and requested that claimant come in to work the next day to meet with himself and other representatives of the employer to discuss the matter. Claimant agreed to do so.

(5) On May 21, 2014, claimant met with his immediate supervisor, the general manager and the vice-president. During this meeting, claimant was told that the employer had called the vendor and had arranged to replace all the oxygen tanks the very next day. Audio at ~17:20. At the meeting, the supervisor, the general manager and the vice-president also expressed concern over other safety issues in the workplace as well as the employer's financial position. From those comments and claimant's past unresolved complaints about the oxygen tanks, claimant concluded that it was unlikely that the leaking oxygen tanks were actually going to be replaced. At the end of the meeting, claimant told the employer's representatives that he was quitting work. On May 22, 2014, all of the liquid oxygen tanks were replaced with new tanks.

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 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.

Based on claimant's testimony, the problem of the leaking oxygen tanks, if left unresolved, was an objectively serious safety concern. However, on the day that claimant ultimately quit work, the employer's management met with claimant in an apparent effort to dissuade him from leaving. At that meeting, the management did not tell claimant that he was required to use the existing oxygen tanks in their then unsafe condition. Rather, the management committed to claimant that it had already taken specific actions to resolve the problem of the leaking tanks the very next workday by replacing all the existing oxygen tanks with new ones. Notably, claimant did not contend that replacing the tanks was an

inadequate solution to the safety issues raised by the leaking tanks. If claimant had reported for work on May 22, 2014, it is unlikely he would have been unable to ascertain whether the tanks had actually been replaced, and would have risked injury by unknowingly using defective, leaking tanks. Claimant would have been readily able to observe whether new non-defective oxygen tanks had actually been delivered to the worksite. Given that claimant had just met with upper management and received an apparently serious and specific commitment to promptly obviate his stated safety concern, a reasonable and prudent employee who wanted to remain employed, exercising ordinary common sense, would not have quit work until May 22, 2014, and would have done so at that time only if he determined that the employer had not followed through and replaced the leaking liquid oxygen tanks. Because claimant did not take reasonable steps before quitting work, claimant did not demonstrate good cause for leaving work when he did.

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

DECISION: Hearing Decision 14-UI-21448 is affirmed.

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

DATE of Service: August 19, 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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