

EMPLOYMENT APPEALS BOARD DECISION

2014-EAB-1269

Reversed
No Disqualification

PROCEDURAL HISTORY: On June 17, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant but not for misconduct (decision # 102843). The employer filed a timely request for hearing. On July 9, 2014, ALJ Triana conducted a hearing, and on July 14, 2014 issued Hearing Decision 14-UI-21444, concluding claimant voluntarily left work without good cause. On July 25, 2014, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant submitted a written argument in which he stated that he was including a copy of a physician's note for EAB's consideration. However, no document was enclosed with claimant's argument. Since EAB has decided this matter in claimant's favor without reviewing the physician's note, its failure to receive the document is not prejudicial to claimant. When reaching this decision, EAB otherwise considered claimant's written argument to the extent it was based on evidence in the hearing record. ORS 657.275(2); OAR 471-041-0090 (October 29, 2006).

FINDINGS OF FACT: (1) The Mills Casino Hotel employed claimant as a kitchen steward from March 22, 2011 until April 21, 2014.

(2) In approximately 2004, claimant was first diagnosed and treated for serious depression. Claimant received prescription medication for his depression until approximately 2008 or 2009. In 2014, claimant began to experience symptoms of severe anxiety as well as a recurrence of major depressive symptoms. Claimant also began to drink heavily and abuse alcohol, which worsened his mental health symptoms. Between approximately February and mid-March 2014, claimant went to the hospital emergency room four times for physical manifestations of anxiety or depression. During this time, claimant tried to work but was unable to do so consistently. At some point before March 25, 2014, claimant sought medical treatment for his worsening anxiety and depression. Claimant's physician prescribed medications for both claimant's anxiety and depression symptoms. On March 25, 2014, claimant's physician evaluated

that claimant was unable to work as a consequence of his mental health conditions and completed an authorization form excusing claimant from work under the Family Medical Leave Act (FMLA).

(3) Sometime around March 25, 2014, the employer approved a leave for claimant under FMLA. The employer made the leave retroactive to March 1, 2014 and sent claimant a letter stating that his FMLA leave was going to exhaust on April 9, 2014. Without that retroactivity, there was a concern that claimant was going to be discharged under the employer's attendance policy because he would have otherwise exceeded the maximum number of unexcused absences allowed. On approximately April 8, 2014, claimant saw his physician again. The physician told claimant that he needed an additional month away from work to recuperate and that he was not in any condition to return to work. The physician completed a form excusing claimant from work until May 4, 2014 and, on that form, noted that claimant had a follow-up appointment on April 18, 2014.

(4) Sometime shortly after April 8, 2014, claimant visited the workplace and gave the April 8, 2014 physician's form to the employer's benefits and safety administrator. During that visit, the administrator told claimant that the employer had made an error in calculating the duration of his FMLA leave and that the leave was actually scheduled to exhaust on April 17, 2014. The administrator told claimant that, since she was aware that he was scheduled to see his physician on April 18, 2014, she would extend his FMLA leave for one day so he would have time to bring in any physician's note that he received during that visit. Claimant interpreted the administrator's statement to him to mean that he needed to obtain a physician's note releasing him to work on April 18, 2014 or his employment was going to be terminated. Claimant assured the administrator that his physician was going to release him to work on April 18, 2014. Claimant and the administrator did not discuss what actions the employer would take if claimant did not receive a physician's release and what alternatives might be available to claimant, under those circumstances, to obtain an approved leave after the expiration of his FMLA leave.

(5) Throughout the time of his FMLA leave, claimant experienced acute symptoms from anxiety and depression. Claimant was not thinking clearly and was having problems with his memory and ability to process and retain information. During this time, claimant was "all messed up in the head" and experienced "weird episodes" in which he thought he was dying. Transcript at 17, 22. Claimant's neighbor, who was trying to help him through this period, thought that claimant "mentally [] just wasn't there" and that he was "out in left field." Transcript at 42.

(6) Claimant had arranged to have a friend drive him to his physician's appointment on April 18, 2014. However, the friend was delayed by a court appearance and did not arrive to pick-up claimant in time to allow him keep the appointment with his physician. On April 18, 2014, claimant called the employer's benefits and safety administrator and, when he was unable to reach her, left a message stating that he was not able to see his physician due to transportation difficulties. Claimant was unable to arrange another appointment with his physician until a few days later. Claimant assumed that the employer had discharged him because he had not obtained a physician's release on April 18, 2014. Based on this belief, claimant did not try to contact the benefits administrator or any other employer representative after April 18, 2014.

(7) On April 18, 2014, the employer's benefits administrator called claimant three times in response to his telephone message to her. Claimant's phone was disconnected and the benefits administrator was unable to reach him. The administrator wanted to tell claimant that she could and would authorize a

personal leave to extend the time of his excused absences from work for at least an additional thirty days beyond the expiration of his FMLA leave.

(8) By April 21, 2014, the employer still had not been able to reach claimant, claimant had not contacted the employer and claimant's authorized leave had been expired for three days. On that date, the employer sent claimant a letter informing him that it considered him to have abandoned his employment.

(9) Also sometime around April 21, 2014, claimant was able to keep an appointment that he had rescheduled with his physician. At that time, the physician was unwilling to give claimant a release to work. The physician told claimant that he was not yet "mentally sound enough" to return to work. Transcript at 19.

CONCLUSIONS AND REASONS: We agree with the ALJ's conclusion that claimant voluntarily left work. We disagree with the ALJ's conclusion that claimant's voluntary leaving was without good cause.

The first issue addressed 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 employer for an additional period of time but was not allowed to do so by the employer, the separation is a discharge. OAR 471-030-0038(2)(b). The date a work separation occurs is the date the employer-employee relationship is severed. OAR 471-030-0038(1).

Although claimant contended that the employer discharged him, the employer's witness testified repeatedly that work was available for claimant and that, if she had been able to contact claimant after April 18, 2014, she had the authority to, and would have, extended his leave to enable him to either obtain a physician's release or a physician's certificate authorizing a personal leave for medical reasons. Transcript at 6, 9, 11, 37. Reconciling the testimony of both parties, it appears, more likely than not, that claimant's conclusion that the employer intended to discharge him on April 18, 2014 if he had not obtained a physician's release was apparently based on a misunderstanding of what the employer's benefits administrator had told him on or around April 8, 2014. Claimant seems to have confused the administrator's comments about a termination of his FMLA leave with the termination of his employment. Transcript at 21, 25. On these facts, on April 18, 2014, the employer was willing to allow claimant to continue working for it, even if that continuation was through the mechanism of an extension of an approved leave of absence. Claimant was the first party to objectively manifest an intention to sever the work relationship when he stopped all contact with the employer after April 18, 2014. Transcript at 20, 25. Although the reason claimant stopped communicating with the employer may have been based on mistaken belief that he had been discharged, claimant's behavior, viewed objectively, nonetheless demonstrated an unwillingness to continue the work relationship with the employer. We agree with the ALJ that claimant's work separation was a voluntary leaving on April 18, 2014, the day he stopped all contact with the employer. Hearing Decision 14-UI-21444.

The second issue addressed is whether the circumstances under which claimant left work disqualify him from benefits. 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 depression and anxiety, permanent or long-term "physical or mental impairments" as defined at 29 CFR §1630.2(h). A claimant with those impairments who quits work must show that no reasonable and prudent person with the characteristics and qualities of an individual with such impairments would have continued to work for his employer for an additional period of time.

While the ALJ found that claimant was "severely depressed" when he left work, she concluded that he did so without good cause and was disqualified from benefits. Hearing Decision 14-UI-21444 at 2, 4. The ALJ reasoned that claimant's failure to contact the employer after April 18, 2014 to confirm that he was indeed discharged and to attempt to explore alternatives to preserve his employment was "not reasonable, even from the perspective of a reasonable and prudent person suffering from depression and anxiety." Hearing Decision 14-UI-21444 at 4. We disagree

As described by claimant and his witness, claimant's mental processes during his FMLA leave and at the time he left work were seriously impaired. Transcript at 17, 18, 19, 21, 22, 27, 30, 42. It is undisputed that the employer's administrator told claimant that his FMLA leave was expiring on April 17, 2014 and she was extending it for one day to enable him to attend his physician's appointment and obtain a physician's note, and that she could not extend the FMLA leave for any more additional days. Transcript at 6, 14, 21, 37. Because claimant had already provided to her a physician's note that excused him from work until May 4, 2014, it was not unreasonable for him to assume that the new note that the administrator wanted him to obtain was a release to work from the physician. Based on this assumption and the information about the expiration of his FMLA leave, combined with his disturbed mental state, it was also not unreasonable for claimant to conclude that if he did not obtain the physician's release and return to work on or shortly after April 19, 2014, he was going to be discharged because any future absences would not be excused under an approved leave. Moreover, the benefits administrator knew during this time that claimant was on leave for a mental health condition and should have been reasonably aware that she needed to be especially clear when she communicated with claimant. Under these circumstances, a reasonable and prudent person with claimant's impaired functioning might reasonably have failed to contact the employer after April 18, 2014 because he believed he was discharged.

We accept the testimony of the benefits administrator that, if she had been able to reach claimant after April 18, 2014, she would have authorized a personal leave for him, which would have protected claimant from being discharged. Transcript at 6, 11, 15, 37. However, she was also clear in her testimony that in her contacts with claimant before he quit work, she had not raised the possibility of extending his leave after his FMLA benefits were exhausted through the mechanism of a personal leave of absence. Transcript at 6, 14, 15, 37. The benefits administrator's made the point in her testimony that, even though she had not explicitly told him, claimant should reasonably have been aware that she would authorize a personal leave to extend his approved time away from work beyond the FMLA authorized time because she had previously done so for him earlier in the year after his FMLA leave for a broken ankle had expired. Transcript at 37. However, it was clear from claimant's hearing testimony that his memory for facts and events was seriously disturbed at the time he left work. Transcript at 17, 18, 19, 20, 21, 22, 27, 28, 30, 42. It is plausible, and likely, that claimant's mental state at that time was such that a reasonable awareness of the option of additional personal leave cannot be imputed to him at

the time he left work. Nor, based on the evidence in the record about claimant's mental state, can what would otherwise be the actions of a reasonable and prudent person be imputed to him, such as confirming with the employer that he was discharged or contacting the employer to determine if there was any way he could retain his job before he decided to stop all contact. *See* Hearing Decision 14-UI-21444 at 4. At the time that claimant left work under the circumstances in this record, a reasonable and prudent person, with symptoms of depression and anxiety as profound and distorting as claimant's, would have concluded that he was discharged, would not have contacted the employer to confirm the reasonableness of this belief or to explore if any alternatives were available to him and would have stopped all contact with the employer.

Claimant voluntarily left work with good cause. Claimant is not disqualified from receiving unemployment insurance benefits.

DECISION: Hearing Decision 14-UI-21444 is set aside, as outlined above.

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

DATE of Service: August 28, 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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