

EMPLOYMENT APPEALS BOARD DECISION

2014-EAB-1350

Affirmed
Disqualification

PROCEDURAL HISTORY: On July 3, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant voluntarily left work without good cause (decision # 122541). Claimant filed a timely request for hearing. On July 24, 2014, ALJ Wipperman conducted a hearing, and on August 4, 2014 issued Hearing Decision 14-UI-22714, affirming the Department's decision. On August 12, 2014, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Stayton Builders Mart employed claimant as a delivery driver and to perform miscellaneous other tasks from October 19, 1998 until May 30, 2014.

(2) During the time that claimant worked for the employer, he had a number of on-the-job injuries for which he made worker's compensation claims to the employer's compensation insurance carrier, the State Accident Insurance Fund (SAIF). Sometime before May 30, 2014, claimant had his most recent injury at work and filed another worker's compensation claim with SAIF. At some point, claimant returned to light duty work. Claimant hired an attorney to assist him in obtaining a settlement of this worker's compensation claim.

(3) At some point after claimant filed his most recent worker's compensation claim, SAIF determined that claimant was a "high risk" employee and encouraged the employer's owner to separate claimant from continued employment. Audio at ~12:24. Around this time, claimant's lawyer told claimant that SAIF wanted to make its settlement of his most recent worker's compensation claim, and its payment of funds to him for this injury, contingent on his agreement to leave work. Audio at ~15:57. SAIF, claimant's lawyer, the employer's owner and claimant's wife all tried to draft a letter that would include claimant's agreement to resign from work. Audio at ~13:03. None of them were able to draft a letter with acceptable wording. No final understanding was reached between SAIF and claimant's attorney that claimant's would agree to leave employment as a condition of settling his most recent worker's

compensation claim. Audio at ~18:02. Efforts to draft the letter stopped. *Id.* At some point before May 30, 2014, claimant signed a settlement agreement with SAIF and received the settlement payment from SAIF. No part of the settlement agreement required claimant to leave work. Audio at ~17:41, ~32:50.

(4) During March, April and May 2014, claimant, who was sixty-five years old, began to talk about retiring or otherwise leaving work. Audio at ~28:16. Based on these comments, the employer's owner started looking for a replacement for claimant. Sometime in early May 2014, the employer's owner located a former employee who was willing to take over claimant's job. Sometime between May 10 and May 15, 2014, the employer's owner asked claimant if he was willing to leave work at the end of May, on May 30, 2014. Claimant stated that he would "prefer" to leave at the end of July 2014. Audio at ~29:28. The owner told claimant that he did not think that the former employee who had agreed to replace him could wait until the end of July to start working for the employer. Audio at ~29:35. Claimant agreed to a separation date of May 30, 2014. Audio at ~ 29:46.

(5) Based on his discussions with the employer's owner, claimant understood that the employer was going to lay him off on May 30, 2014, with the possibility of occasional future work for the employer if the employer needed additional help. On May 30, 2014, claimant left work and did not return thereafter.

CONCLUSIONS AND REASONS: Claimant voluntarily left work without good cause.

The first issue this case presents 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 was a discharge. OAR 471-030-0038(2)(b). When an employer and a claimant mutually agree on a date when the employment will terminate, claimant's work separation is treated as a voluntary leaving and not as a discharge. *See Employment v. Shurin*, 154 Or App 352, 356, 959 P2d 637 (1998).

Claimant took the position at hearing that, although he agreed to end the work relationship with the employer on May 30, 2014, he understood that he was being "laid off," which would not disqualify him from unemployment insurance benefits. Audio at ~11:56, ~14:15, ~19:26. The words the parties use with each other to characterize the work separation is not controlling, and the regulations and case law must be applied to the facts of each case to determine the nature of the work separation. Here, claimant candidly admitted that he agreed to his work separation and the date on which that separation was going to occur. Applying the rule established in *Shurin* to these facts, claimant's work separation can only be characterized as a voluntary leaving of employment on May 30, 2014.

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 she 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.

Claimant contended that he agreed to separate from work when he did because SAIF had made the payment of his worker's compensation settlement contingent on his leaving. Audio at ~16:09, ~21:00, ~22:30. Such a contingency, if claimant had demonstrated that it continued to exist, would, very likely, have constituted good cause for his decision to leave work. *See e.g. Christina Wilcox* (Employment Appeals Board, 2104-EAB-0609, May 14, 2014) (claimant had good cause to leave work when the employer made her receipt of a worker's compensation claim contingent on her resignation); *Karen J. Russell* (Employment Appeals Board, 2014-EAB-0941, July 22, 2014) (claimant had good cause to leave work when the employer made her receipt of money under a severance agreement contingent on her resignation). However, both claimant's wife and the employer's owner testified that, whatever SAIF had initially demanded, claimant received his settlement moneys before he quit work without ultimately being required to agree to resign from employment. Audio at ~17:14, ~18:02, ~32:50. Absent such an overarching financial consideration, claimant did not show that an objectively grave reason for him compelled him to agree to leave employment when he did. Claimant did not present any other reasons for his decision to leave work other than his understanding that his work separation would be characterized by the Department as a "lay off." Audio at ~13:39, ~19:26. Claimant's belief about how the Department was going to characterize his work separation was not reasonable, and would not have led a reasonable and prudent person to decide to quit work if he did not otherwise desire to. Claimant's mistaken belief does not constitute good cause to agree to leave work.

Claimant did not show, more likely than not, that he had good cause to leave work. Claimant is disqualified from receiving unemployment insurance benefits.

DECISION: Hearing Decision 14-UI-22714 is affirmed.

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

DATE of Service: September 17, 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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