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State of Oregon
Employment Appeals Board
875 Union St. N.E.
Salem, OR 97311

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VQ 005.00

EMPLOYMENT APPEALS BOARD DECISION

2014-EAB-1608

Affirmed
Disqualification
(Descalificación)

PROCEDURAL HISTORY: On July 14, 2014, the Oregon Employment Department (the Department) served notices of two administrative decisions, the first concluding that claimant Gerardo Ayon Roman voluntarily left work without good cause (decision # 122938) and the second concluding that claimant Pascual Ayon Roman voluntarily left work without good cause (decision # 103826). On August 6, 2014, both claimants filed untimely requests for hearing on their respective administrative decisions. On August 13, 2014, ALJ Kangas issued Decision 14-UI-23292, dismissing claimant Gerardo Ayon Roman's request for hearing on decision # 122938 as untimely and Decision 14-UI-23294, dismissing claimant Pacual Ayon Roman's request for hearing on decision #103826 as untimely. Both decisions were issued subject to the particular claimant's right to renew the request by submitting a response the Appellant Questionnaire attached to the hearing decision within 14 days of the date the particular decision was mailed. On August 25, 2014, the Office of Administrative Hearings (OAH) received responses from both claimants. On August 28, 2014, OAH issued two letter rulings, one vacating and cancelling Decision 14-UI-23292 and one vacating and canceling Decision 14-UI-23294, and setting both matters for a hearing on claimants' late requests for hearing and, if appropriate, on the merits of the underlying administrative decisions. On September 19, 2014, ALJ Lohr conducted a consolidated hearing on all matters raised by both claimants' claims. On September 24, 2014, ALJ Lohr issued Hearing Decision 14-UI-25759, relating to the claim of claimant Gerardo Ayon Roman, and Hearing Decision 14-UI-25760, relating to claim of claimant Pascual Ayon Roman, both allowing the particular claimant's late request for hearing and both concluding that the particular claimant voluntarily left work without good cause. On October 6, 2014, both claimants filed applications for review with the Employment Appeals Board (EAB).

Pursuant to OAR 471-041-0095 (October 29, 2006), EAB consolidated its review of Hearing Decisions 14-UI-25759 and 14-UI-25760. For case-tracking purposes, this decision is being issued in duplicate (EAB Decisions 2014-EAB-1608 and 2014-EAB-1609).

Because no adversely affected party sought review of those parts of Hearing Decisions 14-UI-23292 and 14-UI-23294 that allowed claimants' requests for hearing, EAB has confined its review to each claimant's work separation.

EAB considered the written arguments of both claimants when reaching this decision.

FINDINGS OF FACT: (1) Lewis Farm, Inc, employed claimant Gerardo Ayon Roman (Gerardo) beginning on March 1, 1999. The employer employed claimant Pascual Ayon Roman (Pascual) beginning on February 24, 2005. Both claimants worked for the employer as general farm laborers. The employment of both claimants ended on approximately June 18, 2014.

(2) Gerardo and Pascual were brothers and performed the same type of farm work for the employer. Their work included spraying chemical pesticides to control weeds and certain burrowing animals on the employer's farm. Their work also included driving forklifts and other machinery to perform duties on the farm. The employer's supervisors and owners generally spoke to Gerardo and Pascual in English. Gerardo and Pascual were more comfortable communicating in Spanish. Neither Gerardo nor Pascual could read English.

(3) Until approximately mid-June 2014, the employer did not provide protective clothing to Gerardo and Pascual to shield their skin them from exposure to the chemical pesticides that they sprayed. Sometime in April or May 2014, Gerardo and Pascual visited a physician for symptoms that they attributed to their exposure to chemicals in the workplace. Gerardo reported to the physician that he experienced headaches, dizziness and throat and eye irritation after spraying chemicals at work. Gerardo told the physician that that the employer was not providing gloves or other protective wear to him or other employees to use when they sprayed chemicals. The physician told Gerardo not to spray chemicals at work if he did not have protection. At some point before approximately May 15, 2014, a representative from the physician's clinic contacted the Occupational and Safety Administration (OSHA) to report the physician's concerns that the employer was not taking adequate steps to protect its employees at the employer's farm.

(4) On approximately May 15, 2014 representatives from OSHA arrived at the farm unannounced and conducted an investigation of the employer's safety measures. An OSHA investigator interviewed Gerardo, Pascual and a coworker. The three told the investigator that they were spraying chemicals without wearing any protective clothing or using protective equipment, that the sprayers they used were often broken and leaked chemicals on them, that they were driving forklifts at work without any training and that one of the forklifts did not have any brakes and that another vehicle they used at work did not have a functioning reverse gear. At the conclusion of the inspection of the workplace, an OSHA investigator told the employer's owner that OSHA was principally investigating to determine if the employer was unnecessarily exposing its workers to pesticides and chemicals. The OSHA investigator told the owner that the employer needed to provide gloves for its employees when they sprayed chemicals, that the employer was also required to repair or replace the faulty chemical sprayers and to install adequate washing and restroom facilities to allow the employees to clean chemicals from their

skin after exposure as well as to provide a sufficient amount of drinking water for the employees. The investigator also told the owner that the employer was required to repair or replace any other faulty equipment and vehicles, and to provide the employees with forklift and pesticide safety training. OSHA fined the employer for various safety violations. OSHA representatives returned to the farm sometime around approximately May 19, 2014 to determine if the employer had made the necessary changes to rectify the violations. OSHA concluded that the employer had done so and did not take further action.

(5) After the OSHA visit, the employer did not assign Gerardo or Pascual to further chemical spraying because the pesticide spraying for the season had been completed. After the OSHA visit, the employer showed a pesticide training video to its employees, as required by OSHA. On May 20, 2014, the employer showed a pesticide training video in Spanish to Gerardo and Pascual. Although they both watched the video, they both refused to sign a sign-in sheet showing that they had received this training.

(6) On approximately June 13, 2014, the employer conducted a forklift safety training session for its employees, as required by OSHA. Because the training was in English, the employer provided a Spanish language interpreter to translate the presentation for Gerardo and Pascual. Both brothers asked the interpreter to explain the reason that they had been called away from their work. The interpreter left the room to consult with the owner. The interpreter's explanation of the training did not satisfy Gerardo and he understood the interpreter to state that the employer had all along been making protection available to its employees. Transcript at 31, 33-34. Gerardo did not agree with this statement and distrusted the interpreter. The interpreter's explanation also did not satisfy Pascual. Gerardo and Pascual refused to sign the sign-sheet for the training because it was in English and they could not understand what it said. Neither brother asked the interpreter to translate verbatim the language of the sign-in sheet. Neither brother participated in the forklift training session.

(7) On June 18, 2014, both Gerardo and Pascual went together to the office of the employer's owner to ask if they could have a copy of the sheet that they had refused to sign. The owner did not understand which sign-in sheet they wanted and tried to give them ones from the June 13, 2014 and May 20, 2014 trainings. When Gerardo and Pascual refused to accept either sign-in sheet, the owner told the brothers that he could not understand what they were asking for. Transcript at 24, 42. After initially stating that it was not what they wanted, the brothers settled on the sign-in sheet from June 13, 2014 and left the workplace with it. Both Gerardo and Pascual thought that the owner's confusion over the sign-in sheets was an attempt to "mock" or "insult" them. Transcript at 24, 41, 42.

(8) After June 18, 2014, Gerardo and Pascual did not return to the workplace. Neither brother told the employer that he was quitting work.

CONCLUSIONS AND REASONS: Claimants Gerardo Ayon Roman and Pascual Ayon Roman voluntarily left work without good cause.

At the outset, it was appropriate for the ALJ to consolidate in a single hearing the issues relating to both claimants' work separations, and none of the participating parties objected to the consolidation. Because both claimants alleged identical reasons for leaving work, and each claimant participated in the events that gave rise to their own and the other's work separation, it was economical to consolidate the hearings. In addition, since the disputed facts and issues were identical in both claimants' cases and both

claimant's raised identical reasons for quitting, it did not unduly complicate the issues or jeopardize the rights of any parties to consolidate the cases of both. *See* OAR 471-040-0015(5) (August 1, 2004).

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.

Both Gerardo and Pascual contended that they left work when they did because the employer's owner mocked and insulted them on January 18, 2014 and, after the OSHA investigation on approximately May 15, 2014, the owner and other supervisors had started to harass and mistreat both of them. Transcript at 16, 19, 21, 23, 35, 41, 42. It does not appear from the testimony of either that they quit work because of safety concerns or any unresolved OSHA violations. Moreover, Pascual agreed and Gerardo did not challenge, that they were not asked to spray any chemicals after May 15, 2014, which was the principal unsafe work condition that both cited. Transcript at 48. The alleged behaviors of the owner and other supervisors after the OSHA site visit to the farm and on January 18, 2014, rather than any ongoing unsafe work conditions, appear to have been the proximate cause of claimants' decisions to leave work, and they are the proper focus of our analysis.

While a supervisor's behavior may constitute good cause for a claimant to leave work if it is abusive or creates on ongoing oppressive work environment, claimant has the burden to demonstrate that the behavior, in fact, rose to the level of abuse or oppression. *See McPherson v. Employment Division*, 285 Or 541,557, 591 P2d 1381 (1979) (claimants not required to "sacrifice all other than economic objectives and *** endure racial, ethnic, or sexual slurs or personal abuse, for fear that abandoning an oppressive situation will disqualify the worker from unemployment benefits); *Beth A. Jackson* (Employment Appeals Board, 13-AB-0502, April 2, 2013) (ongoing unwanted sexual advances and touching despite making complaints); *Brenda A. Kordes* (Employment Appeals Board, 12-AB-3213, January 8, 2013) (ongoing sexual harassment); *Stephen G. Wilkes* (Employment Appeals Board, 12-AB-3173, December 14, 2012) (ongoing verbal abuse despite complaints); *James D. Hayes* (Employment Appeals Board, 11-AB-3647, February 9, 2012) (sexist and ageist remarks); *Pamela Latham* (Employment Appeals Board, 11-AB-3308, December 22, 2011) (supervisor's ongoing verbal abuse and fits of temper); *Shirley A. Zwahlen* (Employment Appeals Board, 11-AB-2864, December 12, 2011) (management's ongoing ageist comments and attitudes); *Denisa Swartout* (Employment Appeals Board, 11-AB-3063, October 28, 2011) (corporate culture hostile to women); *Kathryn A. Johnson* (Employment Appeals Board, 11-AB-2272, September 6, 2011) (supervisor's regular fits of temper and verbal abuse). Although both Gerardo and Pascual identically asserted that the owner and other supervisors "assaulted" them after the OSHA site investigation, Gerardo clarified that they meant verbal and not physical assaults. Transcript at 16, 22, 23, 40, 44. Both of the brothers generally contended that the owner and the supervisors "mistreated" them, "mocked" them, "screamed obscenities" at them, "intimidated" them, "insulted" them and were "very aggressive" toward them, but offered scant specific detail to support these conclusory characterizations. Transcript at 16, 21, 23, 27, 41, 42, 49. While they focused on their

June 18, 2014 meeting with the owner as an example of the owner's harassment and mistreatment of them, the owner denied he had laughed at them or thrown a piece of paper at them. Transcript at 23, 26, 42, 69. The owner's rebuttal testimony plausibly suggested that he was not mocking them when they asked him for a copy of the sign in sheet from June 13, 2014, but genuinely did not understand what document they were asking him about and retrieved several different sign in sheets to try to satisfy their request. Transcript at 69. Moreover, although Gerardo and Pascual claimed that the owner harassed them by asking them to sign certain papers that they did not understand, the owner's explanation that they were merely being asked to sign a sheet confirming that they had received particular trainings was not implausible. Transcript at 19, 24, 44, 53. In response to Gerardo and Pascual's claims that the owner had condoned various supervisors shooting guns at them in the farm fields after the OSHA inspection, the owner denied this but explained that, in the rural area surrounding the farm, other people sometimes did shoot guns. Transcript at 75, 79. Aside from their general assertions, neither Gerardo nor Pascual presented any testimony or other evidence from which it could be inferred that the owner or the supervisors condoned firing guns at them or actually shot the guns at Gerardo and Pascual themselves. While Gerardo and Pascual contended that the owner was harassing and intimidating them in retribution for the costs that the owner incurred in rectifying the OSHA violations that had come to light after their physician contacted OSHA, the owner denied that this was so and denied he had ever mentioned to Gerardo or Pascual the employer's costs in complying. Transcript at 75.

Most of the evidence that claimants presented to support that they had good cause to leave work was based on conclusory assertions that did not include any specific detail. The remainder of the evidence was plausibly rebutted by the employer. There is no reason in the record to disbelieve the testimony of either party, particularly when the employer's owner candidly admitted that, prior to the OSHA inspection, the employer had allowed certain unsafe working conditions to exist on the farm. Transcript at 61, 62. Where, as here, the evidence is evenly balanced on the issue of a claimant's good cause to leave work, the uncertainty must be resolved against claimants, who had the burden to proof on that issue. *See Young v. Employment Department*, 170 Or App 752, 13 P3d 1027 (2000). Based on both burden of proof principles and claimants' failure to present sufficient specific evidence to support that they left work for grave reasons, claimants did not meet their burden to show that grave reasons compelled them to leave work.

Claimant did not show good cause for leaving work when they did. Claimants are both disqualified from receiving unemployment insurance benefits based on this work separation.

DECISION: Hearing Decision 14-UI-25760 is affirmed. *Decisión de la Audiencia 14-UI-25760 queda confirmada.*

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

DATE of Service: <u>December 1, 2014</u>

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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***NOTA**: Usted puede apelar esta decisión presentando una solicitud de revisión judicial ante la Corte de Apelaciones de Oregon (Oregon Court of Appeals) dentro de los 30 días siguientes a la fecha de notificación indicada arriba. Ver ORS 657.282. Para obtener formularios e información, puede escribir a la Corte de Apelaciones de Oregon, Sección de Registros, (Oregon Court of Appeals/Records Section), 1163 State Street, Salem, Oregon 97310 o visite el sitio web en **court.oregon.gov**. En este sitio web, haga clic en "Help" para acceso a información en español.*

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