

EMPLOYMENT APPEALS BOARD DECISION

2014-EAB-1892

Reversed
No Disqualification

PROCEDURAL HISTORY: On September 24, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant voluntarily left work without good cause (decision # 124126). Claimant filed a timely request for hearing. On November 20, 2014, ALJ M. Davis conducted a hearing, and on November 24, 2014 issued Hearing Decision 14-UI-29243, affirming the Department's decision. On December 12, 2014, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Seven Brides Brewing, Inc. employed claimant part-time as a line cook from May 3, 2014 until approximately May 9, 2014.

(2) In 1998 or 1999, claimant was discharged from the United States Marine Corps. After his discharge, claimant experienced several service-related physical and mental health conditions. Sometime before 2014, claimant was diagnosed with service-related anxiety and depression. Claimant also experienced panic attacks. Claimant was prescribed medications for these conditions and attended weekly sessions with a mental health counselor. Sometime before 2014, claimant was also diagnosed with service-related physical limitations in the use of his knees, feet, ankles and back. Claimant had a great deal of pain if he overused these parts of his body. In 2003, the Department of Veterans Affairs (VA) rated claimant as 40 percent disabled due to service-connected conditions and he was awarded disability benefits. In 2008, the VA rated claimant as 50 percent disabled. In 2013, the VA rated claimant as 80 percent disabled and determined that he was unemployable.

(3) Before the employer hired claimant, he had been unemployed for a lengthy period time. During his unemployment, claimant received treatment for his many health conditions and attempted to determine jobs that were suitable given his limitations. Claimant also participated in a vocational rehabilitation program through the VA. Sometime before May 2014, claimant decided that he was able to return to work in a part-time position despite his health conditions.

(4) When the employer hired claimant, he thought he was physically and mentally able to perform the duties of a part-time line cook. Claimant worked approximately six hour shifts for the employer on two days, May 4 and May 5, 2014. During these shifts, claimant realized that he was not able to perform the standing, crouching, and kneeling of a cook without experiencing "devastating" and "tremendous" pain. Audio at ~9:58, ~10:08. Claimant also realized that working in the hectic atmosphere of the kitchen was a "trigger" for his mental health conditions. Audio at ~13:08. After claimant worked on May 5, 2014, claimant arranged with the employer to take a few days off to visit his ill grandfather in California.

(5) Sometime after May 5, 2014, claimant's manager called claimant in California to learn when claimant thought he was returning to work. Claimant told the manager he might be gone longer than he had initially expected and he would let the manager know when he was going to return. After the manager's call to him, claimant thought realistically about his abilities to perform as a line cook on a part-time basis. Claimant concluded that his foot, knee, ankle and back conditions did not allow him to perform the physical movements or sustain the hard floor impacts required in the kitchen without excessive pain, even if he worked shorter shifts than six hours. Claimant also concluded that the triggers to his mental health conditions did not at that time allow him to work in a "service industry" job, like a cook in a kitchen. Audio at ~13:09. Claimant thought that his physical and mental limitations prevented him from continuing to work for the employer.

(6) On approximately May 9, 2014, claimant called his manager and told the manager that he was not going to return to work because the job was "not a good fit for me." Audio at ~12:36. Claimant was too embarrassed to tell the manager that his mental and physical conditions did not allow him to continue working. Audio at ~10:12, ~11:30. On that day, claimant voluntarily left work.

CONCLUSIONS AND REASONS: Claimant voluntarily left work with good cause.

A preliminary 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).

While claimant testified that he voluntarily left work, the employer's witness testified that claimant did not quit and also that the employer did not discharge claimant. Audio at ~8:04, ~18:51, ~20:21. Regardless of the contention of the employer's witness that claimant did not communicate an intention to leave work, it is undisputed that claimant did not return to work after May 5, 2014, whatever his reasons. By not returning to work within a reasonable period of time after May 5, 2014, claimant objectively demonstrated that he was not willing to continue working for the employer. Because claimant contended that he quit work on approximately May 9, 2014, and that date is sufficiently after May 5, 2014 to constitute an unreasonable length of time to fail to return to work, we set that as the approximate date on which the work separation occurred. Claimant's work separation was a voluntary leaving on approximately May 9, 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 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, anxiety and various physical limitations that were 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.

In Hearing Decision 14-UI-29243, the ALJ agreed that claimant had impairments that qualified the standard by which he was required to show good cause for leaving work when he did. However, the ALJ concluded that claimant did not show good cause because, although his physical and mental conditions might have constituted grave reasons to leave his job as a cook, he did inform the employer of his medical conditions and therefore "failed to establish that he pursued reasonable alternatives prior to quitting work on May 9, 2014." Hearing Decision 14-UI-29243 at 3. We disagree.

Claimant provided substantial un rebutted evidence demonstrating that, due to his medical conditions and the demands of a job as a line cook, he was reasonably unable to continue working for the employer, even part-time, in that position. We therefore agree with the ALJ's implicit conclusion that claimant's limitations were a grave reason for him to leave work. However, we do not agree with the ALJ that the employer's evidence showed that claimant had reasonable alternatives to quitting work despite the gravity of his situation. In response to the ALJ's questions about possible alternatives available to claimant, the employer's owner testified only that if claimant had told the employer of his medical limitations: "Could we have done some modifications? Possibly, but right now it's kind of [a matter of] hindsight." Audio at ~ 22:35. This cursory testimony of the owner is insufficient to establish that any hypothetical modifications were likely to have been made or were even a feasible given the essential functions and demands of claimant's job as a line cook and his very serious limitations. On this record, the evidence does not support that there were reasonable alternatives to claimant other than quitting his job. A reasonable and prudent line cook, with the physical and mental health impairments that claimant experienced, exercising ordinary common sense, would have left work when claimant did because the demands of a job as a line cook reasonably were beyond his limitations.

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

DECISION: Hearing Decision 14-UI-29243 is set aside, as outlined above.

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

DATE of Service: February 4, 2015

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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