

EMPLOYMENT APPEALS BOARD DECISION

2015-EAB-0067

Affirmed
Disqualification

PROCEDURAL HISTORY: On December 8, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant voluntarily left work without good cause (decision # 83116). Claimant filed a timely request for hearing. On January 7, 2015, ALJ Seideman conducted a hearing and issued Hearing Decision 15-UI-31441, affirming the Department's decision. On January 26, 2015, claimant filed an application for review with the Employment Appeals Board (EAB).

Although it prevailed at hearing, the employer submitted a written argument in support of Hearing Decision 15-UI-31441. The employer failed to certify that it provided a copy of this argument to the other parties as required by OAR 471-041-0080(2)(a) (October 29, 2006). The argument also contained information that was not part of the hearing record, and the employer failed to show that factors or circumstances beyond its reasonable control prevented it from offering the information during the hearing as required by OAR 471-041-0090 (October 29, 2006). EAB therefore considered only information received into evidence at the hearing when reaching this decision. *See* ORS 657.275(2).

FINDINGS OF FACT: (1) Gordon Trucking, Inc. employed claimant as a truck driver from April 21, 2009 until October 27, 2014.

(2) For several years before October 20, 2014, claimant had been assigned to drive a route called the "Georgia Pacific" run. On this route, claimant usually hauled loads along the I-5 corridor, from southern California north to southern Washington. Although claimant did not have a guaranteed work schedule on this assignment, he often was able to return to home in Williams, Oregon on weekends. However, it was "not abnormal" for claimant to work weekends when he drove the Georgia Pacific run. Audio at ~31:07.

(3) In August 2012, claimant's wife had brain surgery. In early 2013, claimant's wife had knee replacement surgery. In January 2014, claimant's wife was diagnosed with breast cancer and she had double mastectomy surgery in March 2014. Sometime before October 20, 2014, claimant's wife was

also diagnosed with Parkinson's disease and had a neuro-regulator surgically installed to assist in controlling this disease. On several occasions throughout this time, the employer authorized claimant to take leaves under the Family Medical Leave Act (FMLA) to provide care for his wife.

(4) Beginning on October 10, 2014, the employer authorized a FMLA leave for claimant to allow him to provide care for his wife while she was receiving chemotherapy. After October 10, 2014, claimant was away from work. While he was on leave, claimant periodically communicated with the employer to advise it of his own work status.

(5) On October 20, 2014, claimant called his supervisor to ask where he was going to be assigned when he returned to work. The supervisor told claimant that the employer had needed to assign his usual route, the Georgia Pacific run, to another employee. The supervisor told claimant that, when he returned to work, he was going to be assigned to a route other than the Georgia Pacific run. The supervisor did not tell claimant what his new route was going to be or what his new work schedule was going to be. Sometime later, claimant contacted the employer's planner to learn specifically the route that he was going to be assigned after he returned from leave and what his schedule was going to be. The planner told claimant that he was going to be "taken off" the Georgia Pacific run, but she did not know what route he was going to drive and did not know the schedule for that route. Audio at ~7:42. The planner told claimant during this conversation that she could not guarantee that claimant would be home every weekend on his new route. Thereafter, between October 20, 2014 and October 26, 2014, claimant called several employer representatives to learn the nature of his new route and its schedule, but none of the representatives was able to provide more any more specific information to him. Audio at ~13:21. Sometime during this week, claimant also tried to reach the employer's president to obtain the information that he wanted, but was unsuccessful. A message that claimant left for the employer's president was not returned by October 27, 2014.

(6) On October 27, 2014, claimant went to the employer's workplace in an effort to obtain more information about the employer's intentions, including the new route and its schedule. On that day, claimant spoke with employees in the employer's front office. Those employees told claimant that they did not know anything about the specifics of the route to which he was going to be assigned because "it's not our deal." Audio at ~20:40, ~21:17. At that time, claimant told the employer that he was quitting work because he did know what his assigned route and new work schedule was going to be and he thought that the employer was violating FMLA by not restoring him to his position driving the Georgia Pacific run. Audio at ~21:45, ~32:16.

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.

There was a great deal of testimony at the hearing about whether the employer had offered claimant a driving position on the "ghost fleet" after he returned from leave, and whether that position was going to offer claimant as flexible as schedule as he had when he was assigned to the Georgia Pacific run. Audio at ~22:47, ~23:21, ~24:32, ~25:03, ~26:22, ~30:20. Claimant contended that no such offer was made to him by any of the employer's representatives. Audio at ~22:13, ~25:03, ~31:18. Claimant's first hand evidence about what employer representatives did or did not offer to him is entitled to greater weight than the employer's hearsay testimony, based on the statements of employer representatives who did not testify at the hearing. More likely than not, the employer did not offer to claimant a position on the "ghost feet" when he returned to work after his FMLA leave.

Although claimant contended that he quit because the employer did not give him a guarantee that the new position that it had arranged for him would allow him weekends off, he testified that this guarantee was not needed because of his wife's health conditions, but was due to the schedule to which he was accustomed when driving the Georgia Pacific run and his belief that any variation from that schedule would violate his rights under FMLA. Audio at ~31:33, ~32:16; *see also* Audio at ~7:17. However, claimant conceded that, when he was working his regular position driving the Georgia Pacific run, it was not guaranteed that he would have weekends off. Audio at ~ 31:07. In addition, regardless of claimant's contentions, FMLA does not require that an individual be returned to the same position that he held when his leave commenced, but only that he be placed in an "equivalent position with equivalent benefits, pay or other terms and conditions of employment" and an equivalent position includes equivalent "privileges, perquisites and status" and "substantially similar duties and responsibilities." 28 CFR §§825.214, 825.215(a). Assuming claimant's testimony that no employer representative had told him the specifics of the new driving position to which he was going to be assigned is accepted, including that the route, the pay, the benefits and the work schedule were not clarified, claimant did not demonstrate that the employer had violated FMLA when it told very vaguely to him he was going to be reassigned to a different route. Nor does it appear, again accepting claimant's testimony, that by not clarifying the nature of claimant's reassigned position for only one week, the employer manifested a likely intention to violate the "equivalent position" requirement of FMLA. On this record, a reasonable and prudent employee would not have concluded that he needed to quit work because the employer had violated FMLA unless, after waiting a reasonable period of time for clarification, the employer refused to specify its intentions or proposed a new position which was not substantially equivalent in pay, benefits and working conditions as that which claimant had previously held. Our analysis ends here since claimant did not present any objectively grave reasons, independent of an alleged violation of FMLA, that required him to be restored to this former position.

Claimant voluntarily left work without good cause. Claimant is disqualified from receiving unemployment insurance benefits.

DECISION: Hearing Decision 15-UI-31441 is affirmed.

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

DATE of Service: March 10, 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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