

EMPLOYMENT APPEALS BOARD DECISION
2015-EAB-0413

Affirmed
Disqualification

PROCEDURAL HISTORY: On March 16 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant voluntarily left work without good cause (decision 102506). Claimant filed a timely request for hearing. On April 8, 2015, ALJ M. Davis conducted a hearing, and on April 9, 2015 issued Hearing Decision 15-UI-36631, affirming the Department's decision. On April 13, 2015, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant submitted a written argument the expanded upon his testimony at hearing and offered new information. Claimant did not explain why he did not present this new information during the hearing or otherwise show that factors or circumstances beyond his reasonable control prevented him from doing so as required by OAR 471-041-0060(2) (October 29, 2006). For this reason, EAB did not consider this new information when reaching his decision. *See* ORS 657.275(2).

FINDINGS OF FACT: (1) Enterprise Rent-A-Car employed claimant from November 5, 2012 until February 10, 2015. For most of his employment, claimant worked as a reservation agent.

(2) In December 2014, claimant learned that his teen-age daughter was sexually abused sometime before November 2012, when she and claimant lived in Missouri.

(3) Sometime before 2015, claimant began experiencing pain in his back, neck, shoulders and arm when he keystroked information into the employer's computer system or manipulated a computer mouse when performing his work duties. Entering data was a large part of claimant's work activities. By 2015, claimant was experiencing muscle spasms in his back when he was working and the level of his pain and discomfort had increased. Claimant attributed his physical symptoms to the repetitive motions of data entry and to his accumulated stress over the past abuse to his daughter.

(4) In early January 2015, claimant told his manager that he was thinking about leaving work because of the pain and discomfort he was experiencing when tried to work. Claimant's manager suggested that he apply for a newly created position on the escalations team. Claimant did so. At this time, claimant had not consulted with a physician to evaluate treatment options for his pain or to determine whether he needed to quit work to preserve his health.

(5) Sometime before February 1, 2015, the employer offered claimant a position on the escalations team. Claimant accepted the new position and was in classroom training for it on February 2, 3 and 4, 2014. On February 5, 2015 claimant was trained in the practical aspects of the new position, including answering the phones and entering the required data into the employer's computer system. After February 5, 2015, claimant did not return to work because he felt physical discomfort when entering data into the employer's system.

(6) Sometime after February 5, 2015, claimant spoke with the manager of the escalations team about his experience when he tried to work as an escalations agent. The manager recommended that claimant speak with employer's human resources department, or its leave of absence team, to inquire about whether he was eligible to take a leave from work under the Family Medical Leave Act (FMLA) or to learn about his other options. The manager gave claimant the contact number for the human resources department. Claimant called the human resources department, listened to an automated recording, and left a message.

(7) On February 10, 2015, claimant sent an email to the manager of the escalations team stating that he was resigning from work because of the stress he felt over the past abuse of his daughter, the anxiety he felt when he tried working as an escalations agent, and a migraine headache he experienced on February 5, 2015, the last day he actually worked. Claimant had not spoken with the employer's human resources department when sent his resignation email. Claimant believed that a leave was not a viable option to quitting work because, after the leave was over, he would need to return to the position of escalations agent and he further thought that a FMLA leave was limited to ten days duration. Claimant did not consult with a health professional before deciding that he needed to leave work. Claimant thought that medical interventions would not change the pain and muscle spasms he experienced sufficiently to allow him to continue working in a position like that of escalations agent which involved date entry.

(8) On February 10, 2015, claimant voluntarily left work.

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 P2d 722 (2010). The standard for showing good cause is modified for a claimant who has a permanent or long-term "physical or mental impairment" as defined at 29 CFR §1630.2(h). A claimant with such impairment who quits work must show that no reasonable and prudent person with the characteristics and qualities of an individual with such impairment would have

continued to work for his employer for an additional period of time. A claimant who quits work because an immediate family member has been a victim of sexual assault, and who reasonably believes that the immediate family member needs protection from further sexual assault that will occur as a result of claimant's continued employment is not disqualified from benefits. ORS 657.176(12).

Although claimant submitted as evidence a physician's summary of a medical visit that occurred after he left work, apparently to establish that health conditions motivated his decision to quit, there was no indication of the duration of those conditions or that any of them were permanent or long-term impairments. Claimant's description of his physical limitations did not allude to whether they were long-lived or permanent. There is insufficient evidence in this record to establish that the untreated conditions that claimant self-reported to the physician were of the type to require the application of the modified standard for showing good cause to leave work. Exhibit 1 at 2-3. Claimant's decision to leave work is evaluated according to the actions of a reasonable and prudent person without a long-term or permanent impairment.

We agree with the ALJ that the past sexual abuse of claimant's daughter was a serious circumstance. However, claimant presented no evidence showing that he reasonably needed to quit work to protect his daughter from further sexual abuse, or to assist her in healing from the effects of past abuse. The sexual abuse of claimant's daughter occurred in a distant state and there was no evidence that the alleged perpetrator had moved from that state to Oregon. Exhibit 1 at 3-7. Although claimant contended that he needed to attend counseling sessions with his daughter to address the past harms to her, and he did not have sufficient accrued leave available to allow him to attend those sessions, there was no evidence in the record that he pursued the reasonable option of using unpaid sick leave to allow him to participate in the counseling. As a result, there was insufficient evidence to show that either the past sexual abuse of claimant's daughter or the need to participate in counseling sessions with his daughter constituted a grave situation that left claimant no reasonable alternative but to quit his job. The circumstances of claimant's daughter did not provide good cause for him to leave work.

With respect to claimant's physical issues, it does not appear that he reasonably sought to explore any available options before deciding that he needed to quit his job. While claimant might have been subjectively convinced that his medical condition would not improve if he continued to work in a position involving data entry and repetitive stress, he did not present any evidence suggesting or tending to suggest that medical or mental health treatment was likely futile and would not allow him to retain his job. Moreover, that claimant continued to work despite his discomfort and without seeking any medical interventions reasonably suggests that the conditions were not so debilitating that they were grave reasons to leave work. Further, claimant rejected out of hand the escalation team manager's recommendation that he speak with the human resources department and explore taking a leave or other options that might allow him to retain his job in spite of his physical conditions. Audio at ~ 20:40. Claimant might well have been subjectively convinced that the human resources department was unable to provide him with any reasonable alternatives to quitting. However, a reasonable and prudent person, exercising ordinary common sense, would not have reached this conclusion until, at a minimum, he discussed his circumstances with the human resources department and determined that all avenues available through it would not reasonably address his physical concerns. Because claimant did not investigate these obvious alternatives to leaving work, claimant did not show that he had no reasonable alternative to leaving work when he did.

Claimant did not establish good cause for leaving for work. Claimant is disqualified from receiving unemployment benefits.

DECISION: Hearing Decision 15-UI-36631 is affirmed.

Susan Rossiter and J. S. Cromwell;
D. P. Hettle, *pro tempore*, not participating.

DATE of Service: June 2, 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 Court of Appeals website at courts.oregon.gov. Once on the website, use the ‘search’ function to search for ‘petition for judicial review employment appeals board’. A link to the forms and information will be among the search results.

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