

**EMPLOYMENT APPEALS BOARD DECISION**  
**2015-EAB-0517**

*Affirmed*  
*Disqualification*

**PROCEDURAL HISTORY:** On March 3, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant voluntarily left work without good cause (decision # 112400). Claimant filed a timely request for hearing. On April 10, 2015, ALJ Vincent conducted a hearing, and on April 17, 2015, issued Hearing Decision 15-UI-37081, affirming the administrative decision. On May 6, 2015, claimant filed an application for review with the Employment Appeals Board (EAB).

EAB considered the employer's written argument to the extent it was relevant and based on the hearing record.

**FINDINGS OF FACT** (1) In 2010, the City of Portland hired claimant as a probationary firefighter in its Fire and Rescue (PF&R) division. Claimant quit this job, however, because he believed that the employer was going to discharge him.

(2) Claimant returned to work for the employer's PF&R division as a firefighter and paramedic recruit-trainee from July 17 to December 9, 2014. During the first six months of his employment, claimant attended an academy in which he was trained in the skills necessary to work as a firefighter.<sup>1</sup>

(3) As part of his 2014 employment, claimant participated in training regarding the employer's workplace harassment, discrimination and retaliation policy. The policy prohibits all forms of harassment and discrimination in the workplace, provides examples of prohibited inappropriate conduct,

---

<sup>1</sup> We take notice of the training program for Portland firefighter recruits, which is a generally cognizable fact of public record. See [www.portlandoregon.gov/fire/5405](http://www.portlandoregon.gov/fire/5405). Any party that objects to our doing so must submit its objection to this office in writing, setting forth the basis of the objection in writing, within ten days of the date on which this decision is mailed. OAR 471-041-0090(3) (October 29, 2006). Unless an objection is received and sustained, the noticed fact will remain part of the record.

and prohibits retaliation against any individual who reports harassment or discrimination. The policy describes the internal complaint procedure employees can use to report discrimination or harassment; the policy encourages, but does not require, that employees initially contact their supervisors to discuss any complaints. On August 7, 2014, claimant signed a form acknowledging that he had received and read a copy of this policy, and that he had participated in training during which the policy was explained. Exhibit 3. As part of their training on the employer's human relations policies and practices, claimant and his fellow recruits were introduced to a person in the employer's human resources division whom they were encouraged to contact with any questions, concerns or complaints about workplace issues or problems.

(4) The employer expected that claimant would immediately report any workplace injury. Claimant knew and understood this expectation. On August 13, 2014, claimant contacted his immediate supervisor, a PF&R captain, to report that his back was sore. Claimant said that he thought the pain was caused partly by an uncomfortable bed in which he had slept, and partly by one of the training exercises in which he had participated. Claimant's supervisor asked if claimant wanted to see a doctor regarding the pain. Claimant responded that he did not need to see a doctor; he just wanted the captain to know about the problem.

(5) On September 11, 2014, claimant was accidentally hit on the head by another recruit during a training exercise. Claimant received treatment for the injury, but was able to return to work. Claimant's supervisor asked claimant if he was able to continue working, and claimant responded that he was. The supervisor told claimant he should stop working if his pain became too great. Transcript at 26.

(6) On September 17, 2014, claimant told one of his trainers, a PF&R lieutenant, that he was suffering from a possible heat rash on his side and leg. The lieutenant advised claimant to keep an eye on the rash and make sure it did not become infected. When the lieutenant wrote up a report on this incident, she stated that claimant had approached her "complaining" of heat rash. Exhibit 2. Claimant was offended by the use of the word "complaining," because he believed it was a derogatory description of his actions. Transcript at 12.

(7) The employer made daily and monthly evaluations of all recruits who participated in the training program, and also prepared periodic "interim" evaluations of the recruits' performance. On October 20, 2014, claimant received a monthly evaluation report covering the period from September 17 through October 16, 2014. The report rated claimant's performance as unacceptable in 17 of 31 observed criteria. In the report, claimant's evaluators stated that claimant "is failing to demonstrate a consistent effort and failing to show acceptable initiative when completing assigned tasks." Exhibit 1.

(8) On October 23, 2014, claimant injured his foot while working. Claimant did not report the injury, because he was afraid he would be considered "weak" by his supervisors or that his trainers would retaliate against him if he did. Transcript at 14. Claimant consulted a health care provider about his injury, who told him that the foot would only heal if claimant took six weeks off from work. Claimant did not believe he was able to take time off during his training. Claimant did not contact his supervisors or anyone in the employer's human relations division to ask about the possibility of taking leave to allow his foot to heal. The pain claimant experienced from claimant's foot injury significantly impaired his ability to successfully participate in training exercises.

(9) On November 17, 2014, claimant received a monthly evaluation report covering the period from October 17 through November 16, 2014. The report rated claimant's performance as unacceptable in 17 of 31 observed criteria. In their report, claimant's evaluators noted a number of specific deficiencies in claimant's performance, and made several recommendations for improvement. The evaluators stated that claimant "continues to demonstrate an inability or unwillingness to hustle in the Academy so far." Exhibit 1.

(10) On November 24, 2014, claimant met with the PF&R division chief, who oversaw training for the PF&R. The division chief reviewed claimant's performance deficiencies, asked what more the trainers could do to help claimant succeed, and offered assistance from a peer mentor. Claimant told the division chief that he needed no additional help, but just needed to make the improvements that had been suggested to him. Claimant also agreed to work with a peer mentor. Exhibit 2.

(11) On December 3, 2014, claimant received an interim evaluation report. The report rated claimant's performance as unacceptable in 15 observed criteria. In their report, the evaluators stated that claimant "has demonstrated an inability to pay attention to details of written and verbal direction throughout his time at Portland Fire & Rescue's Training Academy," and that this inability affected the personal safety of claimant and other recruits. The evaluators also concluded that claimant "has demonstrated a consistent inability to follow simple directions." Exhibit 2.

(12) Claimant experienced stress and anxiety because of his situation at work. He sought help from the employer's Employee Assistance Plan, talked with his personal doctor about these problems, and was prescribed some medication. Claimant never told his supervisors about his stress and anxiety until he quit his job. Transcript at 30-31.

(13) After receiving the December 3 interim evaluation report, claimant decided to quit his job. Claimant believed that the employer was going to discharge him because of his performance deficiencies. Claimant also believed that one of the trainers had singled him out for discriminatory treatment by holding him to a higher standard than the other recruits. Claimant never complained to any of his supervisors or anyone in the employer's human relations division about treatment he perceived to be discriminatory or harassing, however. Claimant believed he would have been retaliated against or fired if made such a complaint. Claimant felt that the stressful situation he was experiencing at work, as well as the pain from his injured foot, significantly impaired his ability to succeed in the training program.

(14) On December 9, 2014, claimant called his immediate supervisor and voluntarily quit his job.

(15) At the time of the hearing, PF&R had two recruits who had suffered severe back injuries during training. One recruit was placed on layoff status and, when recovered, placed in another class of recruits. The second recruit was assigned light duty work to permit him to recover.

**CONCLUSION AND REASONS:** We agree with the ALJ and conclude that 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 good cause is modified for a claimant with a permanent or long-term “physical or mental impairment” as defined at 29 CFR §1630.2(h). A claimant with such an impairment 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.

Although claimant suffered from foot pain and stress, the record contains insufficient evidence to establish that these conditions were permanent or long-term. Claimant’s decision to leave work is therefore evaluated according to the actions of a reasonable and prudent person with no long-term or permanent impairment.

To the extent that claimant quit his job because he believed he would be discharged, he failed to show good cause for leaving. A claimant who quits work to avoid a possible discharge establishes good cause if the claimant shows that discharge was reasonably certain and likely imminent. We have held that a claimant does not face a reasonably certain or likely imminent discharge if the employer identifies deficiencies in a claimant’s performance, and places the claimant on a plan to correct these deficiencies. *See, e.g.* 2014-EAB-0266 (March 18, 2014) (claimant’s discharge was not reasonably certain or likely imminent when the employer placed claimant on a plan to improve sales but never mentioned discharge); *Sharon N. Martin*, 12-AB-2916 (November 19, 2012) (although claimant’s discharge upon completion of a performance improvement plan appeared likely, it was neither inevitable nor immediate) and *Dora Sue S. Redford*, 12-AB-2914 (November 19, 2012) (although claimant’s discharge appeared likely if she accepted the employer’s 30-day performance improvement plan and did not resign, it was possible that the employer would allow her to continue working after the plan ended). Here, claimant had difficulties mastering the skills needed to become a firefighter. His supervisors implemented a type of performance improvement plan by engaging in extensive efforts to help claimant correct identified deficiencies. Claimant’s discharge appeared likely, but it was not inevitable or immediate, and his supervisors never alluded to the possibility that he would be discharged. Claimant therefore failed to demonstrate he had good cause for quitting because his discharge was imminent or reasonably certain.

To the extent that claimant quit his job because of the stress and foot pain he was experiencing, claimant failed to demonstrate that he faced a situation so grave that he had no alternative but to leave work. Assuming claimant’s foot pain and stress created a grave situation, claimant had the reasonable alternative of reporting these problems, and seeking an accommodation that would allow him to continue his training, or asking about a leave of absence that would allow him to seek treatment for his stress and foot pain. Claimant’s fear that he might be considered weak, or that his supervisors might retaliate against him if he reported his stress or foot pain was not objectively reasonable. His supervisors responded appropriately when claimant reported back pain in August and was injured in September. They arranged for all necessary medical care, made sure that claimant was able to continue his training, and gave no indication that they were upset with or critical of claimant because of the injuries. Nor do we find reasonable claimant’s objection to his trainer’s report about his heat rash. Claimant believed the trainer’s statement – that he was “complaining” about a rash – was derogatory.

The trainer's use of the word "complaining"<sup>2</sup> appears to be a reasonable attempt to accurately describe claimant's statement – that he was in pain due to a possible heat rash – and not a critical remark about claimant's conduct.

To the extent that claimant quit his job because he felt that one of the trainers discriminated against him by holding him to a higher standard than the other recruits, claimant failed to show he faced a situation so grave that he had no alternative but to leave work. If claimant believed that he was unfairly treated, he had the reasonable alternative of utilizing the procedure outlined in the employer's workplace harassment and discrimination policy to complain about this treatment. Claimant's subjective fear that he would be discharged, or that his supervisors would retaliate against him if he made such a complaint were not objectively reasonable: claimant offered no evidence to support these claims of possible retaliation or discharge.

For the reasons stated above, claimant failed to prove that he had good cause for leaving work when he did. Claimant is disqualified from the receipt of unemployment benefits on the basis of this work separation.

**DECISION:** Hearing Decision 15-UI-37081 is affirmed.

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

**DATE of Service: June 23, 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](http://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.

**Please help us improve our service by completing an online customer service survey.** To complete the survey, please go to <https://www.surveymonkey.com/s/5WQXNJH>. If you are unable to complete the survey online and wish to have a paper copy of the survey, please contact our office.

---

<sup>2</sup> "Complaint" includes the following definition: "to express grief, pain, or discontent <complaining about the weather> [www.merriam-webster.com/dictionary](http://www.merriam-webster.com/dictionary)."