

**EMPLOYMENT APPEALS BOARD DECISION**  
**2015-EAB-0548**

*Affirmed*  
*Disqualification*

**PROCEDURAL HISTORY:** On March 20, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant voluntarily left work without good cause (decision # 112017). Claimant filed a timely request for hearing. On April 22, 2015, ALJ Triana conducted a hearing at which the employer did not appear, and issued Hearing Decision 15-UI-37277, affirming the Department's decision. On May 12, 2015, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant submitted a written argument in which he offered new information in the form of a doctor's note about his health condition. Claimant did not explain why he did not present this information at the hearing, or otherwise show that factors or circumstances beyond his reasonable control prevented him from doing so as required by OAR 471-041-0090(2) (October 29, 2006). For this reason, EAB did not consider this new information. EAB considered only evidence entered into the hearing record when reaching this decision.

**FINDINGS OF FACT:** (1) Mountain Sky Landscaping, Inc. employed claimant as a development manager from March 17, 2014 until November 21, 2014.

(2) Since approximately 2000, claimant had a pinched nerve and experienced arthritis in his neck. Working outside in cold weather aggravated claimant's symptoms.

(3) When the employer hired claimant, its owner told claimant he would perform some landscaping work in the field for as a laborer about six months before transitioning to principally performing duties as a development manager. This transition did not completely occur and claimant continued to perform laborer work throughout his employment. On occasion throughout his employment, claimant mentioned to the employer's owner that he was concerned about the impact of the laborer work on his neck condition and told the owner that he preferred not to work in the field.

(4) Throughout claimant's employment, the employer's owner encouraged claimant to take side jobs to perform for clients of his own on his days off. The employer's owner referred side jobs to claimant

when the employer did not have the time to perform the work that those jobs required. The employer also hired claimant as a subcontractor to perform some jobs for the employer on his days off. The work that claimant independently performed on his own behalf and as a subcontractor for the employer was similar to the laborer work that claimant performed in the field for the employer as its employee.

(5) On approximately November 10, 2014, claimant told the employer's owner that he had submitted a bid for a job on which the employer had also bid. That job was scheduled to start in April 2015. The owner did not comment on what claimant had told him. After November 10, 2014, claimant thought that the owner was principally assigning him to do landscaping laborer work in the field. Claimant did not tell the owner that he thought working outside in the cold was aggravating his neck symptoms.

(6) On November 21, 2014, the employer's owner told claimant that he was going to lay claimant off "after the holidays." Audio at ~20:50, ~21:21. By this statement, claimant thought that the owner meant the layoff was going to occur around December 21, 2014 because the employer customarily shut down its business during the Christmas week. Audio at ~20:50, ~21:21. The owner did not give claimant a specific date on which he would be laid off. Audio at ~20:40. In response to the owner's statement about laying him off, claimant told the owner that he "would take a layoff right now." Audio at ~20:50. The owner told claimant "that's fine." Audio at ~22:03.

(7) On November 21, 2014, claimant left the workplace and did not return.

**CONCLUSIONS AND REASONS:** Claimant voluntarily left work without good cause.

Claimant argued at hearing that the employer discharged him on November 21, 2014, reasoning in essence that, after the employer's owner expressed an intention to lay him off after the holidays, his request that the owner lay him off immediately did not change the work separation from a discharge to a voluntarily leaving. Audio at ~20:59. The applicable regulation states that if at the time of the work separation, claimant could have continued to work for the employer for an additional period of time the 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). In situations where a claimant agrees to end the work relationship on a particular day in response to an employer's threatened discharge, the decided cases hold that the work separation should be considered a voluntary leaving. *J. R. Simplot v. Employment Division*, 105 Or App 523, 528, 795 P2d 579 (1990); *Smith v. Employment Division*. 34 Or App 623, 627, 57 P2d 310 (1978); *see also Employment Department v. Shurin*, 154 Or App 352, 356, 959 P2d 637 (1998) (where employee and employer have agreed on a mutually acceptable date when the employment will terminate, the separation is treated as a voluntarily leaving and not a discharge regardless of which party initiated the discussion of a separation).

Accepting claimant's testimony that the owner stated an intention to discharge claimant sometime around the Christmas holiday, claimant responded by voluntarily agreeing to leave on the earlier date of November 21, 2014. Absent claimant's agreement to leave on November 21, 2014, the employer, most likely, was willing to allow claimant to work at least a month longer, or until at least December 21, 2014. Audio at ~21:21. On this record, the fact that claimant proposed and the employer agreed to what ultimately became the separation date and the fact that claimant could have worked for another month

absent his proposal for an earlier separation date, establishes that claimant's work separation was a voluntary leaving on November 21, 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 the longstanding conditions of a pinched nerve and arthritis in his neck, which appear to have been 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.

Although claimant contended that he did not quit work, but was discharged, we infer that the reasons that claimant wanted the employer's owner to accelerate the work separation date to November 21, 2014 were the reasons he left work when he did. To the extent that claimant left work because he thought the employer was treating him differently after he notified the owner on November 10, 2014 that he had submitted the bid on the contract, he did not demonstrate that his perceptions constituted a grave reason to leave work. Although claimant might have felt uncomfortable, he did not present any evidence showing that objective harms resulted from this perceived difference in treatment or that it rose to the level of ongoing abuse, oppression, harassment or the like. Claimant's perceptions of differential treatment were not good cause to leave work when he did.

Claimant also testified a great deal about the pinched nerve and arthritis in his neck and the attendant pain he experienced when he performed laborer work in the cold weather. However, claimant testified that if the owner had not told him he was going to lay claimant off, he would have continued to work indefinitely for the employer despite his conditions. Audio at ~35:24; *see also* at ~11:48, ~13:10, ~17:55. That claimant's neck condition was not, in and of itself, a grave reason to leave work was also suggested by the fact that claimant's work for the employer in the field was similar to the work he performed as a contractor and a subcontractor through his own independent landscaping business and he made no mention that his physical condition required him to shut down that business or that he needed to limit his physical activities in it. Audio at ~28:54, ~29:23. On this record, claimant did not meet his burden to show that the condition in his neck was a sufficiently grave reason to leave work when he did. Nor was it good cause for claimant to leave work when he did because the owner expressed an intention to lay him off in a month. Claimant presented no evidence that grave circumstances would befall him by working for the employer until December 21, 2014.

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

**DECISION:** Hearing Decision 15-UI-37277 is affirmed.

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

**DATE of Service: July 6, 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.

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