EO: 200
BYE: 201609

State of Oregon
Employment Appeals Board
875 Union St. N.E.
Salem, OR 97311

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VQ 005.00

EMPLOYMENT APPEALS BOARD DECISION
2015-EAB-0605

Affirmed
Disqualification

PROCEDURAL HISTORY: On April 2, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant voluntarily left work without good cause (decision # 111722). Claimant filed a timely request for hearing. On April 27, 2015, ALJ Wipperman conducted a hearing, and on May 5, 2015 issued Hearing Decision 15-UI-37973, affirming the Department's decision. On May 26, 2015, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant submitted a written argument in which he attempted to present additional information that was not offered at the hearing. Claimant did not explain why he did not present this new information at the hearing and did not otherwise show that he was prevented from doing so by factors or circumstances beyond his reasonable control as required by OAR 471-041-0090(2) (October 29, 2006). For this reason, EAB did not consider the new information that claimant sought to present. EAB considered only information entered into the hearing record when reaching this decision.

Since the employer did not object to the ALJ's admission of claimant's Exhibit 1 into the record within the time set out in Hearing Decision 15-UI-37973, Exhibit 1 remains a part of the hearing record.

FINDINGS OF FACT: (1) First Response, Inc. employed claimant as a private security patrol officer from April 1, 2009 until March 6, 2015.

(2) As part of his job duties, the employer required claimant to patrol various locations in and around the Charbonneau area of Wilsonville, Oregon. The patrol vehicle that claimant drove had a global positioning system (GPS) that showed the time, location and movements of the vehicle. The electronic tablet that claimant used to create reports while he was in the patrol vehicle had a GPS system that was independent of the system installed in the patrol vehicle and also recorded the tablet's or vehicle's movements.

(3) Sometime around approximately January 27 or 28, 2015, one of the employer's clients located near the Charbonneau area called the employer's operations director and told him that claimant did not appear to have been performing his nightly patrols since unauthorized people had been parking and sleeping undisturbed overnight in the client's private parking lot. On February 4, 2015, a client representative from a clubhouse in the Charbonneau neighborhood called the operations manager and told him that she thought one of the employer's security officers had been watching television in the clubhouse lobby at a time when the officer was supposed to be on patrol. The operations director reviewed claimant's mileage logs for his shifts on January 28 through January 31, 2015 and February 4 and February 5, 2015 and saw that claimant had listed clients for whom he patrolled on those dates and had made mileage entries indicating that he had actively patrolled during those shifts. However, when the operations director reviewed the GPS system records for those same days, both the vehicle and tablet records showed that claimants' patrol vehicle had remained stationary and did not move during those shifts, and the vehicle GPS system, which was able to specifically record the location of claimant's vehicle, indicated that the vehicle had remained at a standstill in the parking lot of the Charbonneau clubhouse throughout those shifts.

(4) On February 6, 2015, the employer's operations director and its human resources manager met with claimant to discuss the discrepancies they had discovered between his mileage logs and his patrol activities as recorded by both the tablet and the vehicle GPS systems. On a document they listed the days on which they believed claimant had not been patrolling during his shifts, and the employer's policies that they believed claimant had violated by not patrolling but representing that he had done so in his mileage logs. They presented this information to claimant on a form titled "Last Chance Agreement – Falsifying Reports." Exhibit 1 at 2. The representatives did not ask claimant to sign the form or enter into any purported last chance agreement when they presented the form to him that day. Claimant denied that he did not perform his patrols on the listed dates. The employer representatives told claimant that he would be subject to discharge if, in the future, he did not perform his required patrols.

(5) After February 6, 2015, the employer reviewed claimant's mileage logs for several nights of work and found that, although the logs represented that claimant had accrued mileage on patrols, the tablet and vehicle GPS records again showed on some shifts that claimant's vehicle had not moved. On March 6, 2015, the employer's operations director and its human resources manager met with claimant again to discuss his mileage logs as compared to the GPS records. The employer representatives presented to claimant a last chance agreement listing several dates after February 6, 2015 when it appeared that he had not patrolled during his shifts. They did not intend to discharge claimant on March 6, 2015, but to document that, by his signature, claimant understood he was going to be discharged if he did not perform his patrols in the future. Claimant refused to sign the last chance agreement. The representatives told claimant that he was not going to be allowed to return to work until he signed the last chance agreement. Transcript at 7, 18, 34, 35. Claimant continued to refuse to sign the agreement. Claimant told the representatives "you guys can fire me" and he started to leave the workplace. Transcript at 35. As claimant was departing, the representatives asked him to turn in his key card and he did so.

(6) After departing from the workplace on March 6, 2015, claimant never returned to work.

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

The first issue this case presents is the nature of claimant's work separation. Claimant contended that the employer's witness discharged him on March 6, 2015. Transcript at 5, 6. The employer's witnesses contended that claimant voluntarily left work on March 6, 2015 after refusing to sign the last chance agreement. Transcript at 19, 34. The applicable regulation states that if claimant could have continued to work for the employer for an additional period of time but was not willing to do so, 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).

Claimant agreed that the employer's representatives did not tell him that he was "fired," "terminated" or discharged before he decided to leave the workplace on March 6, 2015. Transcript at 7. While claimant might have believed the representatives would discharge him if he did not sign the last chance agreement, they had not done so before he exited the employer's offices By leaving the workplace on March 6, 2015, claimant was the first party to objectively and unequivocally manifest a present intention to sever the work relationship by his unwillingness to continue working for the employer. By acting preemptively, in advance of any action by the employer, claimant's work separation was a voluntary leaving on March 6, 2015.

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.

Because claimant contended that he was not discharged, he offered no reasons for quitting work. From the record, it is apparent that claimant disagreed with the alleged violations summarized in the last chance agreement and he thought that, if he signed it, the employer would view his signature as an admission that he had engaged in the behavior it alleged and would summarily discharge him once he signed it. Transcript at 6, 7, 8, 12. To the extent that claimant quit work for one or both of these reasons they did not constitute objectively grave circumstances. It makes no sense that if the employer wanted to discharge claimant it would not done so immediately rather deferring a discharge until it prepared a last chance agreement and claimant had signed it. The explanation of the employer's witnesses, that the employer wanted claimant to sign the agreement to indicate that he was aware of the employer's policies and that it intended to discharge him if he engaged in similar behavior in the future, was much more logical, reasonable and likely than claimant's stated concern. Transcript at 17, 18, 34. A reasonable and prudent employee in claimant's situation would not have objectively concluded that the employer intended to discharge him as a result of signing a last chance agreement or that the employer would construe his signature as indicating he admitted to the alleged behaviors set out in the last chance agreement.

To the extent that claimant quit work because he disagreed with the allegations set forth in the last chance agreement, that agreement reasonably applied only to claimant's behavior after he signed it. Even accepting claimant's contention that he had not engaged in the alleged behavior underlying the last chance agreement, it is difficult to conclude that entering into an agreement requiring him only to comply with the employer's policies in the future reasonably constituted a grave reason for claimant to leave work. Adhering to an employer's policies is reasonably expected of any employee as a matter of course and common sense. If claimant nonetheless thought that an agreement based on allegedly false facts was fundamentally repugnant to him, he had the reasonable alternative of attempting to demonstrate to the employer either that its GPS systems were malfunctioning or that by his subsequent behavior in engaging in all of his required patrols they must have been malfunctioning on the dates listed in the last chance agreement. On this record, a reasonable and prudent person in claimant's position would not have concluded that entering into a last chance agreement that set out allegations with which he disagreed was a grave reason to leave work, or he would have attempted to demonstrate to the employer that its allegations relating to his patrol activities were based on erroneous information.

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-37973 is affirmed.

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

DATE of Service: <u>July 15, 2015</u>

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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