

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

EMPLOYMENT APPEALS BOARD DECISION
2015-EAB-0772

Reversed
No Disqualification

PROCEDURAL HISTORY: On May 13, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant voluntarily left work without good cause (decision # 90647). Claimant filed a timely request for hearing. On June 15, 2015, ALJ Shoemake conducted a hearing, and on June 19, 2015 issued Hearing Decision 15-UI-40355, affirming the Department's decision. On June 24, 2015, claimant filed an application for review with the Employment Appeals Board (EAB).

In the employer's written argument, the employer argued that he missed the hearing because he moved out of state for business and did not receive the notice of hearing until he retrieved his mail on June 23, 2015. The employer's request for relief is construed as a request to have EAB consider new information under OAR 471-041-0090 (October 29, 2006), which allows EAB to consider information not presented at the hearing if the party offering the information shows it was prevented by circumstances beyond its reasonable control from presenting the information at the hearing. The employer argued that its failure to receive notice of the scheduled hearing made it impossible for the employer to attend the hearing or present evidence. However, the notice was mailed to the employer at its address of record with the Department. To show that a failure to receive notice constituted a circumstance beyond its reasonable control that would allow EAB to consider the employer's new information, the employer must show, in essence, that its failure to receive the notice was not caused by its own failure to either process its mail or take steps to resolve any known postal service interruptions or delays. Here, the employer acknowledged that he did not check or monitor mail mailed to the address of record on file with the Department between June 3, 2015, the date the notice of hearing was mailed, and June 23, 2015, the date he retrieved his mail. The employer's decision not to monitor his mail for several weeks at a time, or to make arrangements to attend to time-sensitive mail after moving out of state, was not outside his reasonable control. The employer's request is, therefore, denied.

FINDINGS OF FACT: (1) Chimcare Home Services employed claimant as a chimney sweep and mason from June 17, 2014 to February 20, 2015.

(2) At least 20 times during claimant's employment, claimant's manager failed to order materials necessary for claimant to perform his duties, which caused claimant to be delayed and have to repeatedly reschedule jobs with his customers. The manager left claimant to resolve the problems resulting from the manager's failure to order materials. Claimant spoke with the owner about that on numerous occasions, and the owner told claimant it was the manager's job to order materials. Claimant repeatedly spoke with the manager. Each time, the manager just said he had not had time to order claimant's materials, would order them the next day, and that claimant needed to reschedule his customers.

(3) Claimant had a history of substance abuse and had been sober since approximately 2008. Claimant avoided using drugs and alcohol, avoided people who abused drugs and alcohol drugs and addicts, and tried to avoid conditions that jeopardized his sobriety.

(4) Several of claimant's coworkers used marijuana or other drugs while on and off duty. One drove his work van to a known drug house and reported to work while under the influence of methamphetamines. Another coworker used drugs, had been jailed for a drug-related manslaughter charge, and had reported to work while under the influence of heroin. The employer had discharged the first coworker for his misuse of the work van, but continued to employ the other even though his drug use was commonly known.

(5) Claimant was scheduled to work over 130 or 140 hours per two-week pay period. He felt exhausted after working so many hours, and was concerned about performing hazardous duties while exhausted. He was also concerned that he had to rely upon coworkers under the influence of drugs to help him perform his hazardous duties. He felt depressed, anxious, and overwhelmed because of his working conditions. His personal relationships suffered, he was unable to attend sobriety meetings often enough because of his work schedule, and he felt being around coworkers who used drugs jeopardized his sobriety and made him question his sober lifestyle. He began to feel that he had to quit his job to avoid losing his sobriety or having a breakdown.

(6) On February 20, 2015, claimant reported to work. That morning, a coworker smoked marijuana in front of claimant and talked about his recent release from prison while claimant rode in the coworker's vehicle. Claimant found out that he was supposed to report to a job site on the coast within 30 minutes, but did not have sufficient time to travel to the coast and arrive on time. The van he was supposed to use was not operable. The alternate transportation the employer offered was filled with rubble and needed to be emptied before claimant could drive it. The materials he needed to perform work at the job site on the coast were not available. Claimant felt overwhelmed, frustrated, defeated and depressed because of his working conditions and because he felt the employer was not offering claimant a career with the business, and he felt he could not work another day. Claimant left work, called the employer, and quit work.

CONCLUSIONS AND REASONS: We disagree with the ALJ, and conclude that claimant voluntarily left work with 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). Claimant had anxiety, depression and was a recovering alcohol addict, a permanent or long-term “physical or mental impairment” as defined at 29 CFR §1630.2(h). A claimant with that 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.

In Hearing Decision 15-UI-40355, the ALJ concluded that claimant quit work because the employer did not have the materials claimant needed to do an assigned job available, and while claimant was understandably frustrated at the lack of materials, the lack of materials was not a grave situation that amounted to good cause for quitting work.¹ We disagree that claimant quit work merely because of the missing materials.

On February 20, 2015, claimant reported to work and immediately encountered a convergence of all of the problematic working condition he had repeatedly observed over his six-months of employment. A coworker used drugs in front of him, while on duty, and while driving a vehicle in which claimant rode, jeopardizing claimant's safety. The employer had scheduled claimant to work at a job he could not report to on time, and failed to provide claimant with a working vehicle or the materials necessary to do the job. Claimant knew the employer was aware that it employed employees who used drugs, and had repeatedly discussed the manager's failure to provide the materials necessary for claimant to perform his assigned duties with the manager and owner. He knew further complaints were unlikely to result in any changes to the working conditions that were causing him to feel anxiety and depression, and to feel as though continuing to work for the employer under those conditions was jeopardizing his sobriety. Given those circumstances, we conclude that no reasonable and prudent person would continue to work for the employer for an additional period of time.

Claimant showed good cause for quitting work. Claimant is not disqualified from receiving unemployment insurance benefits because of his work separation.

DECISION: Hearing Decision 15-UI-40355 is set aside, as outlined above.

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

DATE of Service: August 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 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.

¹ Hearing Decision 15-UI-40355 at 2.

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