

EMPLOYMENT APPEALS BOARD DECISION
2015-EAB-0998

Reversed
Disqualification

PROCEDURAL HISTORY: On May 22, 2015 the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant voluntarily left work without good cause (decision #15156). Claimant filed a timely request for hearing. On June 22, 2015, ALJ Vincent convened a hearing at which claimant did not appear, and on June 16, 2015 issued Hearing Decision 15-UI-40776, dismissing claimant's request for hearing due to his failure to appear. On July 14, 2015, claimant filed a request to reopen the hearing. On August 6, 2015, ALJ M. Davis conducted a hearing, and on August 10, 2015 issued Hearing Decision 15-UI-42768, allowing claimant's request to reopen and concluding that the employer discharged claimant, but not for misconduct. On August 21, 2015, the employer filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Prestige Tile & Stone employed claimant as a tile setter from July 7, 2014 until November 14, 2014.

(2) When the employer hired him, claimant was residing in Las Vegas, Nevada and finishing up work on a tile setting project. The employer hired claimant to work in Corvallis, Oregon on a contract it had been awarded for the OSU NSR project. After that project was finished, the employer transferred claimant to the OSU SEA project. Because both projects were publicly sponsored, claimant received prevailing wage for his work, or \$38 per hour. Because the both projects were located more than 60 miles from the employer's offices in Portland, Oregon, the employer also paid for claimant's hotel accommodations and gave him a \$20 per day per diem to pay for food.

(3) Sometime in October 2014, claimant inquired of his supervisor what jobs, if any, the employer might have available for him after the OSU SEA project was completed. Claimant made it clear to his supervisor that he wanted pay generally commensurate to that which he was receiving on the OSU projects to continue working for the employer. The supervisor told claimant that if he continued to work for the employer, his pay was going to be reduced because the available work would be under private contracts and, since the work was in the Portland metropolitan area, the employer would not pay for claimant's living accommodations or give him a per diem for food. Claimant told the employer he could

not “take such a significant pay cut,” although he assumed the employer would pay him \$30 per hour for his work on Portland area projects. Audio at ~12:43. The supervisor told claimant that the employer could not pay the compensation that he wanted. Claimant told the supervisor he would stay at work until the OSU SEA project was finished. The supervisor agreed to this as the end of claimant’s work for the employer. Claimant interpreted the supervisor’s comment as expressing a “mutual agreement” that the employer would lay claimant off when his work on the project was completed. Audio at ~ 13:19.

(4) On approximately November 13, 2015, claimant contacted the supervisor and told him he thought his work on the OSU SEA project would be completed by the end of work on November 14, 2015 and that was going to be his final day. The supervisor agreed to that day as the final day of claimant’s employment.

(5) On November 14, 2015, claimant voluntarily left work.

(6) On June 8, 2015, the Office of Administrative Hearings (OAH) mailed a notice of hearing to claimant at his address of record scheduling a hearing on his claim for unemployment benefits for June 22, 2015. Claimant’s address of record was his father’s residence in Sherwood, Oregon. Claimant never received the notice in the mail and, as a result, did not appear at the hearing.

(7) A few days before July 14, 2015, not having received any notices about the hearing, claimant called the Department to inquire about the status of the request for hearing that he had filed. A representative told claimant that the hearing had already been held and his request for hearing had been dismissed. On July 14, 2015, claimant filed a request to reopen the hearing.

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

The Request to Reopen. OAR 471-040-0040(1) (February 12, 2012) states that a party whose request for hearing has been dismissed because that party failed to appear at the hearing may request to have the hearing reopened. See ORS 657.270(6)(c). The request must be in writing, filed within 20 days of the date of mailing of the hearing decision, and explain in detail why the party failed to appear. Unless the party demonstrates “good cause” or an “excusable mistake,” the request will not be allowed. “Good cause” means that circumstances beyond the party’s reasonable control prevented the party from appearing at the hearing. OAR 471-040-0040(2).

In this case, claimant filed his request to reopen on July 14, 2015, which was within 20 days after the June 26, 2015 date that the hearing decision was mailed. No evidence at hearing challenged claimant’s testimony that he did not receive the June 8, 2015 notice setting a hearing for June 22, 2015. There was nothing in the record that suggested claimant’s arrangement to use his father’s address as his address of record was unreasonable or imprudent or that he did not frequently check the mail he received at that address for important notices. Because claimant’s request was timely filed, and he showed that good cause prevented him from appearing at the June 22, 2015 hearing, claimant’s request to reopen is allowed.

The Work Separation. In Hearing Decision 15-UI-42768, the ALJ concluded that claimant’s work separation was a discharge. The ALJ reasoned that, because claimant was hired to work on the OSU job in Corvallis and that work ended on November 14, 2014, the employer must necessarily have laid him

off on that day or the work relationship must have ended that day under the terms which the employer had established for it. Hearing Decision 15-UI-41768 at 5. We disagree.

OAR 471-030-0038(2) (August 3, 2011) sets forth the standard for determining if the termination of a work relationship should be considered a discharge or a voluntarily leaving. If claimant could have continued to work for the employer for an additional period of time, the work separation was a voluntary leaving. OAR 471-030-0038(2)(a). If claimant was willing to continue 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). When an employee and an employer “mutually agree” that the employment relationship will terminate on a particular date or the happening of a particular event, the Court of Appeals has held that the work separation should be characterized as a voluntary leaving and not as a discharge. *Employment Department v. Shurin*, 154 Or App 352, 356, 959 P2d 637 (1998).

While the ALJ was correct that claimant was hired for a particular project on the OSU campus, the OSU NSR project and his work relationship with the employer would have involuntarily terminated at the conclusion of that project at the end of September 2014. Claimant, however, elected to remain working for the employer after that time on another project, the OSU SEC project. Neither party testified that claimant’s continued employment was limited to the duration of that second project or that it was going to expire at the end of it. As well, both claimant and the employer agreed that at the end of the second project, on November 14, 2014, the employer wanted claimant to remain working for it. Audio at ~12:43, ~15:40, ~22:22, ~42:49. There was no evidence that the employer was unwilling to allow claimant to remain in its employ. Claimant also did not contend that the employer actually took steps to involuntarily lay him off at the end of the OSU SEC project. Rather, it appears that in October 2014, claimant presented to his supervisor the terms on which he would continue to work for the employer after the OSU SEC project had concluded, and when the employer was unable to satisfy those terms, the supervisor agreed to allow claimant to leave at that time. Audio at ~ 13:19, 13:44, ~14:01, ~27:40, ~29:56, ~49:45. Applying the principles in *Shurin* and assuming the employer agreed to lay claimant off when his work on the OSU SEC project was finished, this was a mutual agreement to terminate the employment. As such, under *Shurin*, the work separation should be characterized as a voluntary leaving. The ALJ therefore erred in concluding the work separation was a discharge.

The Voluntary Leaving and Whether it Was Disqualifying. 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.

Claimant asserted throughout the hearing that the employer laid him off and did not specifically state the reasons that he might have decided to leave work. However, based on the tenor of claimant’s and the employer’s testimony about why he approached his supervisor in October 2014, it appears obvious that claimant did not want to remain working for the employer if he did not receive compensation equivalent to that which he received working at the OSU prevailing wage projects and which had included payment

of his living expenses. Audio at ~11:40, ~12:43, ~15:38, ~22:38, ~33:15. Claimant did not present any evidence that a reduction in pay to \$30 per hour (as claimant thought), with no living expenses included, created a grave circumstance requiring him to quit work. Audio at ~11:40. Indeed, absent some evidence to the contrary, this hourly wage appears more than ample on its face. While claimant also testified that he was assaulted by a coworker in October 2014, which in appropriate circumstances might have constituted a grave reason to leave work, he testified at hearing that he remained at work after the alleged assault and that he “absolutely” would not have stopped working for the employer if the employer had been able to meet his pay requirements. Audio at ~30:15, ~31:08, ~33:15. On these facts, it does not appear that the proximate cause of claimant’s decision to leave work was the alleged assault.

Claimant did not establish that grave reasons caused him to leave work when he did. Claimant is disqualified from receiving unemployment insurance benefits.

DECISION: Hearing Decision 15-UI-42768 is set aside, as outlined above.

Susan Rossiter and J. S. Cromwell, participating.

DATE of Service: September 25, 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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