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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-1118

Reversed
No Disqualification

PROCEDURAL HISTORY: On May 27, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant voluntarily left work without good cause (decision # 161407). Claimant filed a timely request for hearing. On June 27, 2015, ALJ Frank conducted a hearing, and on June 29, 2015 issued Hearing Decision 15-UI-40835, affirming the Department's decision. On July 2, 2015, claimant filed an application for review with the Employment Appeals Board (EAB). On August 20, 2015, EAB issued Appeals Board Decision 2015-EAB-0797, reversing Hearing Decision 15-UI-40835 and remanding this matter for further development of the record. On September 9, 2015, ALJ Frank conducted a hearing at which the employer did not appear, and on September 17, 2015 issued Hearing Decision 15-UI-44470, again affirming the Department's decision. On September 23, 2015, claimant filed an application for review with EAB.

FINDINGS OF FACT: (1) Halfway Market employed claimant from July 2005 until May 4, 2015. Claimant worked for the employer as a cashier, a fuel attendant and a tire repair person. The employer had approximately 22 to 25 employees.

(2) In approximately 2012 and 2013, claimant sustained injuries on the job when he was repairing tires and filed worker's compensation claims. On approximately December 1, 2014, claimant was again injured on the job while repairing a tire. EAB Exhibit 1 at 1. After his injury, claimant was off work and filed a worker's compensation claim. *Id.*

(3) When claimant was injured on December 1, 2014, his regular work schedule was four ten hour days each work week, or forty hours per week. Audio of June 22, 2015 Hearing (Audio 1) at ~8:54. ~19:51. On April 27, 2015, claimant's physician released him to work without medical restrictions beginning on April 28, 2015. EAB Exhibit 2 at 1; Audio 1 at ~13:00. On Sunday, May 3, 2015, the employer's owner visited claimant at claimant's house and told him he was scheduled to work beginning on May 4, 2015. Audio of September 9, 2015 Hearing (Audio 2) at 10:35. The owner told claimant that, rather

than working the forty hours per week he had been working when he was injured, the employer was scheduling claimant for four hours of work on four days each work week, or sixteen hours of work each week. The owner reduced claimant's weekly hours because he had sustained three worker's compensation compensable injuries in approximately three years, the owner did not want more "insurance problems" and the owner had safety concerns if claimant worked more hours each week. Audio at ~19:51. Claimant protested that he wanted to return to "full duty" or his regular work week of forty hours. Audio at ~10:56.

(4) On May 4, 2015, claimant's four hour shift was scheduled to begin at 2:00 p.m. Claimant appeared at the workplace at approximately 12:00 noon that day and gave the owner a handwritten note. The note stated that, since claimant had a release from his physician to work without restrictions, he wanted be "put back to full duty" and he thought it was "unfair" for the owner to have reduced his work hours. EAB Exhibit 2 at 2. The note concluded "I would like my regular hours back." *Id.* When claimant handed the note to the owner, he stated that his reduced hours were "unacceptable." Audio 1 at ~16:48, ~18:12. The owner took the note and told claimant, "See you in court." Audio 1 at ~7:40, ~9:49, ~16:48. The owner did not tell claimant that he was "discharged," "fired" or "terminated." Audio 1 at ~14:05. Claimant and the owner both walked away from each other.

(5) At 2:00 p.m. on May 4, 2015, claimant did not report for his scheduled shift. Claimant never told the owner that he was quitting work. Claimant did not show up for work because he thought the owner was "railroading" him by reducing his hours when his physician had released him to return to his regular work duties and hours. Audio 2 at ~14: 26. On May 4, 2015, claimant voluntarily left work.

CONCLUSIONS AND REASONS: Claimant voluntarily left work with good cause.

At the outset, we agree with the ALJ's conclusion that claimant's work separation was a voluntary leaving and adopt the ALJ's reasoning as set out in Hearing Decision 15-UI-44470 at 3. 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.

In Hearing Decision 15-UI044470, the ALJ concluded that claimant did not show good cause for leaving work. The ALJ reasoned that, while claimant might have had concerns about the lawfulness of the employer's actions in reducing his hours upon returning to work after a compensable worker's compensation injury, claimant did not take legal action to challenge the employer's actions until "well after the separation" and therefore the alleged illegality of that action could not have motivated his decision to leave work. Hearing Decision 15-UI-44470 at 3. Alternately, the ALJ determined that claimant left work due to a reduction in his work hours and since he did not argue that his costs of working exceeded his compensation after the reduction, did not meet the standard established for showing good cause under OAR 471-030-0038(5)(e).. The ALJ stated the "there is no law, rule or

precedent known to this arbiter that would, in the event of a reduction in hours causing a resignation, preclude application of OAR 471-030-0038(5)(e) due to illegal acts on the job." Hearing Decision 15-UI-44470 at 3. We disagree.

The ALJ parsed the evidence too finely to determine the reason that claimant left work. Fairly construed, both the note that claimant gave to the employer's owner on May 4, 2015 and his comments to the owner were a protest against the employer's reduction in his work hours after being fully released to work without medical restrictions after sustaining compensable injury. While claimant did tell the employer he thought the employer's actions might have been unlawful, it is sufficient that claimant expressed to the owner that he thought the reduction in his hours after he returned to work was "unfair," which is commonly a lay person's shorthand for a possibly illegal action. Claimant need not state the precise statutes or regulations in support of his contention of unfairness. Viewing the record as a whole, it appears that claimant did not decide to leave work simply because the owner reduced his hours, but because the owner did not return him to full duty after he was released to full duty after sustaining a compensable worker's compensation injury.

ORS 659A.040 applies to employers who employ more than six employees and states that it is an unlawful employment practice for an employer to discriminate against a worker with respect to any term or condition of employment because the worker has invoked the protections of the worker's compensation statutes or regulations. ORS 659A.043 applies to employers who employ more than twenty employees and, subject to certain exceptions not applicable here, states that, after an employee is released to full duties after sustaining a compensable injury, the employee must be reinstated to his former position upon his demand for reinstatement, even if the position was filled by a replacement during his absence. The only evidence in the record about the employer's number of employees was claimant's estimate that the employer had between approximately twenty-two to twenty-five employees. Audio 2 at ~9:56, ~17:49. While the number of the employer's employees was an important issue for which this case was remanded (to determine whether the employer had sufficient employees to apply ORS 659A.043) the employer, who might have supplied a more reliable estimate that claimant's, did not appear during the hearing on remand, although it appeared at the first hearing. Appeals Board Decision, 2015-EAB-0797 at 2, 3. On this record, we are left only with claimant's estimate and, based on it, both ORS 659.040 and ORS 659.043 appear to apply to the employer after claimant sought to return to work on May 4, 2015 after sustaining a compensable injury. The owner's principal reason for reducing claimant's hours after he returned to work, that he had sustained three compensable injuries in three years and the owner did not want further "insurance problems," appears to have been discrimination against claimant in the terms and conditions of his employment because he had previously invoked the protections of the worker's compensation system, which was contrary to the requirement set out in ORS 659A.040. In addition, claimant's May 4, 2015 note and his short conversation with the employer's owner that day, was a clear demand for reinstatement to his former position on the same terms and conditions after he had received a medical certification that he was able to return to his regular position. The employer's owner presented no evidence at the first hearing that claimant's former position was not available and, absent such a rebuttal, there is insufficient evidence to conclude that it was not. On this record, it appears that the employer's reduction to claimant's hours also ran afoul of the requirements of ORS 657A.040.

The Oregon courts and EAB have consistently held that employees are not required to endure oppressive and unlawful employment practices to avoid being disqualified from unemployment benefits for leaving

work without good cause, particularly where the oppressive or unlawful practices are likely to be ongoing and persistent. *See McPherson v. Employment Division*, 285 Or 541, 557, 591 P2d 1381 (1979) (claimants not required to remain working in an ongoing oppressive work environment to avoid being disqualified from benefits due to a voluntary leaving); *J. Clancy Bedspreads and Draperies v. Wheeler*, 152 Or App 646, 954 P2d 1265 (1998) (employer's persistent, ongoing unlawful working conditions may constitute good cause for leaving working without claimant's attempt to obtain voluntary employer compliance with the law). EAB has consistently held that a claimant had good cause leave work when claimant was subjected to ongoing working conditions or employment practices that violated the law. *See Tom D. Opp* (Employment Appeals Board, 12-AB-0383, February 8, 2012) (claimant had good cause to leave work when employer failed to pay him in accordance with Oregon law on an ongoing basis); *Kaitlynn A. Amis* (Employment Appeals Board, 13-AB-0949, July 17, 2013) (claimant had good cause to leave work when employer filed to provide meal and rest breaks that were required by law).

On this record, as it exists, the employer's discrimination against claimant based on his past worker's compensation claims and the employer's failure to reinstate him to his pre-injury position on pre-injury terms was likely an unlawful employment practice. Because the employer's owner insisted on reducing claimant's work hours as a condition of returning to work, the unlawful employment practice was intended to be ongoing. Based on the above precedents, no reasonable and prudent person in claimant's position would have opted to remain at work and endure such ongoing unlawful employment practices. The employer's unlawful practices were good cause for claimant to leave work when he did. Claimant is not disqualified from receiving unemployment insurance benefits.

DECISION: Hearing Decision 15-UI-44470 is set aside, as outlined above.

Susan Rossiter and J. S. Cromwell

DATE of Service: <u>October 16, 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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