

EMPLOYMENT APPEALS BOARD DECISION
2015-EAB-1417

Affirmed
Disqualification

PROCEDURAL HISTORY: On October 13, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant voluntarily left work without good cause (decision # 135002). Claimant filed a timely request for hearing. On November 10, 2015, ALJ Shoemake conducted a hearing, and on November 18, 2015 issued Hearing Decision 15-UI-47898, affirming the Department's decision. On December 3, 2015, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant submitted written argument to EAB consisting entirely of new information that he did not present at hearing. The documents included a letter to claimant from one of the employer's prior managers, and documents from September and October 2015 related to claimant's worker's compensation claim. Claimant did not explain why he was unable to present this information during the hearing or show that factors or circumstances beyond his reasonable control prevented him from doing so as required by OAR 471-041-0090 (October 29, 2006). Moreover, claimant failed to certify that he provided a copy of the new information to the other parties as required by OAR 471-041-0080(2)(a) (October 29, 2006). Therefore, EAB did not consider claimant's new information when reaching this decision.

Hearing Decision 15-UI-47898 mistakenly stated that Exhibit 1 was admitted at hearing without objection. The ALJ did not receive Exhibit 1 into evidence at hearing because claimant did not send a copy of the exhibit to the employer before the hearing. EAB considered the entire hearing record, excluding Exhibit 1.

FINDINGS OF FACT: (1) Roto-Rooter Service Services LLC employed claimant from April 15, 2015 to September 18, 2015.

(2) The employer initially hired claimant as an account representative to perform marketing duties, but claimant also performed light construction work for the employer.

(3) On April 16, 2015, claimant injured his knees while installing carpet at work. Claimant told his supervisor he had hurt his knees. The supervisor did not initiate a worker's compensation claim. During his employment, claimant did not pursue the matter with the employer or initiate a claim on his own when the supervisor did not initiate a claim. Claimant did not miss work or seek medical attention for his injuries until after his work separation from the employer. Claimant did not mention having problems with his knees to the employer's general manager, who was also the owner, until claimant's last day of work.

(4) Claimant was dissatisfied with how the department manager treated him when he was performing light construction duties, but did not complain to the employer about her. The department manager supervised all the projects that required light construction work.

(5) On August 12, 2015, the employer discharged claimant's direct supervisor. At about the same time, the employer decided to eliminate the account representative position for business reasons. Claimant began to perform more light duty construction work. At times, the work required him to kneel.

(6) On September 17, 2015, claimant asked the general manager to meet with him the following morning. On September 18, 2015, claimant met with the general manager and told him that he wanted to return to his marketing duties because he wanted to give his knees time to heal from the April 16, 2015 injury. The general manager told claimant he had to begin a worker's compensation claim, and that the employer had no marketing duties available because it had eliminated the account representative position. The general manager told claimant he could continue to work helping the department manager with light construction jobs. Claimant responded that he would not work with the department manager. Audio Record at 33:29 to 33:34. Claimant explained that he was upset that the department manager had recently given him a list of tasks to complete on a project. The general manager examined the list and told claimant it was an appropriate list. Claimant refused to discuss the department manager further or have contact with her again. The general manager told claimant the employer had no work for him because he refused to work with the department manager.

(7) The employer assisted claimant with completing a worker's compensation claim, which was subsequently denied. Claimant did not attend a scheduled MRI (magnetic resonance imaging) diagnostic testing appointment for his knees.

CONCLUSIONS AND REASONS: We agree with the Department and the ALJ that claimant quit work without good cause.

Both parties testified that the employer discharged claimant. Audio Record at 9:56 to 10:03, 41:30 to 42:34. However, whether claimant's work separation was a voluntary leaving or a discharge is not determined by the parties' characterizations of the work separation, but instead by application of Employment Department law. If the employee could have continued to work for the same employer for an additional period of time, the work separation is a voluntary leaving. OAR 471-030-0038(2)(a) (August 3, 2011). If the employee is willing to continue to work for the same employer for an additional period of time but is not allowed to do so by the employer, the separation is a discharge. OAR 471-030-0038(2)(b).

On September 18, 2015, claimant told the employer that he was no longer willing to do light construction work for the employer due to knee pain, and that he was unwilling to work with the department manager who supervised all the work projects involving light construction work. The employer had only light construction work available for claimant. The fact that claimant was willing to perform marketing work that was no longer available does not change the fact that claimant initiated the work separation at a time when continuing work remained available to him. The work separation was a voluntary leaving.

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.

To the extent claimant left work due to knee pain caused by light construction work, claimant failed to show he faced a grave situation. Claimant did not show by a preponderance of the evidence that the light construction work he performed caused him knee problems such that he had no reasonable alternative but to quit due to the impact of the work on his knees. He had performed light construction work since his employment began yet did not initiate a worker’s compensation claim, despite his supervisor’s failure to do so after the April 16 injuries, and did not miss work or seek medical attention for his knees while employed. Moreover, when offered the opportunity to file a worker’s compensation claim and continue working performing light construction, claimant’s response was not that he could not perform the work, but that he refused to work with the department manager. Even after he filed a claim, claimant did not attend a scheduled MRI appointment to assess the condition of his knees. Claimant failed to show that his knee condition posed a situation of such gravity that a reasonable person would have had no reasonable alternative but to leave work.

To the extent claimant left work because he did not like working with the department manager, claimant did not establish that his concerns about the work environment she created or his desire to have no contact with her at work were for reasons of such gravity that he had no reasonable alternative but to leave work to avoid having contact with her. Claimant was dissatisfied that the department manager gave him a list of tasks to complete, but did not show why the manager’s action in doing so constituted a grave situation for claimant or establish that no reasonable and prudent person would have continued to work for the employer for an additional period of time. Even assuming the department manager created a grave situation for claimant, he had the reasonable alternative of accepting the general manager’s help to mediate the problem. Instead, claimant refused to speak about the department manager, or even see her again before he left work.

Claimant left work without good cause. He is disqualified from receiving unemployment insurance benefits because of his work separation.

DECISION: Hearing Decision 15-UI-47898 is affirmed.

Susan Rossiter and J. S. Cromwell

DATE of Service: January 8, 2016

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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