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

EMPLOYMENT APPEALS BOARD DECISION

2015-EAB-1629-R

Request for Reconsideration Denied

PROCEDURAL HISTORY: On November 25, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 85505). Claimant filed a timely request for hearing. On December 23, 2014, ALJ Frank conducted a hearing, and on December 30, 2014 issued Hearing Decision 14-UI-31108, concluding claimant voluntarily left work without good cause. On January 5, 2015, claimant filed an application for review with the Employment Appeals Board (EAB). On January 8, 2015, EAB issued Appeals Board Decision 2015-EAB-1629 in which it affirmed the hearing decision under review. On January 16, 2015, claimant filed a written argument to EAB. Under the authority granted to us by ORS 657.290(3), we will reconsider Appeals Board Decision 2015-EAB-1629 to address issues raised in claimant's written argument.

FINDINGS OF FACT: (1) Cudahy Lumber Company (the employer) employed claimant as a fork lift driver from March 18, 2013 until October 15, 2014.

(2) As a result of an accident that occurred approximately 27 years ago, claimant is completely blind in one eye. Claimant did not disclose this condition to the employer when he was hired because it did not affect his ability to perform his job as a fork lift driver.

(3) On October 15, 2014, claimant began work at 6:30 a.m. Because it was dark and raining heavily, and because a light in the yard was defective, claimant found it difficult to see and could not safely perform his job. He stopped driving, and contacted the employer's yard supervisor. Claimant told the yard supervisor that he was blind in one eye, and explained that he did not feel comfortable operating the fork lift due to poor visibility caused by the defective light. The yard supervisor told claimant that he would be unable to keep claimant if he could not operate the fork lift. Transcript at 15. Claimant was very upset by the supervisor's statement, but did not believe that he had been discharged. He asked

for some time off to calm himself, and the supervisor allowed claimant to leave the workplace for an hour. Transcript at 18.

(4) When claimant returned to the workplace, the yard supervisor and employer's owner met with him. They told claimant there was nothing he could do if he was unable to operate equipment. The yard supervisor then told claimant he "could push a broom around a couple of days to finish the week." Transcript at 18. Claimant did not accept the offer of cleanup work because he believed the employer had discharged him, and was upset by this action. Claimant also believed that the cleanup work did not need to be done, and that it would only last for a few days. Transcript at 18. Claimant left the workplace, returning only to pick up his final paycheck. Transcript at 19.

CONCLUSION AND REASONS: We agree with the ALJ that claimant voluntarily quit work without good cause.

We begin our analysis by considering the nature of claimant's October 15, 2014 work separation. 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).

At the hearing, claimant asserted that the yard supervisor discharged him when he told claimant that there was nothing for him to do if he was unable to operate equipment. Under OAR 471-030-0038(1)(a), "work" is defined as the continuing relationship between the employer and employee; it is not defined as a specific assignment to a particular position. The employer no longer wanted claimant to perform the job of forklift driver, but wanted to assign him cleanup duties. Because the employer was willing to continue its relationship with claimant, it had work available for him that claimant chose not to accept.

The record shows that claimant could have continued to work for the employer for an additional period of time after October 15, 2014 had he agreed to perform cleanup work. Claimant refused to accept the work offered by the employer. Accordingly, we conclude that claimant voluntarily quit his job.

We next consider whether claimant is disqualified from benefits because he quit his job. A claimant who leaves work voluntarily is disqualified from the receipt of benefits unless he proves, by a preponderance of 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" for leaving work 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). 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 her employer for an additional period of time.

Claimant voluntarily left his job on October 15, 2014 when he refused to perform cleanup work for the employer. Claimant was unwilling to do this type of work because he believed the employer had discharged him, and was upset about what he believed to be the termination of his employment. In addition, claimant thought the work offered would last only a few days and was unnecessary.

Claimant's belief that the employer had terminated his employment was not reasonable. As discussed above, the employer did not discharge claimant from work; the employer removed claimant from his assignment as a forklift driver but was willing to assign claimant cleanup duties for a few days. Claimant's discomfort with the cleanup assignment, and his concern that the assignment would last only a few days, did not constitute good cause for leaving his job. A reasonable and prudent person would overcome his feelings about a work assignment and accept even a few days of work in order to continue employment and earnings for as long as possible. Accordingly claimant failed to demonstrate that he faced a situation of such gravity that a reasonable and prudent person would have no alternative but to leave work. Nor did claimant's concern that the cleanup work would last only a few days provide good cause to quit.

In his written argument, claimant asserted that the hazardous working conditions, such as the defective lighting, to which he was exposed constituted good cause for leaving work. Written Argument at 8. Claimant argues that a reasonable and prudent person, facing this type of work environment, would have no reasonable alternative but to quit his job. Hazardous conditions may have provided a good reason for claimant to stop working as a forklift driver, but had no bearing on his decision to refuse to perform cleanup work for the employer.

Finally, claimant also asserted in his argument that even if he did not have good cause to quit his job, he qualifies for benefits under ORS 657.176(7), which states:

> For purposes of applying subsection (2) of this section, when an employer has notified an individual that the individual will be discharged on a specific date and it is determined that:
>
> (a) The discharge would not be for reasons that constitute misconduct connected with the work;
> (b) The individual voluntarily left work without good cause prior to the date of the impending discharge; and
> (c) The voluntary leaving of work occurred no more than 15 days prior to the date of the impending discharge,
>
> Then the separation from work shall be adjudicated as if the voluntary leaving had not occurred and the discharge had occurred. However, the individual shall be ineligible for benefits for the period including the week in which the voluntary leaving occurred through the week prior to the week in which the individual would have been discharged.

Contrary to claimant's assertion, this statute is inapplicable to his work separation. From the record, it appears probable that the employer planned to discharge claimant after the cleanup work was finished. The record contains no specific date on which this assignment would end, however. The yard supervisor testified that had two to four days of cleanup work available for claimant. Transcript at 29.[1]

[1] In his written argument, claimant asserted that the ALJ " never definitively resolved" the issue of when the cleanup work offered to claimant was scheduled to end, and argued that "the matter should be remanded to develop the factual [sic] relevant so that ORS 657.176(7) can be applied in the absence of a finding of good cause." Written Argument at 10. Contrary to claimant's assertion, and as noted above, the ALJ did ask the yard supervisor how long the cleanup assignment would last, and the supervisor responded "Maybe two to four days at most, probably." Transcript at 29. Thus, the issue

Claimant voluntarily left work without good cause and is disqualified from the receipt of unemployment benefits based on this work separation.

DECISION: The request for reconsideration is denied, and Hearing Decision 14-UI-31108 is affirmed.

Tony Corcoran and J. S. Cromwell;
Susan Rossiter, not participating.

DATE of Service: January 22, 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 website at court.oregon.gov. Once on the website, click on the blue tab for "Materials and Resources." On the next screen, click on the tab that reads "Appellate Case Info." On the next screen, select "Appellate Court Forms" from the left panel. On the next page, select the forms and instructions for the type of Petition for Judicial Review that you want to file.

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regarding the length of the cleanup assignment was resolved at the hearing and it is unnecessary to remand this case to obtain additional evidence on this matter. We also note that if the claimant believed the estimated length of the cleanup assignment needed to be more fully explored, he had the opportunity at the hearing to cross examine the employer's witnesses – the yard supervisor and the owner – about this issue.