EO: 200
BYE: 201639

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
2016-EAB-0037

Affirmed
Disqualification

PROCEDURAL HISTORY: On November 12, 2015 the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant voluntarily left work without good cause (decision # 135001). Claimant filed a timely request for hearing. On December 14, 2015, ALJ McGorrin conducted a hearing, and on December 15, 2015 issued Hearing Decision 15-UI-49381, affirming the Department's decision. On January 4, 2016, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant submitted a written argument in which he largely repeated his hearing testimony. However, in his argument claimant stated, as he did at hearing, that he does not know how to read or write, and that may have hampered him in understanding the intention underlying certain text messages that the employer sent to him. Claimant's Written Argument at 2; Transcript at 21. At hearing, claimant appeared quite able to discuss the text messages and exhibited a normal understanding of their contents. Moreover, claimant did not dispute that he personally sent (and presumably composed) some text of the text messages sent to the employer rather than exclusively relying on his fiancé to communicate by text message. Transcript at 11, 12. It does not appear that an inability to read and write adversely affected claimant's ability to understand any of the text messages.

FINDINGS OF FACT: (1) AMC Fleet Services, Inc. employed claimant as a mechanic's helper from January 15, 2014 until September 25, 2015.

(2) On Monday, August 31, 2015, claimant worked his regularly scheduled shift. On Tuesday, September 1, 2015, claimant's fiancé sent a text message to the employer's owner stating that claimant was sick and would not be reporting for work. On Wednesday, September 2, 2015, claimant's fiancé sent another text message to the owner stating that claimant had hurt his back and could not get out of bed or move. Claimant did not report for work on September 3 or 4, 2015 and neither claimant nor his fiancé contacted the employer about those absences. September 5 and 6, 2015 were claimant's regularly scheduled days off.

(3) On Monday, September 7, 2015, the Labor Day holiday, claimant's fiancé sent a text message to the owner stating that she had taken claimant to the hospital and he had been diagnosed with a pulled muscle in his back, had been prescribed medication and she would provide further information to him about claimant's condition later. Claimant did not report for work on Tuesday, September 8 or Wednesday, September 9, 2015. On Wednesday, September 9, 2015, the owner sent a text message to claimant inquiring about his condition. Claimant's fiancé replied to the owner's message stating that claimant was "all drugged up" and he "hoped to be back [at work] on Monday [September 14, 2015]" if he was able to obtain a doctor's note releasing him to work. Transcript at 10. The employer required a physician's release to work from every employee who was absent for longer than one day. Claimant did not report for work on Thursday or Friday, September 10 and 11, 2015.

(4) Claimant did not report for work on Monday, September 14, 2015 or on any days after. On September 15, 2015, which was the date of claimant's monthly pay draw, claimant sent a text message to the owner asking if his fiancé could pick up his draw. Claimant and the owner then exchanged text messages in which the owner explained that claimant had not worked any days in September and had no accrued pay to draw against.

(5) Beginning sometime before September 17, 2015, claimant and the owner began to exchange a series of text messages about the owner's attempts to facilitate a sale of a truck that claimant owned and wanted to sell. The owner became irritated with claimant's many inquiries about his efforts on claimant's behalf and thought that claimant should be contacting the potential buyers himself since he had the information to do so. On September 17, 2015, claimant sent another text message to the owner asking for information about the potential buyer of the truck. The owner replied by text message that he had previously told claimant to contact the buyer himself and to call the buyer's employer, whom claimant knew, if he did not have the contact information for the buyer. Following those statements, the owner further sent claimant a text message that stated "No more contacts." Transcript at 37. The owner meant only that claimant should not contact him again about the potential truck sale.

(6) On Friday, September 25, 2015, claimant sent a text message to the owner stating that he was going to see a doctor about obtaining a release to return to work on Tuesday, September 29, 2015, and told the owner that he was having his brother or sister come to the workplace to pick up his work tools. Transcript at 11. The owner agreed to release the tools and stated, "I'll need your [work] uniforms back when they get the tools. Been paying for them every week. No sense in wasting money." Transcript at 40. The employer paid a weekly fee to a uniform rental company, and the owner did not want to incur charges for uniforms that were not being used while claimant was injured and could not work. Claimant replied to the owner's request, "So I'm fired?" Transcript at 39. The owner responded, "I didn't say that. Once this is all figured out, then we can talk. Until then, I'm not going to pay for the uniforms anymore." Transcript at 12, 39. When the owner referred to figuring out "all this," he meant claimant's medical situation and his ability to work.

(7) After September 25, 2015, the employer had no further contact with claimant. Claimant never presented a doctor's release to return to work and never contacted the employer about reporting for work. Continuing work was available to claimant until approximately October 11, 2015 when the employer hired a replacement for claimant.

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

The first issue this case presents is the nature of the work separation. Claimant contended that the employer discharged him. Transcript at 27. The employer's position was that claimant voluntarily left work. Transcript at 37, 39, 41. OAR 471-030-0038(2) (August 3, 2011) sets forth the standard for determining if a work separation was a discharge or a voluntary leaving. If claimant could have continued to work for the employer for an additional period of time when the separation occurred, the separation was a voluntary leaving. OAR 471-030-0038(2)(a). If claimant was willing to continue to work 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).

Neither party contended that the employer told claimant plainly that he was discharged and neither contended that claimant ever stated outright that he was quitting. Transcript at 27. While the parties disagreed on the dates that the text messages between the employer's owner and claimant were exchanged, they substantially agreed on their contents. Because the owner testified by reading the text messages from his phone, and claimant stated he was not able to access the messages on his phone, we have adopted the owner's testimony about the dates and the precise language of the text messages since it appears more reliable. Transcript at 29.

The statements of the owner on which claimant relied to infer that he had been discharged were, at best, ambiguous. However, in response to claimant query on February 25, 2015 whether he was "fired" after the owner asked him to bring in his uniforms, the owner clearly stated, "I didn't say that," which reasonably should have alerted claimant that any statements the owner made up to that time were not intended as words of discharge. Transcript at 12, 39. While that final text message exchanged between the parties concluded with the owner's statement about discussing matters "once this is all figured out," that phrase alone, especially immediately following the owner's denial that he was discharging claimant, was not reasonably construed as expressing an intention to discharge claimant. Interpreting that phrase most strongly in favor of claimant's position, it was still oblique and equivocal. It was not reasonable for claimant to interpret it as an expression of the owner's intention to discharge him without first making a clarifying inquiry of the owner, which claimant did not do. The first objective manifestation of an unambiguous intention to sever the work relationship by either of the parties was claimant's failure to contact the owner after September 25, 2015 or attempt to report for work thereafter. We therefore conclude that claimant's work separation was a voluntary leaving, effective September 25, 2015, the day marking the beginning of claimant's continuing failure to contact the employer after having been told he had not been discharged.

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.

Because claimant contended he was discharged, the record shows no reason for claimant leaving work other than that he mistakenly thought he had been discharged. A reasonable and prudent person of normal sensitivity, exercising ordinary common sense, would not quit work on that basis without first confirming his employment status with the employer, especially where, as here, the employer said in his final communication with claimant that he had not been fired. On facts similar to those claimant presented, EAB has consistently held that mistakenly believing one was discharged does not constitute good cause for leaving work when the employer's statements on which that belief was based were ambiguous.[1] Because the owner's statements to claimant were not plainly words of discharge, and, in fact, rejected claimant's assumption that he had been discharged, claimant did not show good cause for leaving work when he did.

Claimant did not meet his burden to show that he had good cause for leaving work. Claimant is disqualified from receiving unemployment insurance benefits.

DECISION: Hearing Decision 15-UI-49381 is affirmed.

Susan Rossiter and J. S. Cromwell, participating.

DATE of Service: <u>January 28, 2016</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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[1] *See Appeals Board Decision* 2015-EAB-0232, April 16, 2015; *Appeals Board Decision* 2014-EAB-1670, December 16, 2014*; Appeals Board Decision* 11-AB-2392, October 10, 2011*; Appeals Board Decision* 11-AB-0702, March 15, 2011; *Appeals Board Decision*, 10-AB-3931, January 14, 2011; *Appeals Board Decision* 10-AB-1790, July 22, 2010*; Appeals Board Decision*, 09-AB-2465, August 18, 2009 (so holding).