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

EMPLOYMENT APPEALS BOARD DECISION
2016-EAB-0217

Affirmed
Disqualification

PROCEDURAL HISTORY: On January 15, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant voluntarily left work without good cause (decision # 101914). Claimant filed a timely request for hearing. On February 9, 2016, ALJ Wipperman conducted a hearing, and on February 17, 2016 issued Hearing Decision 16-UI-53177, affirming the Department's decision. On February 26, 2016, claimant filed an application for review with the Employment Appeals Board (EAB).

Since no party objected the ALJ's refusal to admit Exhibit 2 into evidence within the time set out in Hearing Decision 16-UI-53177, it remains excluded from evidence.

Claimant submitted a written argument in which he presented information not offered into evidence during the hearing. Claimant did not explain why he was reasonably unable to present this information at the hearing, or otherwise show as required by OAR 471-041-0090 (October 29, 2006) that factors or circumstances beyond his reasonable control prevented him from doing so. For this reason, EAB did not consider the new information that claimant sought to present. EAB considered only information received into evidence during the hearing when reaching this decision.

FINDINGS OF FACT: (1) Automobilia, Inc. employed claimant as a lube technician from January 4, 2012 until December 29, 2015. The employer operated a facility that provided oil changes and car washes. Customers stayed in their cars when the cars were serviced or washed.

(2) Approximately early 2015, employees began to use smokeless tobacco vaporizers in workplace areas that were not designated for the use of tobacco products. Claimant objected to his manager several times about the vapors that these devices emitted. In May 2015, at an employee meeting, the manager announced that the employer was implementing a policy in which the use of tobacco vaporizers was prohibited in all workplace areas other than designated smoking areas for tobacco products. Afterward, the employer treated the use of tobacco vaporizers like the use of tobacco, and gave verbal and written warnings to employees who were discovered to have been vaping in non-designated smoking areas.

(3) After the recreational use of marijuana was legalized in Oregon in 2015, a number of vehicles that the employer serviced or washed smelled of marijuana. Beginning approximately mid-2015, claimant reported several times to his manager that he suspected other employees were smoking marijuana in the workplace during work hours, which the employer's policies prohibited. Claimant never observed other employees using marijuana in the workplace, but based his suspicions on occasionally smelling a scent he thought was from marijuana in general workplace areas, occasionally observing other employees had blood shot eyes and because he once saw a lighter in an employee's car that he thought was for marijuana use and the employee left that car blowing smoke out of his mouth but not holding a cigarette. Transcript at 18, 19. Claimant's manager told claimant that he would take action in response to claimant's complaints if claimant provided more concrete and direct evidence that employees were smoking marijuana in the workplace during work hours.

(4) On November 2, 2015, claimant entered a workplace restroom after seeing a particular employee leave it. Upon entry, claimed smelled that a tobacco vaporizer had been used in the restroom as well as what he thought was the scent of marijuana. Claimant suspected that the employee had vaped in the restroom to hide that he had been smoking marijuana in it. At claimant's request, a third employee entered the restroom to corroborate what claimant had smelled. Claimant reported what he and the third employee had smelled in the restroom to his manager. The manager spoke with the third employee and that employee told him that the restroom had been "super cloudy," that vaping had occurred in the restroom, but the employee was uncertain whether he had discerned the smell of marijuana in the restroom. Transcript at 38. The manager spoke to the employee whom claimant suspected had used marijuana in the restroom, and that employee denied he had done so. The manager issued a disciplinary warning to the employee for using a tobacco vaporizing device in the restroom, which was not a designated smoking area. The manager then spoke to claimant, told him that his suspicions were not sufficient for him to discipline the employee, and discussed with claimant "the ways to catch someone using marijuana in the workplace." Transcript at 40.

(5) Shortly after November 2, 2015, in response to claimant's complaint about vaping and suspicion of marijuana use in the restroom, the manager held an employee meeting. At the meeting, the manager told the employees that vaping in workplace areas not designated for smoking was prohibited. The manager also reviewed the employer's drug policy with the employees and told them that, although recreational marijuana use had been legalized in Oregon, it was not allowed in the workplace. He also stated that marijuana use in the workplace could result in the employer's administration of a drug test. Transcript at 40.

(6) Sometime around mid-December 2015, claimant observed the same employee he had suspected of using marijuana in the restroom smoking a cigarette in the workplace in front of a customer. The employee was not smoking in a designated area. When that employee put out his cigarette by dropping it on the ground, claimant stepped on the cigarette and told the employee, "This is not a smoking area." Transcript at 6. The employee responded to claimant in front of the customer, "Fuck you." Transcript at 6. Claimant complained to his manager about the employee's behavior, and thought the manager did not take action to discipline the employee.

(7) On December 29, 2015, claimant's manager issued a disciplinary warning to claimant for allowing the employer's car wash to close early on December 24, 2015 when he was designated the person in

charge during that shift. Claimant told the manager that another employee had closed the car wash without his permission. The manager thought, whether or not claimant's explanation was accurate, claimant should have been aware of the early closing since he was the person in charge and did not rescind the warning. The manager also issued a disciplinary warning to the employee claimant contended was responsible for closing the car wash on December 24, 2015. After the manager gave the disciplinary warning to claimant, claimant kept the warning to make a statement in its "employee comments" section" while the manager left the workplace for lunch.

(8) After the manager left the workplace on December 29, 2015, claimant went to the car wash to cover another employee's duties while that employee used the restroom. That employee was the employee whom claimant blamed for closing the car wash early on December 24, 2015. Before leaving for the restroom, that employee told claimant he was almost finished washing the car he was working on. When that employee returned, he saw claimant was washing parts of the car that he had already washed. The employee told claimant to stop washing the car because it was already done. Claimant ignored the employee and continued washing the car. The employee told claimant, "This is fucking ridiculous" and walked away. Transcript at 6, 47.

(9) After the interaction with the other employee on December 29, 2015, claimant completed the comments section of the disciplinary warning that was issued to him. In his comments, claimant stated that employees were smoking marijuana in the workplace, employees were "yelling profanities" at him, that he was going to "file a complaint with OSHA" and "no longer can I work in a hostile work environment." Exhibit 1 at 10-11. When the manager returned to the workplace, claimant told him he was quitting work. Claimant then clocked out and did not return to the workplace. On December 29, 2015, claimant voluntarily left work.

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

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 contended that he quit work when he did because the employer did not take action when he notified the manager that other employees were vaping in non-designated areas of the workplace, were smoking marijuana in the workplace, and were "verbally abusive" to him. Transcript at 5, 6. With respect to claimant's contention of abuse, he specifically testified only to two incidents of alleged abuse, both involving situations in which two different employees using the work "fuck" in relation to him or his behavior when those employees were apparently irritated with him. While claimant contended that the employee who directed this language toward him on December 29, 2015 used it repeatedly during their interaction, that employee testified to using it only once and the witness whom claimant called on his behalf stated that he heard the use of the work "fuck" directed toward claimant only once in the

interaction. Transcript at 47, 50, 57. Weighing the sum of the evidence on this issue, claimant did not demonstrate that the employee used a foul word toward him more than once on December 29, 2015. A reasonable and prudent person of normal sensitivity would not have concluded that the use of the word "fuck" in connection with his actions on two occasions during an almost two month period created a grave situation, a hostile work environment or rose to a level constituting personal abuse. Claimant did not meet his burden to show that those employees' behaviors on those occasions constituted a grave reason to leave work.

With respect to the vaping in the workplace, claimant testified that after the employer took action in May 2015, the situation "got better and better, but it never fully quit." Transcript at 12. Claimant did not dispute that the employer took action in response to his complaints about vaping or contend that after the employer implemented its policy forbidding vaping in non-designated areas, the manager failed to issue warnings when he became aware of non-compliant vaping. Indeed the one vaping incident that claimant pointed out after the implementation of the employer's policy occurred on November 2, 2015, and it was undisputed that after this occurrence, the employer issued a warning to the employee who had violated its vaping policy. Transcript at 23, 38. While the employer might not have secured absolute compliance with its policy forbidding vaping in non-designated areas, claimant did not show that the employer condoned non-compliance or that the prevalence of non-compliance with its policy was so great that as of the time claimant left work he was sustaining some form of grave harm from illicit vaping. Claimant did not meet his burden to show that vaping in the workplace around the time quit was an objectively grave reason to leave work.

With respect to the use of marijuana in the workplace, claimant testified that he had never personally observed any other employees doing so. Transcript at 18. Claimant speculated that marijuana use was occurring in the workplace because he observed certain signs and smells that were consistent with such use, but could also have been attributable to other causes. Transcript at 18, 19. However, claimant did not dispute the manager's testimony suggesting the source of the marijuana odor claimant perceived could have been from customers' cars. Transcript at 41. Given this possibility, it was understandable for the employer to want solid evidence that an employee had used marijuana in the workplace before it took action. Claimant did not dispute that his manager listened to his concerns about marijuana use, advised him he needed more objective evidence than his speculations about marijuana use before he took action against any employee for violating the employer's policy drug policy, and held a meeting of all employees to advise them that the employer was not going to tolerate marijuana use in the workplace. Under these circumstances, claimant did not demonstrate that the employer's failure to take action against particular employees for marijuana use until it had some objective evidence that supported a suspicion of that use was objectively unreasonable. Claimant did not meet his burden to show that his suspicions about marijuana use in the workplace were objectively grave reasons to leave work.

Claimant did show good cause for leaving work when he did. Claimant is disqualified from receiving unemployment insurance benefits.

DECISION: Hearing Decision 16-UI-53177 is affirmed.

Susan Rossiter and D. P. Hettle;
J. S. Cromwell, not participating.

DATE of Service: March 28, 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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