

EMPLOYMENT APPEALS BOARD DECISION
2016-EAB-0249

Reversed
No Disqualification

PROCEDURAL HISTORY: On January 25, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant voluntarily left work without good cause (decision # 91954). Claimant filed a timely request for hearing. On February 23, 2016, ALJ Vincent conducted a hearing at which the employer failed to appear, and on February 26, 2016 issued Hearing Decision 16-UI-53898, affirming the Department's decision. On March 1, 2016, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant submitted a written argument which relied, in part, on information that claimant did not present during the hearing. Claimant did not explain why he was unable to offer the information during 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) HOF Management, Inc. employed claimant as a maintenance worker from August 15, 2005 until December 15, 2015.

(2) Sometime in approximately early 2014, the employer assigned claimant to work on-site performing maintenance tasks at one of its oldest apartment complexes. At the time of this assignment, the apartment building had many unpatched holes in its basement walls and ceilings which had been made in the course of past plumbing repairs. Approximately one month after claimant's assignment, the employer told claimant he needed to patch the holes in the basement walls and ceilings in preparation for an upcoming federal inspection. Because of the age of the complex, claimant was concerned that he might encounter lead-based paint and asbestos during those repairs and would need to take appropriate safety precautions. Claimant explained his concerns to the site manager and the assistant manager, and both of them assured him that lead-based paint and asbestos were not present in the complex. Relying on their statements, claimant spent four weeks repairing the walls and ceilings, which resulted in the

scattering of much dust and debris that claimant inhaled or that touched his skin. Claimant did not take any protective measures when he performed these repairs.

(3) Sometime before November 8, 2014, claimant arranged with an electrician to re-route the electrical wiring in one of the complex's apartments to accommodate a change in location for a hot water heater. This re-routing would entail opening the walls and ceiling in the apartment and running electrical wiring through the attic space. When an electrician inspected the apartment before beginning work, he told claimant that he could not open the walls and the ceiling because lead-based paint and asbestos were present and a "specialist" would need to perform that work because of the hazards. Audio at ~6:09. When claimant told the electrician he had been assured by his managers that neither was present, the electrician told claimant he had been on site to perform work sometime before and the apartment complex had tested positive for lead-based paint and asbestos at that time. Claimant then approached the managers and told them what the electrician had told him. Contrary to their earlier assurances, the managers agreed with the electrician's assessment and told claimant they were aware of the presence of asbestos in the walls and ceilings of the apartment complex. Claimant became concerned that the managers would tell him whatever was expedient to motivate him to perform work for the employer as quickly and efficiently as possible without regard for the truth and without concern for the consequences to his health.

(4) Shortly before November 8, 2014, claimant called the employer's human resources department to discuss his concerns about the presence of asbestos and lead-based paint in the complex and the managers' misrepresentations about the absence of those hazards before he had made repairs. A representative from the human resources department told claimant to compose an email setting out his concerns and to send it to her. The representative informed claimant she would get back to him within a week after receiving the email. On November 8, 2014, claimant sent the requested email to the human resources representative. Claimant copied that email to himself and his brother to ensure that it was successfully delivered.

(5) After November 8, 2014, the human resources representative did not respond to claimant's email. Beginning about November 14, 2014, claimant called the human resources representative many times to follow up on the email. Claimant left messages for her but she did not respond. Claimant began to think the representative was viewing the caller identification feature on her phone and intentionally failing to answer her phone to avoid his calls. Claimant continued to call the representative.

(6) Sometime after claimant sent the email to the human resources representative in November 2014, claimant contacted the employer to repair a dryer vent because repairing that vent would require claimant to climb a ladder higher than six feet, which was contrary to the employer's safety policies and height restrictions for the types of tasks he was allowed to perform as an on-site maintenance worker. The employer sent a person to perform the repair, but it was not successful. When claimant became aware the vent was not satisfactorily repaired, claimant called one of the employer's off-site managers to inform him that another person needed to be sent out to make the repair. That manager told claimant, "You get up there and do it [yourself]," and when claimant reminded him about the height restrictions for an on-site maintenance worker, the manager stated, "Quit calling and being a baby about it. Get up there and do it." Audio at 9:22. Claimant performed the task himself although it violated the employer's safety policies for his position. Claimant became concerned that the manager was trying to

arrange for him to violate the employer's own safety policies to retaliate against him for making the complaint to human resources about the lead-based paint and asbestos.

(7) Several months after November 2014, the human resources representative still had not responded to claimant's emails and claimant still had not been able to reach the representative by telephone. Claimant approached his on-site managers for assistance in obtaining a response from the human resources representative. The managers told claimant they understood his concerns about the asbestos and lead-based paint, but they did not want to become involved because they feared retaliation. They did not assist claimant.

(8) Sometime shortly before July 9, 2015, claimant finally succeeded in reaching the human resources representative. The representative told claimant she never received his November 8, 2014 email. Claimant re-sent the email to her, and copied it to himself, his brother and another human resources representative to ensure it was delivered. The representative responded to claimant's email, stating that she had arranged to have a meeting with management about the concerns claimant had detailed in his email and she would get back to him in a few days. After a few days had elapsed, claimant began calling the representative but, as before, was unable to make direct contact with her and left messages. The representative did not respond.

(9) Sometime later, claimant's on-site manager began yelling at him regularly about her dissatisfaction with his work and pointing and shaking her finger at him inches from his face. The employer scheduled a meeting at its downtown office to attempt to resolve morale problems between the maintenance personnel and the on-site management at the apartment complex. Claimant, another maintenance person, the on-site manager and the assistant manager attended the meeting. At that meeting, personnel from the employer's downtown office asked the attendees to describe their impressions of the source of the problems. Claimant told the meeting facilitators that he was "not comfortable" discussing the problems because he was afraid of retaliation. Audio at ~13:56. The facilitators assured him there would be no retaliation. Relying on this assurance, claimant stated that, to him, the problem appeared to be the inability of the on-site manager to control her anger. The day after the meeting, when claimant reported for work, the assistant manager and the manager met together privately for a brief conversation. They then instructed claimant to come with them outside. They pointed out three piles of dog feces in the yard and said that cleaning up the feces was claimant's "first task of the day." Audio at ~15:20. Claimant had never before been asked to clean up dog waste since he was a maintenance worker and did not perform yardwork. Claimant performed the task. Claimant thought he was being retaliated against for his earlier comments at the meeting and for the complaint he had earlier made about the asbestos and lead-based paint and exposing the managers' misrepresentations to him about their presence in the complex.

(10) Sometime around approximately the time of the downtown meeting, claimant's coworker in the maintenance department was injured and became unable to work a full schedule. After some weeks, claimant contacted the on-site manager and the employer's human resources department to inform them that he was unable to cover all the maintenance duties when working alone. They did not respond to claimant's requests for assistance and he continued trying to perform all the required work by himself. Claimant concluded that both the on-site manager and the human resources representative were treating him poorly in response to his complaints. The human resources representative still had not responded regarding claimant's emails sent on November 8, 2014 and July 9, 2015.

(11) Sometime before December 1, 2015, claimant was experiencing anxiety over his job and the way in which the on-site managers, the human resources department, and the employer's other management were treating him. Claimant's physician provided a note to claimant excusing him from his on-call responsibilities in an attempt to alleviate some of his anxiety. Claimant did not give the note to the employer because he was afraid of retaliation, and that the poor treatment of him would escalate.

(12) By December 1, 2015, the human resources representative still had not responded to claimant's complaints on November 8, 2014 and July 9, 2015 about the asbestos and lead-based paint in the apartment complex. On December 1, 2015, a new manager the employer hired in its main office to supervise the operations of its apartment complexes had his first meeting with claimant, the on-site managers and other staff at the complex. The first topic the new manager addressed was his expectation that claimant and the other on-site maintenance worker would repair all holes or other damage to the complex's walls and ceilings that were sized equal to or less than approximately a four foot by two foot rectangle. Claimant tried to tell the manager that asbestos and lead-based paint was present in the areas that needed to be patched and he had safety concerns. The manager did not listen and, when claimant finally interrupted and asked him, "Can I say something?" the manager became angry, raised his voice and stated, "I've already been warned about you and your mouth." Audio at ~19:00. The manager then asked claimant over and over, "What do you want?" and each time claimant tried to respond, the manager interrupted him and repeated, "What do you want?" Audio at ~19:39. After several attempts to respond, claimant asked the manager to arrange for assistance with his work since his coworker was still working a reduced schedule because of his injury. Rather than addressing claimant's request, the manager continued to ask claimant in a raised voice, "What do you want?" Audio at ~20:08. By this repetition and failure to respond, claimant concluded the manager was not willing to address the issues he raised. The meeting ended at that time.

(13) On December 1, 2015, after the meeting with the new manager ended, claimant wrote a letter resigning his position. Claimant quit work because his safety concerns had not been addressed, he was unable to tolerate the manner in which the employer's representatives had treated him since he made the original complaint about the asbestos and lead-based paint in November 2014 and, during the December 1, 2015 meeting, the new manager had bullied and intimidated him. In the letter, claimant stated that he intended to work two more weeks, until December 15, 2015.

(14) On December 5, 2015, claimant sent a fax to the employer's human resources department stating that he was rescinding his resignation. He did so because he thought he was financially unable to quit, and he needed to "suck it up." Audio at ~22:52. The human resources department responded to claimant's fax by stating the employer had already processed claimant's resignation and started the process of hiring his replacement. The employer did not allow claimant to withdraw his resignation.

(15) On December 15, 2015, claimant voluntarily left work.

CONCLUSIONS AND REASONS: Claimant voluntarily left work with 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.

In Hearing Decision 16-UI-53898, the ALJ concluded that claimant did not show he had good cause for leaving work when he did. While conceding that claimant's situation might have been grave, the ALJ reasoned that claimant would have avoided that gravity if he had sought "reasonable help from the employer" before deciding to quit, such as contacting the human resources department again. Hearing Decision 16-UI-53898 at 2. The ALJ found that claimant did not "fully explore[] options to quitting when he quit," and his "attempt to return to his job after tendering a resignation" indicated that "the work environment was not such that claimant was unwilling to return to it," which apparently undercut the gravity of claimant's situation. Hearing Decision 16-UI-53898 at 2. We disagree.

The employer did not appear at the hearing, and claimant's testimony about the presence of lead-based paint and asbestos in the areas in which he was expected to perform repair work was un rebutted. The health hazards of exposure to these substances are well-known. Claimant's concern about unprotected exposure to these toxins was understandable and reasonable. While the repairs to the complex that resulted in claimant's exposure to these toxins occurred around early 2014, and were remote in time from his decision to quit, the attitude of the new manager during the December 1, 2015 meeting plainly indicated that he expected claimant to make repairs in the complex that would result in exposure to lead-based paint and asbestos in the imminent future. The nature of the manager's response to claimant's attempt to raise these concerns and have them addressed showed his indifference to them and his combativeness when they were brought up. Claimant's situation was grave.

Although the ALJ concluded that claimant did not explore his "reasonable possible resolution[]" of seeking to have the employer remedy the situation that gave rise to his concerns before he decided to quit, claimant, in fact, raised these concerns with the managerial tier above his on-site managers on December 1, 2015 and was soundly rebuffed, raised these concerns with his on-site managers and they lied to him about them, called the human resources department about these concerns, sent the emails the human resources representative requested and, as of the time he decided to leave, almost a year had elapsed with no substantive response or follow-up to his concerns. Hearing Decision 16-UI-53898 at 2. In addition, when the human resources department delayed responding to claimant's concerns and his phone calls, claimant sought assistance from his on-site managers in obtaining the attention of the human resources department and the managers refused to help him because they feared retaliation if they were associated with the safety issues he raised. On this record, claimant demonstrated that further attempts to resolve the situation with the employer would be futile, based on his attempts, over the course of approximately one year, to have his on-site managers, the employer's human resources department, and the manager of his on-site managers address the manner in which he would make repairs to areas known to have asbestos and lead-based paint, with no resolution of the concerns, or, in some instances, without even an acknowledgement of them.

For those reasons, we disagree with the ALJ and find that claimant made extensive reasonable, albeit unsuccessful, efforts to have the employer address his concerns before he decided to quit. Given the

serious health consequences of exposure to lead based paint and asbestos and the employer's failure to address claimant's concerns about them for approximately one year despite the persistence of claimant's efforts to resolve them, claimant showed that grave reasons to which he had no alternative motivated him to leave work when he did.

We also disagree with the ALJ that claimant's attempt to rescind his resignation demonstrated that, since he was willing to return to work, he did not face a truly grave situation at work, is not sound. The appropriate test to determine whether claimant had good cause to leave work is whether a reasonable and prudent person would have thought the situation grave enough quit work when he quit. That claimant might have been willing to return to work and endure grave circumstances because he feared the financial consequences of being unemployed does not diminish the gravity of his situation or change the course of action we impute to an objectively reasonable and prudent person. Because a reasonable and prudent person would have quit when claimant did, claimant showed that he left work for good cause.

Claimant showed good cause for leaving work when he did. Claimant is not disqualified from receiving unemployment insurance benefits.

DECISION: Hearing Decision 16-UI-53898 is set aside, as outlined above.¹

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

DATE of Service: March 30, 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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¹ This decision reverses a hearing decision that denied benefits. Please note that payment of any benefits owed may take from several days to two weeks for the Department to complete.