

EMPLOYMENT APPEALS BOARD DECISION
2016-EAB-0321

Reversed
No Disqualification

PROCEDURAL HISTORY: On November 24, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant voluntarily left work without good cause (decision # 83017). Claimant filed a timely request for hearing. On March 8, 2015, ALJ Lease conducted a hearing, and on March 9, 2015 issued Hearing Decision 16-UI-54636, affirming the Department's decision. On March 21, 2015, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant submitted a written argument in which he offered new information that he did not present during the hearing. While claimant contended he asked the "Employment Dept. Pendleton" to fax one document to the ALJ before the hearing and she did not receive it, it does not appear that he sent a copy of that document to the other parties, as required before the ALJ could consider the document at hearing. Claimant's Written Argument at 1; Record Document, February 11, 2015 Notice of Hearing at 1. Because claimant did not show that he complied with the Notice, EAB will not consider claimant's new document and, since claimant did not show that factors or circumstances beyond his reasonable control prevented him from offering during the hearing any other new information he sought to present to EAB by way of his written argument, EAB also did not consider it. *See* OAR 471-041-0090 (October 29, 2006). EAB considered only information received into evidence during the hearing when reaching this decision.

FINDINGS OF FACT: (1) Express Employment Professionals, a temporary employee leasing agency, employed claimant from May 11, 2015 until November 3, 2015. Upon hire, claimant was assigned to work as a laborer, cutting and scoring pipes at Rocky Mountain Colby Pipe.

(2) Sometime after claimant's assignment work started, he began training as a machine operator on Rocky Mountain's production line. The lead operator at Rocky Mountain was responsible for claimant's training. At that time, the lead was training another employee and that employee asked to be assigned to a new trainer. The lead often yelled at the employee and mistreated him. Rocky Mountain Pipe decided to have the employee trained by someone else and assigned the lead to train claimant.

(3) Shortly after claimant started his training, the employer and Rocky Mountain agreed that claimant would be trained for work in a particular one of Rocky Mountain's plants. The lead had wanted for a long time to be transferred to the other plant. After the lead was aware that claimant might be assigned to Rocky Mountain's other plant, the lead's behavior toward claimant changed and the lead began to mistreat claimant and to act hostilely toward him.

(4) Once into claimant's training, the lead began to call claimant "dude" and "bro." Audio at ~11:35. Claimant considered those terms highly derogatory and insulting, principally because in areas where ranching was prevalent, a "dude" connoted a person who was inept, a fraud and pretending to engage in activities that were beyond his abilities. The lead also called claimant a "junkie," and told others in the workplace that claimant was under the influence of drugs. Audio at ~13:34. Rather than training claimant, the lead began "yelling" at claimant repeatedly about his supposed mistakes on the production line, often with his face inches from claimant's face. The lead's behavior alternated between the lead refusing to help claimant when claimant asked, and when claimant sought advice about whether certain pipe was flawed in manufacture, the lead refusing to answer and walked away leaving claimant without direction on what he should do. Claimant spoke with the production manager on several occasions about how the lead was not training him, the lead's behavior and his difficulties in trying to perform his job given the lead's treatment of him. The production manager told claimant he needed to learn to "tolerate" the lead. Audio at ~ 25:52. The lead was "harassing," "insulting" and "belittling [claimant] every day." Audio at ~26:05. Claimant felt "emotionally drained," but tried to put up with the lead's behavior.

(5) Before September 2015, the lead told the plant manager several different times that claimant was coming to work under the influence of drugs. On September 21, 2015, the employer, the employee leasing agency, called claimant to tell him the plant manager wanted him to take a drug test and he could not return to work until he took the test. Claimant told the employer's representative that the lead was harassing him and making the workplace a hostile and degrading environment. On September 28, 2015, claimant took a drug test and no prohibited substances were detected. Shortly thereafter, claimant returned to work and learned that the lead had told most of claimant's coworkers that he had failed the drug test.

(6) After September 28, 2015, the lead's behavior toward claimant did not change. It escalated. Claimant was in "despair" about the lead's treatment of him. Audio at ~21:20. Claimant did not know what to do. Claimant spoke again with the production manager. The manager told claimant, "See if you can put up with it [the lead's behavior]." Audio at ~23:12.

(7) The lead's behavior still continued. Claimant was "at a loss about what to do." Audio at ~ 21:19. On approximately October 29, 2015, claimant again sought advice from the production manager. Claimant told the production manager "[i]t's impossible." Audio at ~26:29. The production manager told claimant there was "nothing we can do, it's just the way he [the lead] is and you're stuck with working with him." Audio at ~ 14:54. Claimant asked the production manager if they could speak with the plant manager. However, the plant manager was not available. Claimant asked the production manager to let him know when the plant manager was able to meet with them.

(8) On October 30, 2015, claimant reported for work, but the production manager did not speak with him and claimant was not informed that the plant manager was not able to meet with him. On Saturday,

October 31 and Sunday November 1, 2015, claimant was off from work and met with a spiritual advisor from his church to discuss what he should do about the lead's behavior.

(9) On Monday, November 1, 2015, claimant called in sick to work. On Tuesday, November 3, 2015, claimant notified the employer that he was quitting his assignment with Rocky Mountain Pipe. Claimant decided to leave because he could no longer tolerate the lead's behavior and management at Rocky Mountain had not taken action to stop that behavior and seemed to condone it. On November 3, 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.

In Hearing Decision 16-UI-54636, the ALJ concluded claimant voluntarily left work without good cause. The ALJ reasoned that, although the lead referring to claimant as "dude" and "bro" did not give rise to grave reasons to leave work, she found that much of the other behavior of the lead did, but that claimant had reasonable alternatives to leaving work, such as contacting the employer, the leasing agency, for assistance in resolving the behavior of the lead, an employee of the employer's client, Rocky Mountain Pipe. Hearing Decision 16-UI-54636 at 3. We disagree.

At the outset, we agree with the ALJ that the sum of the lead's ongoing behavior toward claimant created a grave situation for him in the workplace. Indeed, the employer did not dispute claimant's descriptions of the lead's behavior in the workplace or that a reasonable and prudent person would have reacted to it as claimant did. While claimant could have complained to the employer about the lead's behavior, the employer's witness testified that the action the employer might have taken in response to such a complaint was to reassign claimant to another client. However, the reassignment to another company would have had the effect of terminating claimant's work relationship with the employer by mutual agreement. See OAR 471-030-0038(1)(a) (termination of employment with a leasing agency occurs when the particular work assignment ends); *Employment Department v. Shurin*, 154 Or App 352, 959 P2d 637 (1998) (mutual agreement to terminate employment is considered a voluntary leaving). Because the outcome of quitting as claimant did, or by agreement with the leasing agency, was the same, it was not an "alternative" to leaving work. Even if it was, while the employer's witness stated it was "likely that employer would have reassigned claimant to another job, there was no evidence in the record that the employer verified that it had a reassignment available for claimant or that claimant was qualified and capable of performing the work referred to in this unverified hypothetical reassignment. Audio at ~34:01, ~43:02. Absent evidence in this record that the employer actually had an alternative assignment for claimant at the time of his separation, the record fails to show that asking for a reassignment was a "reasonable alternative" to quitting. See *accord Gonzalez v. Employment*

Department, 200 Or App 547, 115 P3d 976 (2005). Absent this or similar information, there was insufficient evidence to show that speaking with the employer was a reasonable alternative to leaving work when claimant did. As such, claimant had grave reasons to leave work for which there were no reasonable alternatives.

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

DECISION: Hearing Decision 16-UI-54636 is set aside, as outlined above.

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

DATE of Service: April 25, 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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