

EMPLOYMENT APPEALS BOARD DECISION
2016-EAB-0569

Affirmed
Disqualification

PROCEDURAL HISTORY: On March 29, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 100444). Claimant filed a timely request for hearing. On April 18, 2016, ALJ Frank conducted a hearing, and on April 26, 2016 issued Hearing Decision 16-UI-58197, concluding claimant voluntarily left work without good cause. On May 12, 2016, claimant filed an application for review with the Employment Appeals Board (EAB).

EAB considered claimant's written argument when reaching this decision.

FINDINGS OF FACT: (1) Swingset Development, LLC employed claimant as a skilled laborer from April 1, 2014 until February 14, 2016.

(2) Claimant and the employer's owner-operator knew each other well. They had been friends since childhood. The owner thought claimant could be a hard worker but sometimes exhibited laziness and failed to follow instructions.

(3) On Thursday, February 4, 2014, claimant was assigned to paint the exterior of a building. The owner told claimant to use a roller to paint the siding, and specifically told claimant not to use a brush since a brush application would not deposit enough paint to saturate that siding-type. After instructing claimant, the owner left the job site.

(4) After the owner left the job site on February 4, 2014, claimant started painting the siding. Claimant did not apply the paint with a roller, but used a brush because it had begun to rain. Sometime later, the owner returned to the job site and inspected claimant's work. The owner saw that claimant had not followed his instructions to use a roller and there were bare patches on the siding where the paint brushed on been insufficient to saturate. The owner was irritated and annoyed with claimant. The owner approached claimant, told him he had not done what he had been specifically instructed to do and that the owner was "mad." Audio at 10:12. The owner began to cite other instances of when claimant had not followed instructions or when he thought claimant's work was inadequate. Claimant tried to

explain why he had not applied the paint that day using the roller, but the owner interrupted him and cut him off. The owner told claimant to “get out of here” or to “get off my job, I don’t need you here,” “get out of my line of vision” and “I’m sick of this kind of stuff with you.” Audio at 7:40, ~10:12, ~10:50. The owner did not intend to discharge claimant and did not tell claimant he was “fired,” terminated or discharged. Audio at ~10:40, ~11:19. Claimant did not believe the owner intended to discharge him by his statements and believed he and the owner could resolve the conflict. Audio at ~ 21:00, ~21:27.

(5) After his interaction with the owner on February 4, 2016 claimant left the workplace and did not return because the owner did not listen to the explanation he tried to give on that day about why he had not used a roller when applying the paint. On February 4, 2016, claimant voluntarily left work.

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

The first issue this case presents is the nature of claimant’s work separation. If claimant could have continued to work for the employer for an additional period of time at the time of the work separation, the separation was a voluntary leaving. OAR 471-030-0038(2)(a) (August 3, 2011). If claimant was willing to continue to work for the 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).

While what the owner stated to claimant could have been subjectively interpreted by claimant as words of discharge, it was not the owner’s intention to discharge him and that was not claimant’s actual interpretation of the owner’s words. Audio at ~ 10:40, ~10:50, ~11:19. Claimant was unequivocal in his testimony that he did not believe the owner was “firing” him and that he did not believe the owner was “even telling [him] to leave the job site.” Audio at ~21:27. According to claimant, although he thought he and the owner could work it out, he “had no intention of going back to work there anyway,” when he left the job site on February 4, 2016. Audio at ~21:00. Based on how claimant understood the owner’s words and claimant’s stated intentions, the owner was not unwilling to allow claimant to continue working, but it was claimant who was unwilling to continue working. Claimant’s work separation was a voluntary leaving on February 4, 2016.

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). 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.

Although claimant did not believe the owner was discharging him on February 4, 2016, claimant testified that he did not return to work after that day because the owner had refused to listen to his explanation about why he had used the brush rather than the roller and because the words that the owner used that day could have been interpreted as words of discharge. Audio at ~19:55, ~21:27, ~22:50. With respect to the words the owner used, the salient issue is how the owner in fact intended them and how claimant in fact understood them. Where, as here, claimant’s interpretation of those words was consistent with the owner’s intention, claimant did not have good cause to quit work based on the

existence of a different, hypothetical interpretation of the same words, not only because claimant in fact knew the employer did not discharge him, but also because that was not the reason claimant decided to quit work. As well, claimant's apparent pique over the owner's failure to listen to his explanation on February 4, 2016 was not a grave situation for claimant. Aside from experiencing what was apparently a transient display of irritation from the owner, claimant did not identify any grave or significant harm that befell him from the owner's refusal to listen to him or suggest that the interaction between him and the owner on February 4, 2016 was the culmination of a sequence of events that, when viewed in their totality, were grave.

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

DECISION: Hearing Decision 16-UI-58197 is affirmed.

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

DATE of Service: June 20, 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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