

EMPLOYMENT APPEALS BOARD DECISION
2016-EAB-0689

Affirmed
Disqualification

PROCEDURAL HISTORY: On April 26, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant voluntarily left work without good cause (decision # 155108). Claimant filed a timely request for hearing. On May 24, 2016, ALJ Frank conducted a hearing, and on May 27, 2016 issued Hearing Decision 16-UI-60617, affirming the Department's decision. On June 13, 2016, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant asserted in his written argument that the ALJ did not admit into the hearing record any of the proposed exhibits that he offered because of uncertainty about whether they were served on the other party and his ability to testify to the contents of those proposed exhibits, which EAB construes as an objection to the exclusion of the proposed exhibits. However, claimant did not contend that he was unable to adequately address the documents that comprised those proposed exhibits during the hearing or that he was otherwise prejudiced by their exclusion from evidence. Audio at ~8:28, ~16:35. In his written argument, claimant also proffered new reasons for deciding to leave work as well as several new documents supporting those reasons. Claimant failed to show as required by OAR 471-041-0090 (October 29, 2006) that factors or circumstances beyond his reasonable control prevented him from offering the new information during the hearing, either by way of his testimony or by offering the new documents into evidence as exhibits during the hearing. For this reason, EAB did not consider the new information that claimant proffered. *See* ORS 657.275. EAB considered only information received into evidence during the hearing when reaching this decision.

FINDINGS OF FACT: (1) Rogue Biofuels Corp. employed claimant as a driver from August 1, 2014 until February 21, 2016.

(2) From time to time during his employment, claimant expressed to the employer's president that he was anxious about some aspect of his job.

(3) Sometime before early February 2016, claimant became aware that he was having problems with his teeth or his gums. Around approximately February 1, 2016, claimant was informed he had an abscessed

tooth that required a dental extraction. At that time, claimant was experiencing pain from the tooth and a fever. Also around February 1, 2016, claimant spoke with the employer's president and told him he needed a week off from work to deal with the abscessed tooth. After that conversation, claimant did not report for work.

(4) On approximately February 8, 2016, while he was off work, claimant spoke with the employer's president and told him he still was not feeling well. Claimant told the president he had not arranged for a dentist to examine the abscessed tooth and had not had the tooth extracted because he did not have insurance and could not otherwise afford treatment. Afterward, the president made an appointment for claimant to have the tooth examined at a local provider of health services for low income people and informed claimant of the arrangements he had made. Sometime on or after February 8, 2016, claimant's tooth was extracted.

(5) Between February 8 and February 21, 2016, claimant and the employer's president set several dates on which it was agreed that claimant would return to work. On each of those dates, claimant called the employer's president and told him he was not reporting for work that day and needed more time off. The president allowed claimant to take those additional days off. Ultimately, claimant agreed to return to work on February 21, 2016. At that time, claimant did not mention that he was still experiencing adverse health effects from the abscessed tooth, but did say he felt fatigued.

(6) On February 21, 2016, claimant reported for work. After he had been driving the employer's truck for approximately one to two hours, claimant telephoned the employer's president. Without explanation, claimant told the president he "couldn't do it" anymore. Audio at ~29:12. The president asked claimant if he was sick, if he was having more problems with his teeth, or if he was anxious for some reason. Audio at ~29:20. Claimant stated he did not know and repeated that he "just couldn't do it anymore" and that he wanted to quit work. Audio at ~29:25. Claimant did not ask for additional time off. Claimant did not tell the president that he was unable to work because he was ill, in pain or too anxious to work. Had he done so, the president would have permitted claimant to take an additional period of time off work.

(7) On February 21, 2016, 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.

Although OAR 471-030-0038(4) provides a modified standard for showing good cause if claimant had a long-term or permanent mental or physical impairment when he made the decision to leave work, it does

not appear that such modified standard is applicable in claimant's situation. Claimant testified that he had no such impairments. Audio at ~32:30. Claimant did not assert that he had an anxiety disorder, and it was the employer's witness, not claimant, who mentioned that claimant had occasionally complained to him about feeling anxious. Audio at ~29:20. Claimant did not contend that he experienced impairing anxiety during any relevant times. As well, it does not appear that claimant's abscessed tooth was other than a temporary condition from which he would fully recover after appropriate treatment. The general standard for showing good cause in OAR 471-030-0038(4) applies here since there was insufficient evidence in the record demonstrating that claimant experienced a permanent or long-term impairment of any nature.

At hearing, the ALJ questioned claimant repeatedly to determine why he left work, and claimant was unable to articulate any reasons other than his abscessed tooth and how sick he felt from it on and immediately before February 21, 2016. Audio at ~18:35, ~19:52, ~20:28, ~21:38. While claimant readily testified that his physician or dentist had released him to work without medical restrictions by February 21, 2016, he did not reconcile that release with his contention that he was still unable to work on February 21, 2016 or explain how it might have happened that his health care professional made such an error in evaluating his ability to work as of February 21, 2016. Audio at ~23:48, ~23:58. Claimant appeared to contend that sometime before February 21, 2016, he asked the employer's president to extend his return to work date beyond February 21, 2016, and asserted that the president made "no comment" in response to this request. Audio at ~23:03, ~23:26. It does not make any sense that the president would remain absolutely silent as a means of denying that request rather than expressly doing so. It is also notable that claimant did not specifically contend he told the president during the February 21, 2016 call the reasons he felt he was unable to continue working that day, that illness prevented him from working or that he needed additional days off to recover his health. Equally significantly, claimant did not specifically rebut the testimony of the employer's president, that claimant did not provide any explanation for why he was unable to continue working on February 21, 2016, but simply repeated he "couldn't" and that he needed to quit. Finally, claimant did not challenge the president's testimony that he would have allowed claimant to take additional time off from work if claimant had expressed a bona fide health reason for needing more days off. Audio at ~30:39. The preponderance of the evidence does not show that claimant took reasonable steps to notify the employer that as of February 21, 2016 he was still ill and needed more time away from work.

On this record, a reasonable and prudent person in claimant's position, who had already been permitted to take three weeks off from work due to an abscessed tooth, would not have quit work on February 21, 2016 if he remained too ill to work without first notifying the employer of the specific health reasons he could not continue working and pursuing a reasonable extension of his time off to recover his health. As well, a reasonable and prudent person, who was pursuing medical treatment for his abscessed tooth, would not have quit work in anticipation that the employer would deny his request for additional time off until he had made that request and, if necessary, sought a medical excuse from his treating physician or dentist.

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

DECISION: Hearing Decision 16-UI-60617 is affirmed.

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

DATE of Service: July 26, 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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