

EMPLOYMENT APPEALS BOARD DECISION
2016-EAB-0787

Affirmed
Disqualification

PROCEDURAL HISTORY: On May 25, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant voluntarily left work without good cause (decision # 63959). Claimant filed a timely request for hearing. On June 20, 2016, ALJ S. Lee conducted a hearing, and on June 28, 2016 issued Hearing Decision 16-UI-62730, affirming the Department's decision. On July 1, 2016, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Beaverton Hyundai employed claimant as a salesperson from March 21, 2016 to April 17, 2016.

(2) Claimant experienced foot and back pain working for the employer. He sought medical treatment. Claimant's doctor recommended that claimant avoid standing on his feet for 10 or 12 hour shifts. Claimant needed to alternate sitting and standing, wear comfortable shoes and rest when necessary.

(3) Claimant experienced difficulty performing his duties because of the pain he experienced. He missed work or left early when he was in too much pain to work. Claimant mentioned his health issues to the sales manager but did not ask the sales manager to modify his duties or work area or provide him with a chair, and did not provide the sales manager with medical restrictions from his doctor.

(4) Claimant last worked on April 11, 2016. He submitted his time card to the sales manager and asked for some time off to rest and recover. The sales manager approved his request for time off work.

(5) On April 17, 2016 claimant notified the sales manager that he was still unable to return to work because of his foot and back pain. The sales manager suggested that claimant should leave work and reapply when he felt capable of working. Claimant agreed to do so. Claimant did not return to work after April 17, 2016.

(6) Claimant did not complain to the employer that he was not adequately paid for the period including April 11, 2016.

CONCLUSIONS AND REASONS: We agree with the ALJ that claimant voluntarily left work without good cause.

If the employee could have continued to work for the same employer for an additional period of time, the work separation is a voluntary leaving. OAR 471-030-0038(2)(a) (August 3, 2011). If the employee is willing to continue to work for the same 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).

Claimant alleged that he had asked to return to work and the employer would not allow him to do so. Transcript at 10. Claimant's attempt to return to work occurred in May 2016, however, almost two months after the separation, and not in April when the separation occurred, and is, therefore, irrelevant to this analysis. Transcript at 12.

Claimant argued that the sales manager told him "they have to let me go," and discharged him because he had health issues that caused his work performance to suffer. Transcript at 5. He claimed that he worked without taking time off until the day the employer let him go on April 17th, except for one or two days when he called in sick. Transcript at 22. Claimant's argument is not credible. The employer's records show that claimant did not work for the employer after April 11th. Claimant was required to fill out a time card for each day he worked. If, as claimant claimed, he worked continuously after April 11th, it does not make sense that he would not have completed time cards for each day worked throughout the ensuing period and submitted them to the employer. Claimant testified that the reason he did not have a time card after April 11th was that his "time card was not working in the system." Transcript at 30. It does not make sense that claimant's time card would stop working on April 11th, coinciding with the last day claimant worked before taking a week or so off work, nor is there evidence that the employer's receptionist, payroll person and the sales manager conspired against claimant to either withhold pay that he had earned after April 11th or otherwise conceal the fact that he had continued working after April 11th. Claimant argued that he did not make sure to report his hours to the employer in order to make sure he was paid because he expected to receive a guaranteed minimum wage at the time. Transcript at 34. However, claimant did not allege or show that he was not required to clock in to work prior to April 11th, a time when he was also receiving the guaranteed minimum wage. In that context, claimant's claim that he believed he would be paid without reporting his hours worked to the employer after April 11th does not make sense.

Considering the totality of the evidence, it is more likely than not that claimant last worked on April 11th, took a week or so off work because of his health, and, when he did not feel healthy enough to return to work a week later, agreed with the sales manager to leave work approximately one week later on April 17th. But for claimant's agreement to leave work, we find that it is more likely than not that continuing work would have been available to claimant, making the work separation a voluntary leaving.

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).¹ 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 quit work because he experienced back and foot pain during his long shifts. His doctor had recommended he wear comfortable shoes, alternate sitting and standing, and rest when necessary. Although an individual's health condition may constitute good cause to leave work, the health condition must be of such gravity that there were no reasonable alternatives to quitting work because of them. Claimant did not establish in this case that he lacked reasonable alternatives. Claimant had the alternative of asking his doctor to provide medical restrictions for the employer, asking the employer to provide him with a chair or allow him to rest when necessary, or asking the employer to allow him to modify the length of his shifts. Given that the employer had chairs available to claimant, was willing to allow him to sit, and had accommodated his request for time off work when he asked for it, the record fails to show that those alternatives were unreasonable or that it would likely have been futile to pursue them. Notably, claimant felt physically capable of returning to work by late May 2016, suggesting that his health issues were not so severe as to preclude him from ever returning to the type of work he was doing for the employer.

Because claimant had reasonable alternatives to quitting work, he did not establish good cause for quitting. Claimant is, therefore, disqualified from receiving unemployment insurance benefits because of his work separation.

DECISION: Hearing Decision 16-UI-62730 is affirmed.

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

DATE of Service: August 1, 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 It does not appear that claimant's health issues constituted long term or permanent impairments as that term is used in 29 CFR §1630.2(h). Even if they had, however, this decision would remain the same for the reasons explained.