

EMPLOYMENT APPEALS BOARD DECISION
2016-EAB-0792

Affirmed
Disqualification

PROCEDURAL HISTORY: On May 18, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant voluntarily left work without good cause (decision # 152724). Claimant filed a timely request for hearing. On June 14, 2016, ALJ S. Lee conducted a hearing, and on June 22, 2016 issued Hearing Decision 16-UI-62372, affirming the Department's decision. On July 6, 2016, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Graziano Foodservice, Inc. employed claimant from February 6, 2000 until February 26, 2016, last working in food preparation.

(2) Sometime before November 27, 2016, Residence Inn, a motel, hired claimant to work. After that time, claimant worked both for the employer and for Residence Inn.

(3) On November 27, 2015, claimant was injured while working for Residence Inn. On December 13, 2015, claimant notified the employer's owner that he was unable to work due to the injuries he had sustained at Residence Inn. At this time, the owner told claimant that the employer would allow him to take a leave of absence from work for as long as he needed to recover from the injuries and, when he was able to work in some capacity, would modify his work duties to allow him to return to work that accommodated injuries. Around this time, claimant gave the employer a note from a physician restricting him from work until December 19, 2015. Claimant did not report to work for the employer after December 13, 2015.

(4) Around December 19, 2015, claimant notified the employer that he was not physically able to return to work on December 19, 2015. The employer continued claimant's leave. Sometime later, claimant gave the employer another note from a physician stating that he was released for modified work from

January 26, 2016 through February 23, 2016. Sometime around January 26, 2016, claimant again met with the employer's owner. Claimant told the owner he was still too injured to return to work as of January 26, 2016. The owner told claimant that when he was able to return the employer would modify his job duties "to whatever the doctor [said claimant] needed." Transcript at 15.

(5) On February 24, 2016, claimant did not report for work. On February 26, 2016, claimant met with the employer's owner and its chief financial officer (CFO). Claimant told both employer representatives that his injuries still prevented him from working despite the physician's note releasing him to modified duties as of January 26, 2016. Claimant also told the employer that the pending worker's compensation claim he had filed against Residence Inn due to his injuries did not allow him to return to work. Claimant told the employer representatives that he wanted to quit work. Claimant did not ask for an extension of his leave of absence or inquire about the manner in which the employer would modify his work duties to accommodate his injuries and allow him to return to work. The CFO drafted a resignation letter for claimant, which he signed. The CFO asked claimant to return his warehouse keys and he did so.

(6) On February 26, 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.

OAR 471-030-0038(4) provides that a modified standard for showing good cause is applicable if a claimant had a permanent or long-term impairment when he or she decided to leave work. While claimant testified that his injuries prevented him from returning to even modified work duties after three months, claimant did not show that his injuries constituted permanent or long-term impairments. Although claimant was apparently receiving treatment from a physician, he did not present an evaluation from the physician, or even contend that the physician considered him unable to return to appropriately modified duty work as of January 26, 2016 and to unrestricted duty as of February 23, 2016. Moreover, claimant did not contend during the hearing that any limitations arising from his injuries were likely permanent or long-term and did not provide an approximate timeline for his convalescence. There is insufficient evidence in this record to support that a modified standard for showing good cause applies to claimant's decision to leave work.

While claimant contended the employer did not suggest to him that it would make modified work available to him that was within his physician's restrictions, the employer's witness stated several times that the employer did so and claimant was "not interested in anything but quitting" on February 26, 2016. Transcript at 19, 24. There was no reason in the record to doubt the truthfulness of the testimony

of either party. Because claimant carried the burden of persuasion in the case, this disputed issue must be resolved in favor of the employer. *See Young v. Employment Department*, 170 Or App 752, 13 P3d 1027 (2000). As well, claimant did not dispute that the employer gave him ample time away from work on leave to enable him to recover from his injuries, and did not suggest any motive explaining why the employer would abruptly change its attitude on February 26, 2016. It appears the employer was sincere in its efforts to maintain an employment relationship with claimant, and the preponderance of the evidence shows that it offered claimant modified work in lieu of quitting as well as being willing to extend his leave to the extent needed to facilitate his recovery from his injuries.

A reasonable and prudent person would not have left work at the time when claimant did. A reasonable person would at least have tried the modified work the employer was offering before he concluded that he needed to quit because the work, as modified, would be too arduous. Transcript at 15, 18, 19. Because claimant did not try modified work as a reasonable alternative to quitting, claimant did not show good cause for leaving work when he did.

Claimant did not meet his burden of showing good cause for leaving work. Claimant is disqualified from receiving unemployment insurance benefits.

DECISION: Hearing Decision 16-UI-62372 is affirmed.

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

DATE of Service: August 5, 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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