

EMPLOYMENT APPEALS BOARD DECISION
2016-EAB-0848

Affirmed
No Disqualification

PROCEDURAL HISTORY: On June 10, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant voluntarily left work without good cause (decision # 95014). Claimant filed a timely request for hearing. On June 22, 2016, ALJ K. Monroe conducted a hearing, and on July 1, 2016 issued Hearing Decision 16-UI-63060, reversing the Department's decision. On July 13, 2016, the employer filed an application for review with the Employment Appeals Board (EAB).

The employer submitted a written argument but failed to certify that it provided a copy to claimant as required by OAR 471-041-0080 (October 29, 2006). The argument also contained information that was not part of the hearing record, and the employer failed to show that factors or circumstances beyond its reasonable control prevented it from offering the information during the hearing as required by OAR 471-041-0090 (October 29, 2006). For these reasons, EAB did not consider the information in the written argument. EAB considered only information received into evidence at the hearing when reaching this decision.

FINDINGS OF FACT: (1) Maiden Enterprises employed claimant as an assistant manager on its ranch from February 5, 2016 until April 14, 2016.

(2) Sometime around 2010, claimant had surgery on his right wrist and several screws were installed. At that time, claimant was also diagnosed with underlying osteoarthritis in that wrist. In 2015, claimant was further diagnosed with a severe loss of cartilage around his right knee, a severe degeneration of that knee and post-traumatic osteoarthritis. Claimant's physician recommended surgery to repair the knee. Claimant also had arthritis in his shoulder. Claimant experienced much pain and swelling if he tried to perform tasks that put stress on his knee, his wrist or his shoulder or required repetitive movement of those body joints. Claimant regularly saw physicians to treat these conditions and was prescribed pain medication. The medication did not resolve the pain that claimant experienced on moving those body parts. Claimant found it extremely difficult to perform manual labor. Claimant's physician advised him

that “you chose the wrong profession” when he worked in a job requiring manual labor. Transcript at 18.

(3) When claimant interviewed with the employer for the assistant manager position, he understood that that the position was one in which he would “keep track of details” for the owner, “help create programs,” “make things [operate] more efficient[ly]” and make decisions when the owner was absent. Transcript at 34. Claimant understood he would not personally be required to perform heavy manual labor, and would oversee and supervise other employees in such tasks. Claimant told the owner that he had a bad knee which might interfere with his ability to perform physically demanding tasks.

(4) During claimant’s employment as assistant manager, the employer’s owner usually left a list of daily tasks for claimant to complete. Many of those tasks required sustained physical effort and repetitive movement of claimant’s arthritic knees, wrists and shoulders. After claimant performed such work, he experienced extreme pain that prevented him from moving the affected joints. The next day, claimant’s joints would be swollen and stiff, he would be very sore and he would continue experience some pain that his medication did not completely eliminate. Claimant told the owner he was not physically capable of performing the physically demanding work that the owner was assigning for him to complete personally.

(5) On March 30, 2016, claimant spoke to the owner at a morning meeting and asked him if he thought claimant’s position was working out. The owner told claimant it was not. Claimant interpreted the owner’s comment as asking him to move on to other employment. Claimant asked the owner if he could keep working until he found another job he found another job and the owner told him he could.

(6) After March 30, 2016, the owner assigned increasingly heavy manual work to claimant, much of it physically demanding and requiring repetitive movements of his knees, wrists and shoulders. That work included stacking hay, chasing calves, digging holes, loading, unloading and moving lumber and other work requiring heavy labor. Claimant experienced pain and the same after-effects as he had before.

(7) On April 14, 2016, the employer’s owner left claimant a list of tasks to be completed that day. The note also detailed prior tasks assigned to claimant that the owner thought had not been satisfactorily completed. At the end of the note, the owner asked claimant to tell him what his last day of work would be. Claimant was upset at the substance of the note because he thought the owner was accusing him of “loafing” when he had been physically unable to perform the work that was assigned to him. Transcript at 7. Claimant sent a text message to the owner expressing his upset and stating, “This note looks like you are ready for me to goe *****I am not a loafer. I have turned this place upside down for you. But I think it is time for you to see what it’s like with me gone. I’ll pick up my check on Monday.” Transcript at 11. The owner replied by text message, stating “I was trying to figure out a timeline.” Transcript at 11. Claimant responded “you got one. It’s today, that’s the time.” Transcript at 12. Claimant left the workplace that day and did not return.

CONCLUSIONS AND REASONS: Claimant voluntarily left work with good cause.

The first issue this case presents is the nature of the work separation. OAR 471-030-0038(2) sets out the differences between a work separation that is a voluntary leaving and one that is a discharge. If claimant

could have continued to work for the employer for an additional period of time, the work 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 was not allowed to do so by the employer, the separation was a discharge. OAR 471-030-0038(2)(b).

Claimant contended that the owner's note to him off April 14, 2016 read in the context of their March 30, 2016 was a note of discharge. Transcript at 5, 9. The owner contended that he did not discharge claimant, but claimant voluntarily left work on April 14, 2016. Transcript at 24. The parties did not dispute that the owner told claimant on March 30, 2016 his work was not satisfactory, and the owner either told claimant or agreed that claimant could remain employed until he located new employment. Transcript at 24, 25; Exhibit 1 at 1. Although the owner's April 14, 2016 note expressed displeasure with some of claimant's work and asked claimant to tell him his last day of work, it did not state he was discharged as of that day, did not tell claimant his time to locate new a new job had expired, and did not direct claimant to leave work or indicate in any fashion he was not welcome to continue to work until he located other employment. The owner's April 14, 2016 response to the text message in which claimant set out how he had interpreted the owner's note of that day, strongly suggests that the owner's intentions in the note were innocuous, and he did not intend to end claimant's employment on that day. Since the owner was willing to allow claimant to work for some additional period of time after April 14, 2016, until he found new employment, claimant's work separation was a voluntary leaving as of April 14, 2016.

A claimant who leaves work voluntarily is disqualified from the receipt of benefits unless he proves, by a preponderance of the evidence, that [she/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 P2d 722 (2010). Claimant had severe osteoarthritis of his right wrist, right knee and shoulders, which are permanent and long-term "physical or mental impairments" as defined at 29 CFR §1630.2(h). A claimant with those impairments who quits work must show that no reasonable and prudent person with the characteristics and qualities of an individual with such impairments would have continued to work for his employer for an additional period of time.

While claimant contended the employer discharged him, he testified in detail about his physical conditions and how those conditions made ranch work unsuitable for him. It is inferred that claimant voluntarily left work due to the physically demanding nature of the work the owner assigned to him and his inability to perform that work without severe pain and discomfort. The employer did not dispute claimant's physical condition, as described, and claimant presented evaluations and summaries from his treating physicians as evidence in support of his testimony Exhibit 2 at 7-12. The employer did not dispute and appeared to agree both that claimant had reported to the owner that he was physically unable to perform some of the work that the owner was assigning to him and that he was experiencing severe pain when he attempted such work. Transcript at 27. As the owner described the type of non-managerial work available to claimant his ranch after March 30, 2016, it was, by nature, physically taxing work in which he would often be unable to arrange for claimant to receive assistance. Transcript at 30, 32. A reasonable and prudent person with claimant's physical condition of osteoarthritis, whose conditions were aggravated by the heavy physical demands of the ranch work that he was expected to

regularly perform and who experienced severe pain and physical limitations when he attempted that work, would have concluded he had no alternative but to leave work.

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

DECISION: Hearing Decision 16-UI-63060 is affirmed.

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

DATE of Service: August 19, 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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