

EMPLOYMENT APPEALS BOARD DECISION
2016-EAB-0859

Affirmed
Request to Reopen Allowed
Disqualification

PROCEDURAL HISTORY: On March 22, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant voluntarily left work without good cause (decision # 75357). Claimant filed a timely request for hearing. On April 12, 2016, the Office of Administrative Hearings (OAH) mailed notice of a hearing scheduled for April 25, 2016, at which the employer failed to appear. On April 29, 2016, ALJ Vincent issued Hearing Decision 16-UI-58484, concluding the employer discharged claimant, but not for misconduct. On May 7, 2016, the employer filed a request to reopen the hearing. On June 27, 2016, ALJ Vincent conducted a hearing, and on July 1, 2016 issued Hearing Decision 16-UI-63062, allowing the employer's request to reopen and concluding that claimant voluntarily left work without good cause. On July 20, 2016, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Country Roads Recreation 3, Inc. employed claimant as an RV mechanic from October 17, 2015 to February 27, 2016.

(2) Claimant wanted to take Monday, February 29, 2016 off work to accompany his wife to a medical appointment. The employer's owner denied claimant's request, citing the employer's business needs.

(3) At the end of claimant's shift on February 27, 2016, claimant told the owner he was going to take the following Monday off work. The owner did not tell claimant he was allowed to take that day off. Claimant then left the workplace. Later that afternoon, the owner called claimant at home and twice told him that he "cannot do this." Audio recording at 12:30. Claimant replied, "if I can't do it I'm going to pick up my tools on Tuesday." Audio recording at 12:45, 15:10. The owner told claimant it was his decision.

(4) Claimant did not report to work Monday, February 29, 2016. On Tuesday morning, claimant reported to the workplace to collect his tools.

(5) At some point prior to March 22, 2016, the employer notified the Department that its address of record was located in Florence, Oregon. The Department mailed notice of decision # 75357 to the Florence, Oregon address. OAH mailed the April 12, 2016 notice of hearing to the employer at an address in Pahrump, Nevada. As a consequence, the employer did not receive notice of the April 25, 2016 hearing until after the hearing was held.

CONCLUSIONS AND REASONS: We agree with the ALJ that the employer's request to reopen should be allowed, and that claimant voluntarily left work without good cause.

ORS 657.270(5) provides that any party who failed to appear at a hearing may request to reopen the hearing, and the request will be allowed if it was filed within 20 days of the date the hearing decision was issued and shows good cause for failing to appear. "Good cause" includes "[f]ailure to receive a document because the . . . Office of Administrative hearings [*sic*] mailed it to an incorrect address despite having the correct address." OAR 471-040-0040(2)(a)(A).

The employer failed to appear at the April 25th hearing because OAH misdirected the notice of hearing to an incorrect address, despite having or having access to the employer's correct address as noted on the administrative decision at issue and in Department records. The employer therefore showed good cause under OAR 471-040-0040(2)(a)(A) to reopen the hearing, and its request is allowed.

Claimant testified that the employer discharged him, and the employer's owner testified that claimant quit work. 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).

Although the parties' evidence was in dispute on every pertinent fact, the employer's evidence was more reliable for the reasons that follow. As a preliminary matter, claimant described an unlikely sequence of events, because it seems implausible that the owner would allow claimant's time off request, change his mind about allowing the time off, then call claimant to discharge him merely for asking for a day off work, and refer to him as needing to "grow[] up" while doing so. The owner testified claimant quit work by announcing that he was taking Monday off work, and, when the owner refused permission, left work, later said "if I can't do it I'm going to pick up my tools on Tuesday," then did not report to work on Monday and returned to the workplace Tuesday only to collect his tools. Audio recording at 12:45, 15:10. Claimant's actions were consistent with the owner's sequence of events, and the owner's testimony was internally consistent throughout the hearing and plausible. Claimant's testimony, on the other hand, was not. For example, claimant initially testified that on February 27th he asked the owner for permission to take Monday off work, and, although the owner was "hesitant" to allow him to do so, but ultimately said, "okay, go ahead and take the day off and we'll see you Tuesday." Audio recording at 8:00, 8:15. The only person claimant referenced during that portion of his testimony was the employer's owner; claimant never indicated anyone else was present during the conversation, much less that permission to take Monday off work came from someone other than the owner. Later in claimant's testimony, however, after the owner denied giving claimant permission to leave work and named others who were present during the conversation claimant had alleged occurred between claimant and the owner, claimant alleged that the permission had actually come from another person who was present. Audio recording at 19:50. Because of that inconsistency and the implausibility of the sequence of

events claimant described, claimant's testimony was not a reliable source of evidence as to whether or not claimant had permission to take Monday off work, and we therefore found facts in accordance with the employer's evidence.

On February 27, 2016, claimant told the owner that he was taking Monday off work. The owner did not give claimant permission to do so, and, in a later phone call, repeatedly told claimant that he "cannot do this." Claimant told the owner that he would "pick up my tools on Tuesday" if he could not have Monday off work, then did not report to work on Monday and did not ask to continue working when he reported to the workplace on Tuesday to collect his tools. The employer had continuing work available to claimant on Monday and thereafter, and it appears more likely than not, based on the employer's evidence, that claimant chose not to continue working. The work separation was, therefore, 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). 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 disputed that he quit work, and the record therefore lacks claimant's perspective on the basis of his decision to leave. To any extent he quit work because he mistakenly believed the owner discharged him during their telephone conversation on February 27th, however, claimant quit work without good cause. Claimant did not establish by a preponderance of the evidence that the owner told him he was discharged, fired or otherwise unwelcome to continue working. Under the circumstances, a reasonable and prudent person of normal sensitivity, exercising ordinary common sense, would likely have first engaged in further discussion with the owner about his employment status to confirm whether or not the owner had continuing work available to him before concluding that it was not.

To any extent claimant quit work because the employer would not allow him to take Monday off work, claimant quit work without good cause. Claimant wanted to take the day off work to take his wife to a medical appointment, but said at the hearing that he would have reported to work Monday had the employer not allowed him to take the time off work. Audio recording at 6:45. Although we considered claimant's testimony on that point unreliable for reasons already explained, the fact that claimant made the claim suggests the likelihood that his need to take his wife to her medical appointment was not a situation of such gravity that he had to quit work because of it. Even if it had been, the outcome of this decision would remain the same. The owner's unrefuted testimony was that he offered claimant permission to transport his wife to her appointment if he reported to work after he finished. Audio recording at 11:30. The veracity of that testimony was supported by the owner's unrefuted testimony that he customarily accommodated claimant's scheduling needs as far as allowing him to take periods of time off work to transport his wife to work and his children to school, making it more likely than not that the owner would likely have offered the same accommodation to claimant on February 29th, and, therefore, unnecessary for claimant to quit work in order to transport his wife to her appointment.

Claimant did not establish that the circumstances under which he left work were such that no reasonable and prudent person of normal sensitivity, exercising ordinary common sense, would have concluded that he had no reasonable alternative but to quit work. We therefore conclude that claimant quit work without good cause, and is disqualified from receiving unemployment insurance benefits because of his work separation.

DECISION: Hearing Decision 16-UI-63062 is affirmed.

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

DATE of Service: August 11, 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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