

EMPLOYMENT APPEALS BOARD DECISION
2016-EAB-0944

Reversed
No Disqualification

PROCEDURAL HISTORY: On June 17, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant voluntarily left work with good cause (decision # 11828). The employer filed a timely request for hearing. On August 2, 2016, ALJ M. Davis conducted a hearing, and on August 5, 2016 issued Hearing Decision 16-UI-65137, reversing the Department's decision. On August 12, 2016, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant submitted a written argument, but did not certify that he provided a copy of his argument to the other parties as required by OAR 471-041-0080 (October 29, 2006). Claimant's written argument also contained information not presented during the hearing, and he did not show that factors or circumstances beyond his reasonable control prevented him from offering that information at the hearing as required by OAR 471-041-0090 (October 29, 2006). For these reasons, EAB did not consider claimant's written argument, including the new information he sought to present, when reaching this decision.

FINDINGS OF FACT: (1) Camping World employed claimant as a service assistant from May 4, 2016 until May 6, 2016.

(2) Claimant had a bad back and sciatica. Before May 2016, claimant had five surgeries on his back.

(3) On May 5, 2016, claimant's second day at work, claimant experienced very intense back pain when trying to perform the work that was assigned to him. The pain was sciatic pain that ran down claimant's right leg.

(4) On May 6, 2016, claimant spoke to his supervisor about the pain he experienced when trying to perform his work. The general manager walked into the shop and past claimant and his supervisor as

they were talking. Claimant asked his supervisor if his work could be modified because of the level of pain he experienced when working. The supervisor told claimant no work modifications were available. Claimant then told the supervisor he was not physically able to continue working. The supervisor instructed claimant to see the general manager's administrative assistant, who handled human resources functions for the employer, to process his separation from work. Claimant saw the administrative assistant. Claimant told the administrative assistant he was quitting because he could not physically perform the work. The administrative assistant said nothing about modified work that might be available and allow claimant to continue working.

(5) On May 6, 2016, claimant voluntarily left work.

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

In Hearing Decision 16-UI-65137, the ALJ concluded that, despite the divergent testimony of the parties, the work separation was a voluntary leaving. Hearing Decision 16-UI-65137 at 2. The ALJ further concluded that claimant was disqualified from benefits because he left work without good cause. The ALJ reasoned that since claimant could have spoken to the administrative assistant and the general manager in addition to his supervisor about whether modified work was available to him, he did not show that no reasonable alternatives were available to him other than leaving work. Hearing Decision 16-UI-65137 at 3. We agree that claimant's work separation was a voluntary leaving, but disagree that claimant did not show good cause for leaving work when he did.

With respect to the work separation, while claimant contended he did not quit work he also appeared to contend that the employer did not discharge him. Audio at ~7:48. In contrast, the employer's witness, the general manager, testified that claimant told both his supervisor and the administrative assistant that he was quitting due to his inability to perform the work. Audio at ~24:53, ~25:45, ~27:32. The standard for determining whether claimant's work separation should be considered a voluntary leaving or a discharge is set forth at OAR 471-030-0038(2) (August 3, 2011). 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). 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 initially presented detailed testimony about conversations he had with his supervisor and the administrative assistant on May 5, 2016 in which he repeatedly told his supervisor he was not quitting work and did not tell the administrative assistant he was quitting. Claimant further testified that he went into the workplace on May 6, 2016 only to confirm that his supervisor was not going to make job modifications available to him. However, claimant changed his testimony at the end of the hearing when the ALJ referred him to the Personnel Status Change Form he signed on May 6, 2016 and on which the administrative assistant had written "he decided he isn't physically able to do the work." Exhibit 1, part 1 at 1; Audio at ~10:42, ~11:49. Claimant then agreed that May 6, 2016 was actually the date he spoke with his supervisor and the administrative assistant and the date when the work separation had occurred. He also provided the additional detail that he thought the administrative assistant had written what she did about the separation because he recalled telling her about his back pain and sciatica. Audio at ~37:38. However, claimant did not explain how his refreshed recollection of the correct date of the work separation might have changed his recollection of his various statements to his supervisor

that he was not quitting work or why the administrative assistant would not have mentioned on the form that he was not quitting work if he insisted to her, as he supposedly had done with his supervisor, that he was not quitting. Given the inconsistencies and reversals in claimant's testimony it appears less reliable than that of the employer's general manager. The preponderance of the persuasive evidence in this record is that claimant voluntarily left work on May 6, 2016 because he was not able to perform the duties of his job.

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 P2d 722 (2010). Claimant had sciatica and long-standing back problems, which presumably was a permanent or long-term "physical or mental impairment" as defined at 29 CFR §1630.2(h). A claimant with that impairment who quits work must show that no reasonable and prudent person with the characteristics and qualities of an individual with such impairment would have continued to work for his employer for an additional period of time.

Claimant contended he asked his supervisor several times about whether his job could be modified to take account of his back condition before he decided to leave work. Audio at ~9:30, ~10:01, ~10:27. From the record, it appears that claimant left work due to his physical condition after his requests for modified duties were refused. Although the general manager testified to his belief that claimant did not ask his supervisor about modified duties, his testimony that he heard claimant and the supervisor talking on May 6, 2016 about claimant's physical condition only as he passed by them on his way to his office is an acknowledgement that he did not hear their complete conversation. Audio at ~26:59, ~34:40. Since claimant provided first-hand testimony that he asked his supervisor several times whether modifications could be provided that would allow him to continue working for the employer and the employer was unable to provide a complete rebuttal of claimant's testimony, we accept claimant's account as accurate. As well, it appears that the employer's administrative assistant, who was also its human resources person, did not inform claimant that job modifications might be available from the employer, although she was on notice that claimant was resigning because he could not perform his job duties without accommodations. On these facts, a reasonable and prudent person with a serious back condition who was unable to perform his job duties without modifications would reasonably have concluded the employer would not provide modifications to him after his supervisor flatly and unequivocally told him such modifications were not available and the employer's human resources person, who knew he was resigning because of his physical inability to perform the work, did not mention that modifications might be provided. *See e.g., Early v. Employment Department*, 244 Or App 643, 321, 328 __P3d __ (2015) (employer's failure to offer claimant alternatives to quitting, when employer knew claimant was quitting after six months of attempting to resolve problems with her supervisor, "implicitly suggest[s]" that no alternatives were available). A reasonable and prudent person with claimant's impairment, who was unable to perform his job duties and for whom no job accommodations were reasonably forthcoming would have quit work when claimant did.

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

DECISION: Hearing Decision 16-UI-65137 is set aside, as outlined above.

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

DATE of Service: September 13, 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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