

EMPLOYMENT APPEALS BOARD DECISION
2016-EAB-1192

Affirmed
Disqualification

PROCEDURAL HISTORY: On September 15, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant voluntarily left work without good cause (decision # 80811). Claimant filed a timely request for hearing. On October 13, 2016, ALJ Logan conducted a hearing, and on October 14, 2016 issued Hearing Decision 16-UI-69301, affirming the Department's decision. On October 24, 2016, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant submitted a written argument but did not certify it was served on the other parties as required by OAR 471-041-0080 (October 29, 2006). Claimant's written argument also contained new information that he did not present at the hearing because his "frustration and agitation" did not allow him "to understand that the questions I was being asked." Claimant's Written Argument at 4. However, EAB has reviewed the entire record and it does not reveal that claimant misunderstood any questions, faltered answering them or that his emotional state reasonably prevented him from offering information on his own behalf in response to the apparently intended meaning of the questions he was asked. Consequently, claimant did not show that factors or circumstances beyond his reasonable control prevented him as required by OAR 471-041-0090 (October 29, 2006) from offering at hearing the new information that he now seeks to present to EAB. Absent this showing, there is no basis for EAB to consider claimant's new information. For both of these reasons, EAB did not consider claimant's written argument or the new information he sought to present by way of his written argument. EAB considered only information received into the hearing record when reaching this decision.

FINDINGS OF FACT: (1) Wolcott Plumbing employed claimant as a finish worker from February 29, 2016 until July 25, 2016.

(2) Before claimant was hired by the employer, he and two plumbers were let go by another employer and they decided to look for work together. Claimant and the two plumbers wanted to negotiate uniform compensation and benefit packages from prospective employers they desired to work for. Claimant learned that the two plumbers had negotiated an offer from the employer that included the paid holidays

of New Year's Day, Memorial Day, Independence Day, Labor Day, Thanksgiving Day and the Friday after and Christmas Day.

(3) Before claimant was hired, he met with one of the employer's supervisors. Claimant told the supervisor that he did not want to accept a position with the employer unless he received paid holiday days each year. Claimant understood the supervisor to state that he would receive paid holiday days. Claimant also told the supervisor that one of his prior employers had required him to perform high voltage and low voltage electrical work that he should not have performed because he was not a licensed electrician. The supervisor assured claimant that the employer would not require him to perform electrical work that he was not licensed to perform. Claimant accepted the employer's offer of employment and was hired.

(4) After claimant was hired, his immediate supervisor, who was not the same supervisor that had interviewed him, sometimes told him to perform electrical work that he was authorized to perform in order to save money. Although claimant told this supervisor he was not allowed to perform that work, the supervisor insisted and claimant did the electrical work. He did not complain to the interviewing supervisor or someone else in the employer's management structure.

(5) Claimant did not work on Memorial Day, May 30, 2016. When claimant received his paycheck for the pay period that included May 30, 2016, claimant saw that paid time off (PTO) rather than holiday pay was entered to compensate him for that day. Claimant spoke to the supervisor who conducted his hiring interview, and that supervisor told him that "they're still working on the holiday pay [issue]." Transcript at 9. Sometime around late June or early July 2016, claimant's direct supervisor required him to perform low voltage work on a job in Washington that under Washington law should have only been performed by a licensed electrician. Claimant performed that work and did not complain to the interviewing supervisor or another member of management.

(6) Shortly before the next holiday, July 4, 2016, claimant asked the supervisor who had conducted his hiring interview if he was going to receive holiday pay for that day. The supervisor told claimant that the employer did not generally give holiday pay to field personnel like claimant. The supervisor told claimant that he was a "special case" because the supervisor had promised claimant that he would receive paid holidays and the employer likely was going to give claimant six extra days of PTO to take the place of holiday pay and to allow him to have all holidays off with pay. Transcript at 18, 23-24. Claimant took July 4, 2016 off and the employer entered PTO on his paycheck to account for his pay that day off.

(7) On approximately July 11, 2016, claimant submitted his resignation to his direct supervisor and stated his last day was going to be July 25, 2016. Claimant did not turn the resignation in to the supervisor who had interviewed him when he was hired because that supervisor was away from work for two weeks.

(8) On July 25, 2016, claimant met with the supervisor who had interviewed him. Claimant told the supervisor he was quitting because he wanted paid holidays and did not want to be paid for them using extra PTO days. Claimant was concerned that he would have to request holidays off using PTO, and if the employer rejected his requests he might have to work on holidays. The supervisor told claimant that the six additional PTO days for him had been formally approved by the employer's management. The

supervisor tried to explain to claimant that it did not matter how he received the holiday pay and that the six extra PTO days he received was the equivalent of holiday pay for the six paid holidays the employer recognized for employees entitled to paid holidays. Claimant told the supervisor, "It's not the same." Transcript at 30. At that time, the supervisor was not aware that claimant's direct supervisor had been requiring him to perform unauthorized electrical work on some jobs.

(9) On July 25, 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.

Claimant testified he left work because he did not receive the paid holidays that he was promised when he was hired and because his direct supervisor had required him to perform electrical work that he was not licensed to perform because he was not an electrician. Transcript at 5. With respect performing electricians' work, it would appear that claimant's direct supervisor was requiring him to engage in unlawful activities. See OAR 918-282-0010(2) (October 1, 1996); WAC 296-46B-920 (December 15, 2013). While such a situation likely constituted a grave circumstance, claimant did not show that he attempted to remedy it by telling the employer's management of his direct supervisor's instructions. For example, claimant was seemingly well acquainted with the supervisor who had interviewed him, who had assured him he would not be required to perform electrical work, and claimant had discussions with that supervisor about his dissatisfaction with the arrangements for him to receive holiday pay. However, claimant did not dispute the testimony of the supervisor that he was not aware claimant was being instructed to perform work that was properly done only by a licensed electrician and it is inferable that he did not inform that supervisor of what his direct supervisor was requiring of him. Transcript at 26. Claimant also did not contend that he told any other supervisors, members of the employer's management or anyone else of his direct supervisor's instructions that he perform unlicensed electrician's work. Claimant presented no evidence from which it might be inferred that making complaints about his direct supervisor's unlawful instructions would be futile and the employer would likely not take action to stop them. While the instructions issued to claimant by his direct supervisor might have created a situation of gravity, a reasonable and prudent person in claimant's circumstances would have notified the supervisor who interviewed him and assured him he would not be required to perform unlicensed electrical work, or other supervisors or members of the employer's management, before concluding that he had no alternative to leaving work as a result of the unlawful instructions of his direct supervisor.

With respect to the issue of paid holidays, the employer's witness, the supervisor who interviewed claimant, acknowledged that he and claimant had discussed holiday pay, and claimant might have

understood he was going to receive paid holidays. Transcript at 23, 24. However, the witness further testified that although the employer decided not to provide holiday pay to field employees like claimant, because claimant was a “special case” who would not have accepted the employer’s offer of employment if he knew he would not receive holiday pay, the supervisor had arranged to get him six additional days of PTO that he could use in place of holiday pay to achieve the same end of having holidays off with pay. Transcript at 23, 24. Although claimant contended that the PTO would be different from receiving holiday pay because he would have to make a request to have the holidays off and there was a possibility the employer might not allow him to take a holiday off, the supervisor stated that was unlikely that claimant would not be allowed to have the holidays off. Transcript at 25. Moreover, claimant had taken Memorial Day 2016 and July 4, 2016 off and received pay for those days using two of the six extra PTO days he was provided without issue or objection by the employer, suggesting that there was no immediate risk that he would be required to work holidays in the future at the time claimant quit work. That claimant might need to request holidays off and there would be a theoretical possibility the employer would not permit him to take a holiday off did not create a grave situation for claimant. The record shows the employer did what it reasonably could to give claimant the same benefit as if he had holiday pay, and the difference in title between PTO and holiday pay also was not a grave reason for claimant to leave work. A reasonable and prudent person would not have considered the situation grave and would not have decided to leave work when claimant did and for the reasons that claimant did.

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

DECISION: Hearing Decision 16-UI-69301 is affirmed.

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

DATE of Service: November 10, 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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