

EMPLOYMENT APPEALS BOARD DECISION
2016-EAB-1362

Affirmed
Disqualification

PROCEDURAL HISTORY: On October 5, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant voluntarily left work with good cause (decision # 91950). The employer filed a timely request for hearing. On November 16, 2016, ALJ McGorin conducted a hearing, and on November 17, 2016 issued Hearing Decision 16-UI-71349, reversing the Department's decision. On December 5, 2016, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant submitted a written argument which contained information not offered into evidence during the hearing. In the argument, claimant also sought to have the hearing reopened to allow him to offer testimony from witnesses he did not call on his own behalf at the hearing. EAB construes both types of new information that claimant seeks to present as a request that EAB consider additional evidence under OAR 471-041-0090 (October 29, 2006), which allows EAB to consider new evidence if the party offering it shows it is relevant and material and that factors or circumstances beyond the party's reasonable control prevented the party from offering it during the hearing. Claimant did not explain why he did not present this evidence or the testimony from those witnesses during the hearing and did not show that reasons beyond his reasonable control prevented him from doing so. Absent such a showing, EAB is not authorized to consider the new information that claimant sought to present and claimant's request is denied. EAB considered only information received into evidence during the hearing when reaching this decision.

FINDINGS OF FACT: (1) Sometime prior to mid-April 2016, McLoughlin Auto Group employed claimant principally to handle sales of Fiat vehicles at its dealership. Ron Tonkin Dodge Inc. purchased the dealership at which claimant was employed in April 2016 and kept claimant as an employee. Ron Tonkin Dodge, Inc. employed claimant as studio director for Fiat vehicles from April 15, 2016 until July 31, 2016.

(2) When the employer acquired the dealership at which claimant worked, the employer had two automotive technicians that were certified to perform service and warranty work on Fiat gasoline

powered vehicles. During claimant's employment, the number of these Fiat certified mechanics varied between two and approximately eight. During this time, the employer did not have an automotive technician formally certified to perform service and warranty work on Fiat electric powered vehicles on-site. However, the employer had such a certified technician at another nearby dealership it owned who was available to perform work on electric vehicles that were sold by claimant's dealership. Also, for the period comprising claimant's employment, the employer was allowed by Fiat Corporation to have service and warranty work on gas and electric-powered Fiat vehicles it sold performed by non-certified technicians because it had very recently acquired the dealership at which claimant worked.

(3) During claimant's employment, many of his coworkers complained about the quality of the Fiat vehicles and referred disparagingly to them. The coworkers sometimes called Fiats "that fucking Italian car" or "that piece of crap" to express their lack of respect for the Fiat brand. Transcript at 23, 25. On some occasions, claimant's coworkers would refuse to assist him in jump-starting Fiats when claimant wanted to show potential customers the Fiats to potential customers. Since claimant was so closely associated with the Fiat brand because he was the studio manager for Fiats, he was displeased about how his coworkers characterized Fiats and felt disrespected as Fiat's representative at the dealership. Claimant told the general manager at his dealership at least twice about his coworkers' comments and the general manager told claimant that the workers' behaviors "had to stop immediately." Transcript at 16, 17.

(4) On June 26, 2016, a manager was irritated with claimant because he thought claimant was not performing his job. The manager told claimant that he was "stupid" and an "asshole." Transcript at 21, 22. Afterward, the manager apologized to claimant for what he had said.

(5) Sometime before early July 2016, claimant wanted to transfer from the employer's location on McLoughlin Boulevard to its location in Beaverton. Claimant contacted management at the Beaverton location and received what he thought was a favorable response to his potential transfer. Claimant then asked the general manager of his dealership if the general manager would authorize the transfer. On approximately July 7, 2016, the general manager sent claimant a text message stating that he would allow the transfer in 30 days if claimant still wanted it. Exhibit 1 at 1, 3. Claimant then sent a text message to the general manager at the Beaverton location informing him of the response the other general to his request. The general manager at the Beaverton told claimant he had "to defer" to the position of the other general manager. Exhibit 1 at 5, 6. On July 9, 2016, claimant was notified by the Beaverton dealership that he could not transfer to the Beaverton location at that time.

(6) On July 18, 2016, claimant met with the general manager of his dealership. Claimant was told that the employer was going to move him from the Fiats to the side of the dealership that sold Dodge vehicles. Claimant felt he was being "belittled" by the change since he was hired as the studio director for Fiats but would be a salesperson on the Dodge side and have fewer responsibilities.

(7) Throughout his employment, claimant never complained to the employer's human resources office or its management that he thought he was being belittled, discriminated against or mistreated in the workplace.

(8) July 31, 2016 was the last day that claimant reported for work. Claimant did not inform the employer or any of its representatives that he was not going to work thereafter for the employer or that he had decided to leave 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.

The first stated reason that claimant gave for leaving work was his allegation that the employer’s management required him to misrepresent to customers that the employer was able to perform service and warranty work on Fiat vehicles that the customers purchased when the employer was not able to perform that work. Transcript at 8-10. However, the employer’s general manager and its sales manager disputed this contention, and testified the employer had at all times during claimant’s employment on-site Fiat certified-technicians who could perform work on gas-powered Fiats, an exception in place from Fiat Corporation for new dealerships that authorized general technicians to perform such work on gas and electric powered Fiats, and a technician certified to perform work on electric-powered Fiats at one of the employer’s nearby dealerships to whom customers could take their Fiats or who was available to come to the McLoughlin location to perform such work on-site at that dealership. Transcript at 32-34, 39-41, 45-47. The testimony of the employer’s representatives appeared credible, particularly since it is a highly unusual situation for a new car dealership to lack the ability to perform service and warranty work on cars with a manufacturer’s warranty. Moreover, the evidence was at best evenly balanced about the employer’s ability to provide service on Fiats, and there was no reason in the record to doubt the credibility of either claimant or the employer’s witnesses. Where, as here, the evidence on a disputed issue is of equal weight and persuasion, the issue must be resolved against claimant since he carries the burden the proof in a voluntary leaving case. *See Young v. Employment Department*, 170 Or App 752, 13 P3d 1027 (2000). Since claimant did not show that the employer lacked the ability to perform service and warranty work on the Fiats that he sold, there was no basis in the evidence for claimant’s allegation that the employer required him to misrepresent the employer’s ability to do so. Claimant did not meet his burden to show that the employer required him make misrepresentations to customers or that such alleged misrepresentations were good cause to leave work.

The second reason claimant stated for leaving work was that claimant’s coworkers belittled and discriminated against him and the Fiat brand in the workplace. Transcript at 14, 21, 23. Although the employer’s witnesses acknowledged that claimant’s coworkers expressed that they thought poorly of the Fiat brand, the employer’s witnesses denied that the disparagement extended to claimant personally. Transcript at 35-37, 47, 49. The employer’s witnesses also denied that claimant had never complained about being personally disparaged. Transcript at 35-37, 49, 57, 58. As above, the evidence on this disputed issue is also evenly balanced and there is no reason to doubt the credibility of either party’s

testimony. For the same reason as previously stated, claimant did not meet his burden to show that he was personally belittled in the workplace by his coworkers' comments. Moreover, while claimant's coworkers might have expressed that they held the Fiat brand in low-esteem, there was no evidence showing that these opinions, without more, created a situation of gravity for claimant. Notably, claimant did not contend that any customers heard the coworkers' comments, were deterred from purchasing Fiats by them, or that any cognizable harm came to claimant from the coworkers' comments. Nor did claimant contend, or show, that the failure of some coworkers on occasion to jump-start the Fiats caused him to lose potential sales.

Claimant's final stated reason for leaving work was that the employer discriminated against him by refusing his request to transfer to the Beaverton dealership. Transcript at 28. The employer's witnesses denied they interfered with or tried to obstruct this transfer and stated they did not know why the Beaverton dealership ultimately decided not to accept claimant's transfer. Transcript at 47-48. The documents that claimant submitted at hearing showed that the general manager of claimant's dealership did not refuse to authorize the transfer, but stated that he would allow it "in 30 days if you try [y]our best," with no explanation of what that final comment meant. Exhibit 1 at 3. Nothing was stated in the messages from the general manager at the Beaverton location to claimant that indicated more than that the general manager would abide by the 30 day delay in transfer that claimant's general manager wanted. Exhibit 1 at 6. On this record, the evidence is insufficient to show that the claimant's general manager refused his transfer request, that the Beaverton general manager withdrew an offer of transfer position to claimant because of the request for 30 days from the general manager of claimant's dealership, or that claimant's general manager intended that result by requesting 30 days. The record is unclear about the reasons that the Beaverton general manager withdrew his offer to claimant, if indeed he had previously offered the transfer position to claimant. Claimant did not present sufficient evidence to show that the employer blocked his transfer to the Beaverton dealership at all, let alone that it was for a discriminatory or retaliatory reason.

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-71349 is affirmed.

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

DATE of Service: January 13, 2017

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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