

EMPLOYMENT APPEALS BOARD DECISION
2016-EAB-1423

Late Application for Review Allowed
Hearing Decision 16-UI-71254 Modified – Disqualification

PROCEDURAL HISTORY: On October 5, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant voluntarily left work without good cause (decision # 145243). Claimant filed a timely request for hearing. On November 10, 2016, ALJ Wyatt conducted a hearing, and on November 16, 2016 issued Hearing Decision 16-UI-71254, affirming the Department's decision. On December 6, 2016, Hearing Decision 16-UI-71254 became final without claimant having filed an application for review. On December 19, 2016, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant failed to certify that he provided a copy of his argument to the other parties as required by OAR 471-041-0080(2)(a) (October 29, 2006). Therefore, we did not consider the argument when reviewing the record developed at hearing. We considered claimant's argument only as it applied to his late application for review.

FINDINGS OF FACT: (1) Shopko Stores Operating Co., LLC employed claimant from November 1, 2015 to May 20, 2016.

(2) Prior to May 14, 2016, claimant had perfect attendance at work and his work performance was more than satisfactory to the employer. Claimant developed concerns about his work environment. He had gastrointestinal problems that he felt were embarrassing, sweated at work because of the temperature of the work environment, and thought one of those issues caused him to have an odor. Claimant thought based on his coworkers' body language and body positions that they were frustrated with him and isolating him because of his odor. He also perceived that the new general manager did not like him.

(3) On May 14, 2016, claimant did not report to work for a scheduled shift or notify the employer he was going to be absent from work. He chose to remain home because he was concerned about his odor and the way his coworkers would treat him at work. He did not call his supervisor because he did not have a working telephone. The supervisor contacted claimant through his emergency contact number,

and, when claimant explained his concerns, the supervisor told claimant to keep in touch with her so she could work with him on scheduling matters.

(4) On May 20, 2016, claimant reported to work for a scheduled shift. He felt uncertain that he wanted to continue working for the employer, and his intent in working that shift was to “test the water” to see if he wanted to continue working for the employer. Audio recording at ~ 21:00. During the shift he felt he continued to experience the same problems with his coworkers and was not supported by management.

(5) Claimant left work early on May 20th without checking the work schedule to see if he was scheduled for additional shifts. The employer had scheduled claimant to work on May 21, May 25, May 26 and May 28, 2016. Claimant was aware that he was scheduled to work on May 21st. He did not report to work for that shift or the others, nor did he make or attempt to make contact with the employer to ask about his work schedule, to discuss his concerns or to discuss ongoing employment.

(6) On approximately November 13, 2016, claimant was arrested in Deschutes County and incarcerated in the Deschutes County Adult Jail for 30 days. Claimant asked a third party to forward his mail to him at the jail, and the third party agreed to do so. When Hearing Decision 16-UI-71254 arrived at claimant’s address of record, the third party forwarded it to claimant at the jail. The jail’s mail room did not deliver the item to claimant because the third party did not correctly address it. The period of time in which claimant could file a timely application for review of Hearing Decision 16-UI-71254 expired while claimant was incarcerated and had not received the decision. Claimant received Hearing Decision 16-UI-71254 shortly after he was released from custody on December 13, 2016 and filed his application for review with EAB on December 19, 2016.

CONCLUSIONS AND REASONS: Claimant’s late application for review is allowed. We agree with the ALJ that claimant voluntarily left work without good cause.

Late application for review. Claimant was required to file his application for review no later than December 6, 2016. *See* ORS 657.270(6); OAR 471-041-0070(1) (October 29, 2006). He filed it on December 19th, making the application for review late. The filing period may be extended a “reasonable time” if claimant shows “good cause” to do so. ORS 657.875. “Good cause” is when claimant proves that factors or circumstances beyond his reasonable control prevented a timely filing. OAR 471-041-0070(2)(a). A “reasonable time” is seven days after the circumstances that prevented a timely filing ceased to exist. OAR 471-041-0070(2)(b).

The fact that claimant did not receive his application for review because he was incarcerated, in and of itself, is not sufficient to establish good cause to extend the filing dealing. However, because claimant had someone monitor his mail and forward it to him in jail, the person attempted to do so, and the forwarded mail was withheld from him because the third party unwittingly addressed it incorrectly does. Claimant’s failure to receive his mail despite his good faith efforts to do so was the result of factors or circumstances outside his reasonable control, and he has established good cause to extend the filing period. Because claimant filed the application for review six days after the date the circumstances that had prevented a timely filing ceased to exist, claimant also proved that he filed his late application for review within a reasonable time. Claimant’s late application for review is, therefore, allowed.

Work separation. We first determine whether claimant’s work separation was a discharge or a voluntary leaving. 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).

There was some suggestion at the hearing that the employer discharged claimant on or shortly after May 28, 2016 when claimant failed to report work for a fourth consecutive scheduled shift. The record shows, however, that claimant had quit his job over a week earlier. On May 20th, claimant only reported to work to “test the water.” He had been considering whether or not to continue working for the employer, and, after working only a partial shift that day, decided to leave work early. Claimant attempted at the hearing to attribute his failure to call the employer about working after May 20th to his lack of a cell phone or access to another phone. Audio recording at ~ 28:15. However, given that his decision to work on May 20th was a test to see if he wanted to continue working, he left early because he did not like the way his coworkers and manager were acting, and he knew both that he was scheduled to work May 21st and missed that shift, claimant’s failure to make any effort to contact the employer suggests it is more likely than not that, as of the time he left work on May 20th, he was no longer willing to work for the employer, and that is the reason he ceased making contact with the employer or reporting for work after May 20th. We therefore conclude that claimant quit work on May 20th, at a time when he could have continued to work for the employer for an additional period of time, making the work separation a voluntary leaving.

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).¹ 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 quit work because he believed he had an odor that was either caused by an embarrassing gastrointestinal problem he was experiencing or because the employer overheated the workplace causing him to sweat at work. He perceived through his observations of his coworkers’ body language and positions that they were ostracizing him. He perceived that he lacked management support based at least in part, if not entirely, on his belief that the new general manager disliked him. Although claimant’s sensitivity to his circumstances and embarrassment over his perceived odor no doubt made it difficult for claimant to raise his concerns with a supervisor, the circumstances claimant described that prompted him to quit work did not amount to a “grave situation” such that an ordinary and reasonable person would feel he had no choice but to quit work. Although he thought the general manager would

¹ Although claimant had medical issues around the time of his work separation, the record fails to show that they were a permanent or long-term “physical or mental impairment” as defined at 29 CFR §1630.2(h). We therefore analyzed claimant’s work separation using the standard of a reasonable and prudent person without impairment. Even if we had concluded otherwise, the outcome of this decision would remain the same for the reasons explained herein.

not listen to his concerns, claimant had other supervisors with whom he could, and did, discuss his concern about having an odor, and that supervisor had indicated she would work with him on the issue. She was also willing to work with claimant as far as his request to reduce his work schedule to accommodate another job claimant thought he was going to begin in late May because she did not want to lose claimant as an employee. The record therefore fails to suggest that that supervisor, or others, would have been unwilling or incapable of hearing about claimant's concerns and taking any reasonable steps necessary to address them, or that bringing his concerns to them would have been futile.

Claimant voluntarily left work without good cause. He is, therefore, disqualified from receiving unemployment insurance benefits because of his work separation.

DECISION: Claimant's late application for review is allowed. Hearing Decision 16-UI-71254 is modified as to the effective date of claimant's disqualification.

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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