

EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-0098

Hearing Decision 17-UI-75306 Reversed ~ No Disqualification
Hearing Decision 17-UI-75330 Affirmed ~ Ineligible Weeks 41-16 through 43-16

PROCEDURAL HISTORY: On November 22, 2016, the Oregon Employment Department (the Department) served two notices of two administrative decisions, one concluding claimant did not actively seek work from October 9, 2016 to November 5, 2016 (decision # 75113), and the second concluding claimant voluntarily left work without good cause (decision # 75957). Claimant filed timely requests for hearing on both decisions. On January 17, 2017, ALJ Lohuis conducted a hearing on decision # 75113, and ALJ L. Lee conducted a hearing on decision # 75957. On January 24, 2017, ALJ Lohuis issued Hearing Decision 17-UI-75330, concluding claimant did not actively seek work from October 9, 2016 to October 29, 2016, and ALJ L. Lee issued Hearing Decision 17-UI-75306, affirming decision # 75957. On January 26, 2017, claimant filed timely applications for review of both hearing decisions with the Employment Appeals Board (EAB).

Pursuant to OAR 471-041-0095 (October 29, 2006), EAB consolidated its review of Hearing Decisions 17-UI-75306 and 17-UI-75330. For case-tracking purposes, this decision is being issued in duplicate (EAB Decisions 2017-EAB-0097 and 2017-EAB-0098).

With respect to review of Hearing Decision 17-UI-75330 (whether claimant was eligible for benefits from October 9, 2016 to October 29, 2016), EAB reviewed the entire hearing record. On de novo review and pursuant to ORS 657.275(2), Hearing Decision 17-UI-75330 is **adopted**.

With respect to review Hearing Decision 17-UI-75306 (whether claimant voluntarily left work without good cause), EAB reviewed the entire hearing record and determined as follows.

FINDINGS OF FACT: (1) City of Portland employed claimant as a park ranger from August 18, 2011 to October 7, 2016.

(2) Shortly after beginning work, claimant helped organize an employee's union and complained to the employer or through OSHA about unsafe working conditions. In 2014 or 2015, claimant complained that his supervisor, H, had previously employed an interview candidate, had placed the candidate's name on the interview list, and had lied to claimant by claiming he did not know the candidate and claiming

that B, not H, had placed the candidate's name on the interview list, resulting in H's candidate being hired even though two other candidates were better qualified.¹ H immediately filed a complaint accusing claimant and B of racial discrimination. The employer concluded claimant had engaged in discrimination and imposed discipline.

(3) Claimant felt he experienced harassment and retaliation because of his organizing activities and complaints. After H's accusation, claimant filed a union grievance and notice of tort claim alleging whistleblower retaliation, both of which went to mediation. As a result, he was found not to have discriminated against H, discipline was rescinded, and he received back pay and was reinstated to a position of his choosing. The employer ultimately substantiated claimant's complaint against H.

(4) In the meantime, claimant was ostracized by coworkers. He was the subject of rumors. The employer repeatedly denied claimant's requests for a partner and gave a different basis for each refusal, resulting in claimant feeling vulnerable and unsafe, and left him unable to do all of his duties. Claimant had received positive evaluations and more recognition awards than his peers yet was repeatedly denied leadership opportunities in part because of the complaint, even though he was cleared of wrongdoing and his own complaints were often substantiated. The employer also denied claimant leadership roles citing his lack of experience but awarded leadership roles to others with less experience, and denied claimant opportunities for reasons that were disregarded when awarding opportunities to others. In early 2016, the employer gave claimant a "terrible" performance evaluation claimant felt was unjustified.²

(5) In August 2016, five individuals claimant interrupted while fighting in a park attacked and damaged claimant's truck while claimant was inside. Claimant's supervisors had checked on a coworker's well-being after that coworker was assaulted and claimant expected them check on him, but none did. They instead strongly criticized claimant and suggested that he should have just driven away and called police later. Claimant was upset that the supervisors had not checked on his well-being, and he thought the suggestion that he should have driven away from the park violated policy.

(6) Claimant felt the employer was making "my daily life of going to work miserable."³ Claimant and the employer had previously contemplated transferring or reassigning claimant but no transfers were available. Claimant asked about potential job openings; the employer responded that they would look into them, and claimant waited to hear whether he could apply for or transfer to the open positions. Ultimately, he was not given the opportunity to apply for other job openings with the employer.

(7) Although the employer did not have immediate plans to discharge claimant, the mediator and the union suggested that claimant would probably not "survive the year" without the employer terminating his employment.⁴ Claimant was told he had a choice either to enter into a settlement negotiation that included his resignation or continue to work under the same conditions he was experiencing until his tort claim went to trial, likely late 2017. In September 2016, claimant agreed to enter into a settlement of his dispute with the employer, conditions of which included a financial settlement and claimant's agreement to resign. On his last day of work the employer gave claimant a distinguished service award. The

¹ We have assigned pseudonyms to protect the privacy of the individuals involved.

² Transcript at 41-42.

³ Transcript at 37-38.

⁴ Transcript at 37.

employer placed claimant on administrative leave pending execution of the agreement by the City Council, and claimant's resignation became effective October 7, 2016.

CONCLUSIONS AND REASONS: We disagree with the ALJ and conclude that claimant voluntarily left work with 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.⁵ "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.⁶ The standard is objective.⁷ 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 ALJ concluded that claimant quit work without good cause, reasoning that, while "[i]t might have been foreseeably difficult to continue working while claimant waited for his tort claim to go to trial," it was more likely than not that "continuing to work, at least until he had found another job he preferred elsewhere, constituted a reasonable alternative to quitting and becoming unemployed . . . [w]hile claimant's decision to quit his job for the settlement may have been justifiable, it did not provide good cause for purposes of receiving unemployment benefits."⁸ We disagree.

As a preliminary matter, it is immaterial that claimant could have continued to work an additional time for the same employer. Not only is that true in every case in which an individual voluntarily leaves work, it is beside the point.⁹ The issue that must be decided in every quit case is not whether or not the individual could have continued working, but whether the individual had good cause for leaving work.

At the time claimant quit work, he had, over a period of several years, experienced, among other things: a false accusation of race-based discrimination in apparent retaliation for making a valid complaint; wrongful suspension from work; rumors; he was ostracized by his coworkers; denied the partner he needed to complete his assigned work and, consequently, left unable to properly do his job; placed at risk and exposed to unsafe situations; given an inaccurate unduly critical performance evaluation, belied by an award he received just a few months later; barred from advancement opportunities for reasons that, on this record, appear arbitrary and/or based upon claimant's exercise of his right to file complaints about harassment and unsafe working conditions or upon a false complaint about him; he was treated differently than others with respect to his assault; the process through which he was allowed to seek transfers or reassignments during the mediation and settlement processes had the effect of preventing claimant's efforts to maintain his employment; he was advised by a mediator and his union that if he did not settle his potential tort claim and resign that the employer was certain to discharge him within a year; he experienced undue amounts of stress because of his working conditions; and it appears on this record

⁵ ORS 657.176(2)(c); *Young v. Employment Department*, 170 Or App 752, 13 P3d 1027 (2000).

⁶ OAR 471-030-0038(4) (August 3, 2011).

⁷ *McDowell v. Employment Department*, 348 Or 605, 612, 236 P3d 722 (2010).

⁸ Hearing Decision 17-UI-75306 at 3.

⁹ See *accord Warkentin v. Employment Department*, 245 Or App 128, 261 P3d 72 (2011); *Campbell v. Employment Department (Campbell I)*, 245 Or App 573, 263 P3d 1122 (2011); *Strutz v. Employment Department*, 247 Or App 439, 270 P3d 357 (2011); *Campbell v. Employment Department (Campbell II)*, 256 Or App 682, 303 P3d 957 (2013).

that the conditions listed were unlikely to abate at any time in the foreseeable future.

It appears more likely than not that claimant faced a grave situation, and, by September and October 2016, that he had exercised all of his reasonable alternatives – he had complained to the employer, filed OSHA complaints, filed a grievance, pursued a tort claim, and participated in mediation, all while continuing to tolerate the same types of conditions that made him complain in the first place, while those conditions were ongoing. At that point, it appears for all practical purposes that he had two options, continuing to work, which, as noted, is not considered a reasonable alternative, or quitting work and gaining both the financial benefit of the settlement award and the benefit of no longer being subjected to the working conditions and associated stressors described herein. Under the circumstances, no reasonable and prudent person of normal sensitivity, exercising ordinary common sense, would have continued to work for the employer for an additional time.

Therefore, with respect to review of Hearing Decision 17-UI-75306, claimant voluntarily left work with good cause. Claimant is not disqualified from receiving benefits because of his work separation.

DECISION: Hearing Decision 17-UI-75306 is set aside, as outlined above.¹⁰ Hearing Decision 17-UI-75330 is affirmed.

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

DATE of Service: February 14, 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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¹⁰ With respect to Hearing Decision 17-UI-75306, this decision reverses a hearing decision that denied benefits. Payment of any benefits, if any are owed, may take from several days to two weeks for the Department to complete. Please note that any denial of benefits based upon Hearing Decision 17-UI-75330, or any other matter not before EAB at this time, remains in effect.