

EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-0193

Affirmed
Disqualification

PROCEDURAL HISTORY: On August 2, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant voluntarily left work with the employer without good cause (decision # 134426). On August 22, 2016, decision # 134426 became final without claimant having requested a hearing. On August 24, 2016, claimant filed a late request for hearing. On August 29, 2016, ALJ Kangas issued Hearing Decision 16-UI-66523, dismissing claimant's request for hearing subject to his right to renew the request by responding to an appellant questionnaire by September 12, 2016. On September 20, 2016, claimant filed a late response to the appellant questionnaire and an explanation as to why his response was late. The Office of Administrative Hearings (OAH) considered claimant's response, on September 28, 2016 canceled Hearing Decision 16-UI-66523, and on October 4, 2016 scheduled a hearing for October 17, 2016. On October 17, 2016, ALJ Vincent conducted a hearing, and on October 20, 2016 issued Hearing Decision 16-UI-69601, allowing claimant's late request for hearing, and concluding the employer discharged claimant for misconduct.

On November 7, 2016, claimant filed a timely application for review with the Employment Appeals Board (EAB). On December 5, 2016, EAB issued EAB Decision 2016-EAB-1243, reversing Hearing Decision 16-UI-69601 and remanding this matter to OAH for additional proceedings. On January 26, 2017, ALJ Triana conducted a hearing at which the employer failed to appear, and on January 27, 2017 issued Hearing Decision 17-UI-75621, allowing claimant's late request for hearing and concluding that claimant voluntarily left work with the employer without good cause. On February 16, 2017, claimant filed a timely application for review of Hearing Decision 17-UI-75621 with EAB.

No party applied for review of that portion of Hearing Decision 17-UI-75621 allowing claimant's late request for hearing on decision # 134426. EAB therefore limited its review to whether claimant is disqualified from receiving benefits based on his work separation from the employer. Claimant submitted written argument with his application for review but 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). The argument also contained information that was not part of the hearing record, and failed to show that

factors or circumstances beyond claimant's reasonable control prevented him from offering the information during the hearing as required by OAR 471-041-0090 (October 29, 2006). We considered only information received into evidence at the hearing when reaching this decision. *See* ORS 657.275(2).

FINDINGS OF FACT: (1) Wal Mart Associates Inc. employed claimant as an overnight stocker from March 22, 2012 to May 3, 2016.

(2) The employer typically scheduled claimant to work Wednesdays through Saturdays, 10:00 p.m. to 7:00 a.m. the following morning. The employer expected employees to report for work as scheduled, and those unable to do so to notify the employer. Claimant understood those expectations. In January 2016, the employer gave claimant a final written warning for missing work, which stated that he would be discharged if he missed work again before June 2016.

(3) On April 24, 2016, claimant was arrested and incarcerated for driving with a suspended license while returning to work from his lunch break. Claimant's wife notified the employer that he had been incarcerated and would not be returning to work that day. Claimant was next scheduled to work on April 27, 28, 29 and 30, 2016. Claimant missed all four shifts because he was still incarcerated. Claimant's wife notified the employer each day that claimant was going to be absent from work due to his continued incarceration. The employer never informed claimant's wife that claimant had been, was, or was going to be discharged for missing work.

(4) Claimant was not scheduled to work from May 1 through 3, 2016. On May 3, he was released from incarceration. Claimant mistakenly assumed he had been discharged for missing work, did not contact the employer to confirm his employment status, and abandoned his job. Claimant therefore did not contact the employer or attempt to report for work from May 4 through 7, 2016, May 11 through 14, 2016, or May 18 through 21, 2016.

(5) During or shortly after claimant's incarceration, the employer mailed him forms for requesting a leave of absence and other paperwork to preserve his employment. Claimant did not receive the forms or paperwork. Sometime between May 13 and 23, 2016, the employer processed claimant's work separation due to his failure to report for work, contact the employer, request a leave of absence or otherwise attempt to preserve his employment.

CONCLUSIONS AND REASONS: Claimant quit work and failed to establish that he did so with good cause.

We first address whether claimant voluntarily left work or was discharged. 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). "Work" means "the continuing relationship between an employer and an employee." OAR 471-030-0038(1)(a). The date an individual is separated from work is the date the employer-employee relationship is severed. *Id.*

Here, claimant severed the employment relationship on May 3, 2016 by mistakenly concluding that he had been discharged, not contacting the employer to confirm his employment status and abandoning his job, as demonstrated by the fact that he did not attempt to report for work after that date. Although claimant was willing to continue to work for the employer for an additional period of time, the employer did not prevent him from doing so. Because claimant could have continued the employment relationship for an additional period of time, the work separation is a 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) (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.

When a claimant has voluntarily left work because he mistakenly assumed he was discharged, he must show that no reasonable and prudent person would have contacted the employer and attempt to preserve his employment, or that doing so likely would have been futile. Here, claimant received his final written warning for attendance violations several months before the absences at issue. Given that claimant was unable to report for work, that his wife notified the employer each day that he was going to be absent, and that the employer never informed her that claimant had been, was, or was going to be discharged, claimant failed to show that no reasonable and prudent person would have contacted the employer and attempted to preserve his employment. And given that the employer mailed claimant forms for requesting a leave of absence and other paperwork to preserve his employment, and delayed processing claimant’s work separation for 10 to 20 days, the record fails to show that attempting to preserve his employment would have been futile.

Claimant therefore failed to establish that he voluntarily left work with good cause, and he is disqualified from receiving benefits based on his work separation from the employer.

DECISION: Hearing Decision 17-UI-75621 is affirmed.

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

DATE of Service: March 21, 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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