

EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-0266

Affirmed
Disqualification

PROCEDURAL HISTORY: On November 18, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant voluntarily left work without good cause (decision # 114802). Claimant filed a timely request for hearing. On February 9, 2017, ALJ Buckley conducted a hearing, and on February 13, 2017 issued Hearing Decision 17-UI-76773, affirming the Department's decision. On March 1, 2017, claimant filed an application for review with the Employment Appeals Board (EAB).

Since no party filed objected to the admission of Exhibit 1 into evidence within the time period set out in Hearing Decision 17-UI-76773, Exhibit 1 will remain in the record.

FINDINGS OF FACT: (1) Wright Lumber, Inc. employed claimant as a millwright from July 1, 2016 until August 18, 2016.

(2) The employer was start-up lumber mill. The employer needed to have many tasks performed necessary to ensure the successful operation of a mill, including fine-tuning the machines it had purchased and establishing and implementing operational and safety policies. The employer hired claimant to assist in this process. The employment agreement between the employer and claimant was that claimant would work "as needed" on the tasks that were assigned to him. There was no agreed-upon date or event that would end the employment relationship.

(3) During his employment, claimant was often frustrated and angry about various work-related occurrences. Claimant became concerned about the employer's safety procedures, including a lack of consistently followed lock out and tag out procedures. Claimant approached the employer's owner about his safety concerns. Claimant told the owner that he was going to contact the Occupational Safety and Health Administration (OSHA) about various safety issues. The employer held a safety meeting at which claimant presented his safety concerns, drafted and adopted a safety policy relying on notes that claimant created about appropriate procedures and designed a safety training program. Claimant was

also often concerned that the employer did not have the materials or equipment necessary for him to adequately perform the tasks that the employer assigned to him.

(4) Sometime shortly before August 18, 2016, claimant concluded that until the employer obtained a conveyor there were no tasks that he was able to perform. On August 18, 2016, claimant told the owner “I’m done” and that he was quitting. Audio at ~27:58, ~28:54. That day, claimant also sent a text message to the owner repeating what he earlier said. That message stated in part, “I’ve gone as far as I [] care to go,” raised claimant’s concerns over the work performance and safety practices of a coworker and concluded with the statement that claimant was not going to contact OSHA about the safety issues. Audio at ~13:10, ~17:20; Exhibit 1 at 2. A few days later claimant returned to the mill and removed his tools. The employer gave claimant two final paychecks. Claimant did not contact the employer and did not work after August 18, 2016. The employer assumed claimant had quit work on August 18, 2016.

(5) Sometime shortly before October 2, 2016, the owner contacted claimant because the employer had overpaid claimant by issuing two final paychecks to him. This contact was the first between the employer and claimant since August 18, 2016. The owner asked claimant to repay the amount the employer had overpaid him. Claimant offered to return to work for the employer until he worked off the amount of the overpayment. The owner told claimant he would consider that proposal, but rejected it in a text message sent to claimant on October 2, 2016 in which the owner stated, “Best to part ways and move on.” Exhibit 1 at 1.

CONCLUSIONS AND REASONS: Claimant voluntarily left work without good cause.

The employer contended claimant voluntarily left work on August 18, 2016 when he stated he had “gone as far as I care to go.” Audio at ~13:10; ~27:23. Claimant contended that the employer discharged him on October 2, 2016 when the owner told him he could not work off the debt he owed to the employer. Audio at ~19:19, ~19:48. Accordingly, the first issue this case presents is the nature of the work separation. If claimant could have continued to work for the employer at the time the work separation occurred, the separation is a voluntary leaving. OAR 471-030-0038(2)(a) (August 3, 2011). However, if claimant was willing to continue to work for the same employer for an additional period of time but was not allowed to do so by the employer, the separation was a discharge. OAR 471-030-0038(2)(b).

The text message claimant sent to the employer on August 18, 2016, considered in isolation, is ambiguous as to whether claimant was expressing an intention to quit work. That claimant picked up his tools only a few days after stating “I’m done” and sending a message that repeated that sentiment suggests that his intention on August 18, 2016 was to leave work. While claimant suggested in his testimony that he was intending on August 18, 2016 only to take a temporary hiatus from work until the employer obtained the additional equipment necessary for him to continue working, he agreed he did not clearly communicate that to the owner, and that he did not speak to the employer for the ensuing one and a half months, when the owner contacted claimant about the compensation he had been overpaid. Audio at ~13:10, ~13:38, ~14:20, ~15:07. If it had been claimant’s aim on August 18, 2016 only to temporarily cease working until the employer obtained additional equipment, it makes no sense that claimant did not contact the employer even once during the lengthy time he was not working after August 18, 2016 to inquire about the alleged delay in securing the equipment or to find out why the employer was not assigning additional work to him. That claimant did not contact the employer about

its failure to contact him after August 18, 2016 is strong corroboration that claimant was unwilling to work for the employer after August 18, 2016 and that he intended by his communications on that day to quit work. Claimant's work separation was a voluntary leaving on August 18, 2016

Claimant vigorously argued at hearing that, regardless if what happened on August 18, 2016, the employer had offered to allow him to return to work shortly before October 2, 2016 and rescinded that offer by the owner's text message to him on October 2, 2016. Audio at ~19:48, ~43:28. Even if claimant's account is believed, that would not change the fact that claimant severed the work relationship on August 18, 2016 by his voluntary leaving. Any events that may or may not have occurred in September and October 2016 would involve a separate offer of work and separate work separation from the one at issue here.

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). 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.

Because claimant contended the employer discharged him, he did not provide any reasons for quitting. However, throughout his hearing testimony, claimant referred to his discomfort with "safety issues" in the workplace. Audio at ~12:10, ~15:07, ~23:00. To the extent safety concerns might have motivated his decision to leave work, claimant did not demonstrate that they constituted grave circumstances. Claimant did not dispute that, as a start-up mill, the employer recognized it needed to adopt and implement adequate safety procedures and that, as a new employer, the employer was "very concerned" with safety." Audio at ~31:55. During his employment, claimant brought various safety issues up to the employer and the employer listened to claimant, had safety meetings where claimant discussed his concerns, developed safety policies based on his input and claimant was perceived as being "instrumental" in developing safe practices in the workplace. Audio at ~ 32:46. Claimant also did not dispute that the employer actually contacted OSHA on its own initiative to assist in ensuring that the overall workplace was safe and conferred with OSHA's consulting service about the adequacy of its safety measures. Audio at ~32:10. In light of the employer's un rebutted testimony on the many steps that it took to make its workplace safe, claimant did not demonstrate that unaddressed safety concerns constituted grave reasons for him to leave work. Aside from safety issues, there are no other reasons discernible on this record that claimant left work, let alone any grave reasons.

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

DECISION: Hearing Decision 17-UI-76773 is affirmed.

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

DATE of Service: March 30, 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.

Please help us improve our service by completing an online customer service survey. To complete the survey, please go to <https://www.surveymonkey.com/s/5WQXNJH>. If you are unable to complete the survey online and wish to have a paper copy of the survey, please contact our office.