EO: 200
BYE: 201711

State of Oregon
Employment Appeals Board
875 Union St. N.E.
Salem, OR 97311

733
VQ 005.00

EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-0280

Reversed
No Disqualification

PROCEDURAL HISTORY: On January 5, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant voluntarily left work without good cause (decision # 152400). Claimant filed a timely request for hearing. On February 24, 2017, ALJ Lohr conducted a hearing and issued Hearing Decision 17-UI-77712, affirming the Department's decision. On March 2, 2017, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant submitted a written argument that contained information not offered into evidence during the hearing. However, claimant did not explain why he did not present this information at the hearing or otherwise show that factors or circumstances beyond his reasonable control prevented him from doing so as required by OAR 471-041-0090 (October 29, 2006). For this reason, EAB did not consider the new information that claimant sought to offer when reaching this decision.

FINDINGS OF FACT: (1) Production Media Company employed claimant as an advertising salesperson from November 28, 2016 until December 2, 2016.

(2) The employer sold advertising space on folders that were distributed to real estate agencies to provide to their clients, principally home buyers, as places in which to store paperwork related to real estate purchases. The advertisers were principally businesses in the local community who provided services to homeowners. When claimant was interviewed prior to being hired, the employer's human resources manager told claimant that the employer had received negative reviews on the internet and elsewhere due to the dishonest activities of a former vice-president who had since left the company.

(3) Claimant was in training for the one week he worked for the employer. While claimant was in training, the training manager told claimant to state to prospective advertisers only what the training managers instructed him to tell them. The training manager told claimant to tell all potential advertisers that there were only two advertising spaces remaining available on the folder for which they were being solicited even when there were many more spaces available. When claimant asked the manager why he

was expected to make such a representation when it was not accurate, the manager told him, "That's what we say to get them to buy [space]. Otherwise people won't buy the product [the advertising space]." Audio at ~13:30. The training manager also told claimant to state to potential advertisers that the real estate agency to which a folder was going to be distributed had many more agents than it actually had to create the illusion that the folder would have a wider distribution than it actually would have. For example, claimant was instructed to tell a potential advertiser that one real estate agency had 25 to 50 agents to which folders would be distributed, but when claimant visited the agency's website he determined it had fewer than 10 agents. Audio at ~11:03.

(4) While claimant was in training, the training manager also told claimant to tell potential advertisers that were being solicited that there would be an initial printing of 2,000 to 2,500 folders when the initial printing would actually be 500 folders. This representation was made to create the illusion that folder and the advertiser's advertisement would reach a larger audience than it actually would. Audio at ~11:16. On one training call, when claimant had to turn the potential advertiser over to the training manager to finalize the sale of advertising space, the training manager corrected the statement claimant had made to the customer that 500 folders would initially be printed and dishonestly told the customer that the initial printing would be 1,500 folders. Audio at ~12:56. The training manager further told claimant to tell potential advertisers that they would be the only advertiser on the folder providing the service or product that the potential advertiser provided when, in fact, the employer took advertisements for the same folder from multiple advertisers in the same field of business. As part of his training, claimant listened to a call that the training manager said was a "perfect example" of what to tell a potential advertiser. Audio at ~11:42. In that call, the potential advertiser was told that he would be the exclusive advertiser on the folder in the advertiser's line of business. When claimant questioned the training manager about the accuracy of what the potential advertiser had been told, the sales manager did not deny that the potential advertiser was not guaranteed to be the exclusive advertiser in the field, but said that such representations were necessary to sell advertising space on the folders. Audio at ~ 12:30.

(5) Also while he was in training, the training manager told claimant to tell the potential advertisers he was soliciting for business that the folder on which their advertisement would appear was expected to be printed and distributed within six weeks when, in fact, there was no expected date and printing might not occur for eight months or a year since the employer did not print any folders until all the advertising space on the folder had been sold. As well, the phone number the employer assigned to claimant was a number formerly assigned to customer service. Throughout claimant's training, messages were left on that line by customers complaining about various sales practices used to solicit their business, including that they were not the exclusive advertiser in their field as they were promised, that the number of initial folders printed was not the number represented to them and that over a year had gone by since they purchased advertising space and the folder had not yet been printed, although they had been told it would be printed at much earlier date.

(6) On December 2, 2016, after claimant's training week was completed, claimant decided to quit work because he was unwilling to use the sales tactics and make the representations to potential advertisers that the training manager had instructed him to make in order to sell advertising space. Claimant did not complain to the employer's management or human resources department before quitting because the dishonest practices appeared so widespread and accepted in the workplace that he thought it would be futile to do so. Claimant voluntarily left work on December 2, 2016.

CONCLUSIONS AND REASONS: Claimant voluntarily left work for 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.

In Hearing Decision 17-UI-77712, the ALJ concluded claimant did not have good cause to leave work when he did and was disqualified from benefits. The ALJ reasoned that, although claimant might have been instructed "to lie" in order to sell advertising space, he did not pursue the reasonable option of "discuss[ing] his concerns with his supervisor or the HR director" before leaving. Hearing Decision 17-UI-77712 at 2. In addition, the ALJ reasoned that "[c]laimant's failure to complain to those in authority to correct any perceived unethical conduct undermines his testimony that his circumstances were so intolerable he had no choice but to quit." *Id.* We disagree.

At the outset, although the employer's witness, the human resources manager, generally testified that she did not think claimant was instructed to make misrepresentations to secure advertising business, she also testified she had no first-hand information about what instructions claimant might actually have received and she "wasn't aware of how the calls were going [and I] can't say that what he [claimant] is saying [about the sales tactics he was instructed to use] is incorrect or not." Audio at ~49:30. Since claimant is the only witness with first-hand knowledge about what he was told to do in order to sell advertising, his testimony outweighs that of the employer's witness. Accepting claimant's testimony as accurate, the training manager's instructions to claimant to fraudulently deceive potential customers in such a wide-ranging manner for the employer's benefit created a grave situation for claimant.

While claimant could theoretically have raised his concerns with the employer's management or human resources department about how he was told to conduct sales contacts and what he was instructed to say to potential advertisers, the issue is not merely what alternatives were hypothetically available, but whether a reasonable and prudent person would have reasonably concluded that pursuing those alternatives would not have been futile based the workplace practices and attitudes he observed. Here, it appears from claimant's testimony that the dishonesty in which he was instructed was rampant, customarily engaged in with potential advertisers by other employees and actively encouraged, rather than merely being condoned, by his training managers. Given that the dishonesty was widely accepted, was explicitly approved by claimant's trainers, and he was instructed to be dishonest with potential advertisers, a reasonable and prudent person in claimant's circumstances would have reasonably concluded the employer was aware of the wide-spread practice and that any complaints about it would have served no purpose or were not likely to yield effective remedial actions. On these facts, we disagree with the ALJ that complaining to the employer's management or the human resources department was a reasonable alternative to quitting.

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

DECISION: Hearing Decision 17-UI-77712 is set aside, as outlined above.[1]

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

DATE of Service: April 11, 2017

NOTE: This decision reverses a hearing decision that denied benefits. Please note that payment of any benefits owed may take from several days to two weeks for the Department to complete.

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.

[1] This decision reverses a hearing decision that denied benefits. Please note that payment of any benefits, if any are owed, may take from several days to two weeks for the Department to complete.