

EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-0656

Affirmed
Disqualification

PROCEDURAL HISTORY: On April 18, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant voluntarily left work without good cause (decision # 104338). Claimant filed a timely request for hearing. On May 17, 2017, ALJ Murdock conducted a hearing, and on May 19, 2017 issued Hearing Decision 17-UI-83879, affirming the Department's decision. On May 26, 2017, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Lexus of Portland, LLC employed claimant as a car detailer from October 23, 2006 until March 9, 2017.

(2) Claimant was originally from Vietnam. Claimant's capacity to speak, read and comprehend English was limited. At times, claimant's adult son assisted claimant in communicating with the employer. Claimant's son and the son's family lived in the same house as claimant and claimant's wife. Claimant's adult daughter lived an approximately 25 minute drive away from claimant's residence. Claimant's wife's sister and the sister's husband lived an approximately 20 minute drive away from claimant's residence. The sister-in-law's husband also worked in the employer's detailing department.

(3) Claimant requested and the employer approved a leave for claimant to allow him to travel to Vietnam. The leave began on January 3, 2017 and claimant was to return to work date was February 6, 2017. However, as of February 6, 2017, claimant was ill and hospitalized in Vietnam. Claimant's wife spoke to claimant's son about claimant's inability to return to work at the scheduled end of his leave. On February 7, 2017, claimant's son left a phone message for the employer stating that claimant had not been able to report to work on the day before because he was ill and still in Vietnam. On February 8, 2017, the employer mailed paperwork to claimant at his address in the United States that would allow claimant to apply for an extension of his leave of absence due to illness. Because claimant was still in Vietnam when the paperwork was delivered, claimant's son placed the correspondence in claimant's room. On February 23, 2017, since claimant had not returned the leave of absence paperwork to the

employer, the employer sent a second letter to claimant informing him that he needed to return the paperwork by March 5, 2017.

(4) On March 2, 2017, claimant returned to his residence in the United States. Claimant had brought with him the medical records generated during his hospitalization in Vietnam. Those medical records were written in Vietnamese. Claimant thought that he needed to have English translations of those records to submit to the employer along with the leave of absence paperwork. Claimant tried to locate someone who could translate the records, but was unsuccessful. Claimant did not ask his son for assistance in translating the records, locating someone who could perform a translation, or in contacting and explaining to the employer that, although he had medical record supporting his need for an extension of his initial leave, those records were written in Vietnamese. Claimant did not do so because his son was “busy.” Transcript at 6. Claimant did not try to contact the employer himself or ask anyone else to contact the employer on his behalf after he returned to the United States on March 2, 2017.

(5) On approximately March 6, 2017, the employer learned that claimant had returned to the United States and had not communicated it with it. On March 9, 2017, still not having been contacted by claimant, the employer sent a letter to claimant stating that by failing to communicate with it, the employer considered claimant to have voluntarily abandoned his position.

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

The employer contended claimant quit work, but claimant denied he did so. Transcript at 9, 14. The first issue this case presents is therefore the nature of claimant’s work separation. 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).

The employer was willing to allow claimant to continue working as evidenced by its repeated contact with claimant about maintaining his employment and its offer to extend claimant’s leave if he returned the necessary paperwork. Claimant apparently understood that, as evidenced by his understanding that he needed to respond to the employer’s correspondence with medical documentation. Claimant’s failure to contact the employer, or to arrange for someone else to contact it on his behalf, from at least February 23, 2017 through March 9, 2017 under these circumstances was reasonably, and inevitably, construed by the employer as job abandonment. Notably, not only did claimant not initiate contact with the employer when he had returned from Vietnam or respond to the employer’s request for medical information, once the employer sent a letter notifying claimant that it had construed his lack of communication with the employer as a voluntary leaving, claimant still did not communicate to the employer that the employer was incorrect, that he had not quit and wanted to continue working. Because claimant chose not to contact the employer or evince an intention or willingness to continue his employment relationship with the employer, the work separation was a voluntary leaving as of March 9, 2017, the date the employer communicated to claimant its understanding of claimant’s behavior and claimant did not respond.

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.

Claimant did not quit work because of a grave situation, nor did he establish that he had no reasonable alternative but to quit work when he did. The record fails to show that claimant was entirely incapable of communicating with the employer, and his reluctance to communicate with the employer was not a grave situation. Despite the language barrier between claimant and the employer's management, claimant had managed to work for the employer for 11 years and, prior to his trip to Vietnam, and had figured out a way to adequately communicate with the employer that he needed a leave of absence and the duration he wanted the leave to last. When he was ill, hospitalized in Vietnam, and unable to return to work on his scheduled return to work date, claimant, albeit through his family, was able to figure out a way to communicate to the employer that he was not going to return to work as scheduled. Given claimant's history successfully communicating with the employer, it does not appear that claimant's communication barriers presented him with a grave situation in the final instance, or that he was simply unable to communicate with the employer at all about his employment.

While claimant contended he did not communicate with the employer because he was unable to find a translator for his medical records, it is not clear why he did not communicate with the employer at all. To any extent he wanted to wait to communicate with the employer until he had medical records translated into English, it is not clear why he did not ask his son to perform the needed translation, or if his son could not perform the translation, why he did not ask his son for assistance in locating a capable translator. Even if the medical records remained untranslated, it is also not at all clear why claimant did not contact the employer to explain his inability to obtain a translation or to seek the employer's assistance in locating a translator or in resolving the situation in another way, or to merely provide the employer with the medical documentation he had brought with him from Vietnam. It is inexplicable that claimant did not either contact the employer himself, or ask his son, a relative, or someone else with more fluency in English than claimant had to contact the employer on his behalf, particularly since his son had done so in the past and the son's time commitment in making that contact for claimant would be negligible.

On the facts as they exist in this record, a reasonable and prudent person in claimant's situation would have, at a minimum, communicated directly or had someone communicate on his behalf with the employer that he wanted to continue his employment. Claimant did not establish that he had good cause to leave work. Claimant is disqualified from receiving unemployment insurance benefits.

DECISION: Hearing Decision 17-UI-83879 is affirmed.

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

DATE of Service: June 22, 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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