

EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-0864

Affirmed
Disqualification

PROCEDURAL HISTORY: On April 12, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant voluntarily left work without good cause (decision # 154543). On May 2, 2017, decision # 154543 became final without a request for hearing having been filed. On May 24, 2017, claimant filed a late request for hearing. On July 5, 2017, ALJ Janzen conducted a hearing, and on July 7, 2017, issued Hearing Decision 17-UI-87412 allowing claimant's late request for a hearing and concluding that claimant voluntarily left work without good cause. On July 18, 2017, claimant filed an application for review with the Employment Appeals Board (EAB).

Based on a *de novo* review of the entire record in this case, and pursuant to ORS 657.275(2), the ALJ's findings and analysis with respect to the conclusion that claimant showed good cause for filing a late hearing request are **adopted**.

FINDINGS OF FACT: (1) Metro Machinery Rigging employed claimant as a driver/rigger from March 6 through 13, 2017.

(2) The employer initially assigned claimant to participate in training at Access Crane, a sister company located in Hubbard, Oregon. During the morning of March 8, claimant was assigned to work with two other employees on the ground "rigging" while another employer operated an excavator. After lunch, a younger employee was assigned to operate the excavator, while claimant continued to work with other employees on the ground.

(3) Claimant, who was experienced in operating heavy machinery such as the excavator, believed the younger employee was operating the excavator in an unsafe manner. Claimant then replaced the younger employee as the operator of the excavator. When the foreman, who had been absent from the area where claimant was working, returned to the area, he and claimant engaged in an angry argument about claimant's work assignment and his attitude. Claimant then went to his vehicle, intending to leave the job site, because he did not want to continue working in an environment he believed to be unsafe.

(4) The foreman notified the employer's dispatcher that claimant had walked away from the work area, and the dispatcher went to claimant's vehicle to speak with him. Claimant told the dispatcher he did not feel safe in the workplace; the dispatcher told claimant to go home for the day, and also told him to contact his supervisor at Metro Machinery "to see if they have any work or anything for him to do the following day." Transcript at 51. Claimant then left the Access Crane worksite.

(5) Because the Metro Machinery supervisor was out of town, claimant was unable to speak with him until March 13, 2017. On that date, the supervisor told claimant that he needed to return to Access Crane to continue his training, and also needed to apologize to the foreman and the young operator. Claimant told supervisor he was unwilling to return to Access Crane, because he did not believe it was a safe work environment, and was also unwilling to apologize to the foreman and operator, because he believed he had done nothing wrong. Transcript at 26. The supervisor then told claimant he would not ask claimant "to return at all." Transcript at 27. Claimant never returned to work for the employer.

DECISION AND REASONS: We agree with the ALJ and conclude that claimant voluntarily left work without good cause.

Claimant testified that the employer discharged him when his supervisor told him "his services were no longer needed." Transcript at 27. The employer, however, asserted that claimant voluntarily quit work, by walking off the job and refusing to return. 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) (August 3, 2011). 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).

Here, the record shows that during his March 13 conversation with his supervisor, claimant told the supervisor he was unwilling to return to Access Crane, as his supervisor asked him to do, because he believed the work environment was unsafe. Because claimant could have continued to work for the employer, but refused to do so, we conclude his work separation was a voluntary leaving.

A claimant who leaves work voluntarily is disqualified from the receipt of benefits unless she proves, by a preponderance of the evidence, that she had good cause for leaving work when she 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.

Claimant asserted that he quit his job for the employer because he believed the employer exposed him to unsafe working conditions on March 8, 2017 – his second day on the job. According to claimant, he left the job site on that date because the employer's foreman refused to respond to his concerns about the unsafe manner in which a young and inexperienced employee was operating an excavator. The employer's foreman, however, presented a different account of the events of March 8. The foreman testified that he was willing to address claimant's safety concerns, but that claimant was unhappy with

this work assignment and refused to go to the employer's office to talk with the foreman about his attitude. Transcript at 60-61. On this record, we find no reason to doubt the credibility of either claimant or the foreman. The evidence regarding the employer's willingness to respond to the safety concerns claimant expressed on March 8 is therefore equally balanced. Where the evidence is equally balanced, the party with the burden of persuasion, here claimant, has failed to satisfy its evidentiary burden. Claimant therefore failed to demonstrate that the foreman refused to acknowledge or act upon his complaint about safe operation of the excavator.

Because claimant failed to demonstrate that he faced a grave situation – a supervisor who tolerated and would not remedy unsafe working conditions – he failed to demonstrate good cause for quitting his job. Claimant is disqualified from the receipt of unemployment benefits on the basis of this work separation.

DECISION: Hearing Decision 17-UI-87412 is affirmed.

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

DATE of Service: August 11, 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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