

EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-0918

Affirmed
Disqualification

PROCEDURAL HISTORY: On March 28, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant voluntarily left work without good cause (decision # 93434). Claimant filed a timely request for hearing. On July 20, 2017, ALJ Buckley conducted a hearing, and on July 21, 2017 issued Hearing Decision 17-UI-88575, affirming the Department's decision. On July 27, 2017, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant submitted documents with his application for review that had not previously been made part of the record. Because claimant failed to certify that he provided a copy of the documents to the other parties as required by OAR 471-041-0080(2)(a) (October 29, 2006), and also failed to show that factors or circumstances beyond his reasonable control prevented him from offering the documents into evidence during the hearing as required by OAR 471-041-0090 (October 29, 2006), the documents are excluded from evidence. We considered only information received into evidence at the hearing, and not the new documents, when reaching this decision. See ORS 657.275(2).

FINDINGS OF FACT: (1) Red Lobster Restaurants, LLC employed claimant as a dishwasher from September 2012 to March 1, 2017.

(2) Claimant had tried for four years to get transferred to a pantry position but the employer kept him in the dishwasher position. Claimant disliked being scheduled for short shifts because he lived "a long way" from work. Transcript at 5. Claimant thought his manager assigned him unreasonable duties and "kept messing with me." Transcript at 5. He complained about his manager to two other managers, and the other managers considered claimant confrontational and argumentative and thought that the manager was just holding claimant accountable for his duties.

(3) Claimant's back was injured and frequently hurt at work. Claimant thought that his manager knew his back hurt and still asked him to do tasks that hurt him. Although the manager excused claimant from performing certain tasks on a case-by-case basis when claimant said the task would hurt, claimant

wanted light duty work or to be reassigned to the pantry so he did not have to do things like lift the trash, lift silverware or handle “Lobsterfest” and “Shrimpfest” workloads by himself. Claimant did not go to the doctor, obtain a doctor’s note restricting him to light duty or restricting him from doing particular duties or lifting particular amounts of weight, or provide the employer with any such note. Claimant had a phone number for human resources but he did not contact human resources for help.

(4) On February 28, 2017, claimant’s manager told him he needed to get under the sink to clean a drain. Claimant and the manager “started arguing,” and claimant said, “no, I’m not gettin’ up under there because my back was hurtin’.” Transcript at 5, 8. The manager told claimant he considered claimant’s refusal insubordinate, and said that if claimant left work without doing the assigned task the manager “would consider it walking off the job.” Transcript at 29. Claimant felt that the situation “was building up over the time,” he “just got tired” of the manager “telling me if I’m not gonna do what he said, I can quit,” and quit work. Transcript at 5, 12. Claimant subsequently clocked out and went home.

(5) On March 1, 2017, claimant returned to the workplace with a letter stating that he was resigning because he was unable to continue working with his manager and was not moved to the position that he wanted. The employer did not require claimant to work out a notice period. Had claimant not quit work, the manager intended to give him a final written warning for insubordination based upon his refusal to perform a job duty when instructed.

CONCLUSIONS AND REASONS: We agree with the ALJ that claimant voluntarily left work without 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).¹ 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 testified that he quit work because his manager kept giving him ultimatums about quitting work if he did not want to complete his assigned duties. Transcript at 5, 12. However, claimant also testified, “I think if they had to put me on light duty, I think my back would a been fine and I’d been still workin’ there. But since they didn’t put me on light duty, I’m not gonna – I don’t wanna hurt myself. I’m already hurtin’, but I don’t wanna hurt myself that bad.” Transcript at 41. It appears based upon the totality of the circumstances that the manager’s ultimatums were the result of claimant’s refusal to do assigned tasks claimant felt would hurt him or cause him further back injury, and the proximate cause of

¹ Claimant did not identify what his back injury diagnosis was, or establish that the injury was a permanent or long-term impairment as defined at 29 CFR §1630.2(h). We therefore analyzed claimant’s decision to quit work using the standard of a reasonable and prudent person without impairment. Even if we had concluded otherwise, the outcome of this decision would remain the same because, for the reasons explained herein, a reasonable and prudent person with the characteristics and qualities of an individual with a back injury would not have quit work under the circumstances claimant described without pursuing his reasonable alternatives to quitting work.

claimant's decision to quit work was therefore the employer's failure to give him a light duty assignment. However, at the time claimant quit work because the employer failed to give him a light duty assignment to accommodate his injury, claimant had not yet been to a doctor. He had not provided the employer with a doctor's note excusing him from performing dishwashing work or particular tasks associated with that work, imposing restrictions on claimant's ability to do certain tasks, or suggesting that it was medically necessary for claimant to be placed in a light duty assignment. Nor, despite having the phone number for human resources, had claimant contacted it to ask for assistance, either to protect him when his manager wanted him to do tasks that hurt, or to help him figure out how to get reassigned to the light duty assignment he desired. Those alternatives were reasonable, and, given that the employer had demonstrated a willingness to implement some accommodations of claimant's physical health by sometimes relieving him from performing certain duties when he asked even though he lacked a doctor's note or medical restrictions, claimant did not show that it would have been unreasonable or futile to pursue them.

For those reasons, we conclude that claimant voluntarily left work without good cause. Claimant is therefore disqualified from receiving unemployment insurance benefits because of this work separation.

DECISION: Hearing Decision 17-UI-88575 is affirmed.

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

DATE of Service: August 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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