

EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-0923

Hearing Decision 17-UI-88295 Affirmed ~ Ineligible Weeks 21/17 through 22/17
Hearing Decision 17-UI-88296 Affirmed ~ Ineligible Weeks 21/17 through 28/17
Hearing Decision 17-UI-88481 Reversed ~ No Disqualification

PROCEDURAL HISTORY: On June 14, 2017, the Oregon Employment Department (the Department) served notice of three administrative decisions, one concluding claimant did not actively seek work from May 21 through June 3, 2017 (decision # 95353), the second concluding claimant was not available for work from May 21 through May 27, 2017 (decision # 93604), and the third concluding claimant voluntarily left work without good cause (decision # 104533). Claimant filed timely requests for hearing on all three decisions. On July 18, 2017, ALJ Buckley conducted a hearing on decisions # 95353 and # 93604, and on July 19, 2017 issued Hearing Decision 17-UI-88295, affirming decision # 95353 and Hearing Decision 17-UI-88296 modifying decision # 93604 and concluding claimant was not available for work from May 21 through July 15, 2017. On July 18, 2017, ALJ Lohuis conducted a hearing on decision # 104533 at which the employer failed to appear and on July 20, 2017, issued Hearing Decision 17-UI-88481 affirming decision # 104533. On July 29, 2017, claimant filed timely applications for review of all three hearing decisions with the Employment Appeals Board (EAB).

Pursuant to OAR 471-041-0095 (October 29, 2006), EAB consolidated its review of Hearing Decisions 17-UI-88295, 17-UI-88296 and 17-UI-88481. For case-tracking purposes, this decision is being issued in triplicate (EAB Decisions 2017-EAB-0925, 2017-EAB-0924 and 2017-EAB-0923).

FINDINGS OF FACT: (1) Power Ford Lincoln employed claimant until May 12, 2017 as a certified automotive technician.

(2) In late 2016, the ownership of claimant's employer changed. The new owner demoted claimant from the position of shop foreman and master technician to a regular technician. As a result, claimant had a 20 percent reduction in his income. In addition, the employer gave claimant an additional day of work per week (Saturday). The employer also gave work that required a certified technician to non-certified technicians, which resulted in a loss of income to claimant. The employer also expected claimant to teach non-certified technicians how to perform certified work.

(3) The new owner assigned a different manager to be claimant's supervisor. During 2017, that supervisor yelled at claimant and used foul language toward him "numerous times" in front of claimant's coworkers including the week before he quit, such that claimant felt "verbally abused" by his supervisor. Audio Record at 6:54, 7:29. Another technician also began to use foul language toward claimant.

(4) During 2017, claimant asked the supervisor to stop yelling and using foul language toward him and complained about the supervisor's conduct and the allocation of work to the general manager, three other managers, human resources, and the owner. Two of the managers and the owner told claimant they would address claimant's concerns, but the supervisor's treatment of claimant and the allocation of work did not improve.

(5) On May 12, 2017, claimant voluntarily left work due to dissatisfaction with the allocation of work and mistreatment from his supervisor.

(6) On May 17, 2017, claimant filed an initial claim for unemployment insurance benefits.

(7) Claimant claimed benefits for the weeks from May 21, 2017 through July 15, 2017 (weeks 21/17 through 28/17). These are the weeks at issue. The Department denied and did not pay benefits for the weeks at issue.

(8) Claimant's labor market was Waldport and Newport, Oregon. During the weeks at issue, the Department expected claimant to seek work as an automotive technician. Automotive technician work is customarily performed on Monday through Saturday from 8:00 a.m. to 6:00 p.m. in claimant's labor market.

(9) Claimant did not engage in five work-seeking activities per week during weeks May 21 through June 3, 2017 (weeks 21/17 and 22/17).

(10) During all the weeks at issue, claimant devoted ten hours per day to self-employment between the hours of 6:00 a.m. to 7:00 p.m. Claimant was not willing to abandon his self-employment if offered other work. Claimant advertised his business and was not willing to close the business immediately to accept other work.

CONCLUSIONS AND REASONS: We agree that claimant was not available for work during weeks 21/17 through 28/17, and that he did not actively seek work during weeks 21/17 and 22/17. However, we disagree regarding the work separation and conclude claimant voluntarily left work with good cause.

Available for Work. To be eligible to receive benefits, unemployed individuals must be available for work during each week claimed. ORS 657.155(1)(c). An individual must meet certain minimum requirements to be considered "available for work" for purposes of ORS 657.155(1)(c). OAR 471-030-0036(3) (February 23, 2014). Among those requirements are that the individual be willing to accept work opportunities during the usual days and hours customary for the work being sought, be capable of accepting and reporting for suitable work opportunities within their labor market, and refrain from imposing conditions that limit the individual's opportunities to return to work at the earliest possible time. *Id.*

During all the weeks at issue, claimant was unwilling to give up his self-employment if he was offered other work and his self-employment hours conflicted with the days and hours automotive technician work was customarily performed in his labor market. By prioritizing his self-employment over other work, claimant demonstrated he was not available for work other than his self-employment. Because claimant was not willing to accept other work during all of the usual hours and days of the week customary for the work being sought because of his self-employment activities, claimant's self-employment was a condition that substantially reduced his opportunities to return to work at the earliest possible time, and claimant was not available for work during all the weeks at issue.

Actively Seeking Work. To be eligible to receive benefits, unemployed individuals must actively seek work during each week claimed. ORS 657.155(1)(c). For purposes of ORS 657.155(1)(c), an individual is actively seeking work when doing what an ordinary and reasonable person would do to return to work at the earliest opportunity. OAR 471-030-0036(5)(a) (February 23, 2014). With limited exceptions, individuals are “required to conduct at least five work seeking activities per week, with at least two of those being direct contact with an employer who might hire the individual.” *Id.* Because claimant did not engage in five work-seeking activities per week during the weeks from May 21 through June 3, 2017, claimant was not eligible to receive benefits under ORS 657.155(1)(c) for those weeks.

Voluntary Quit. 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 P2d 722 (2010). A claimant who quits work must show that no reasonable and prudent person would have continued to work for her employer for an additional period of time.

In Hearing Decision 17-UI-88481, the ALJ assessed separately each of the reasons claimant provided for leaving work: leaving work for self-employment, reduction in earnings, increase in his work schedule, and mistreatment by his supervisor.¹ The ALJ concluded that none of those reasons created a situation of sufficient gravity that claimant had no reasonable alternative but to leave work when he did.² We disagree.

Claimant quit work because his supervisor repeatedly yelled and used foul language toward claimant in front of other employees. Claimant's description of the supervisor's conduct toward claimant, and the subsequent mistreatment from another technician, and the extent to which it was “verbally abusive” to claimant, is unchallenged in the record. From claimant's description, it may be inferred that claimant experienced the yelling and foul language as abusive. Claimant took reasonable steps to address the supervisor's behavior by speaking directly to the abusive manager, multiple other managers, human resources and the owner. Any action the employer may have taken to improve claimant's working conditions did not stop the conduct that distressed claimant. On this record, a reasonable and prudent

¹ Hearing Decision 17-UI-88481 at 3.

² *Id.*

employee would have concluded that the supervisor's continued abusive behavior, which the employer did not deter and which caused claimant distress, created a grave situation to which claimant had no alternative but to leave work.

Moreover, although claimant's demotion, increased hours, reduction in pay and the preferential allocation of work given to non-certified technicians, did not each separately create a grave situation for claimant, those factors exacerbated claimant's dissatisfaction with a workplace where his supervisor mistreated him despite claimant's multiple complaints. We thus conclude that, based on a totality of circumstances, that claimant quit work due to a situation of such gravity that a reasonable and prudent person of normal sensitivity, exercising ordinary common sense, would conclude he had no reasonable alternative but to leave work. Claimant therefore had good cause to leave work when he did, and he is not disqualified from receiving unemployment insurance benefits because of this work separation.

DECISION: Hearing Decisions 17-UI-88295 and 17-UI-88296 are affirmed, and Hearing Decision 17-UI-88481 is set aside, as outlined above.

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

DATE of Service: August 18, 2017

NOTE: Appeals Board Decision 2017-EAB-0923 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.

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