

EMPLOYMENT APPEALS BOARD DECISION
2018-EAB-0136

Affirmed
Disqualification

PROCEDURAL HISTORY: On December 14, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant voluntarily left work without good cause (decision # 84603). Claimant filed a timely request for hearing. On January 16, 2018, ALJ Scott conducted a hearing, and on January 24, 2018 issued Hearing Decision 18-UI-101538, affirming the Department's decision. On February 7, 2018, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) A & P Pump Service, LLC employed claimant as a licensed water well driller from August 2017 to November 17, 2017.

(2) The employer and claimant agreed upon hire that claimant would work 10-hour shifts Mondays through Thursdays. The employer did not always have 10-hour shifts available those days, which had the effect of reducing claimant's hours. Claimant often had to send text messages to the employer asking where job locations were going to be and what time he should report to work and had to wait for others at job sites, which also had the effect of reducing his hours. The employer regularly had more work available Fridays through Sundays and sometimes offered the work to claimant, but claimant repeatedly refused the work.

(3) The employer paid claimant \$22 per hour to work as a driller. The employer also had work available setting pumps, but that work paid significantly less than claimant earned so the employer assigned the work to others or did the work himself. Claimant asked the employer to assign him work setting pumps. The employer refused because he did not want to pay claimant \$22 per hour to set pumps.

(4) On November 17, 2017, claimant complained to the employer about his schedule, and that he was working far fewer than the 40-hours per week they had agreed upon. The employer had more hours for claimant but not on the days of the week claimant wanted to work. The employer also thought claimant decreased his own hours by taking time off work on Mondays through Thursdays. Claimant spoke with the employer about hiring claimant's girlfriend, but the employer refused. Claimant also thought the employer had promised him a \$3 per hour pay increase three months after hire, which he had never

received, and asked the employer to increase his pay or put him on salary. The employer refused. At some point during the conversation, the employer told claimant, "I'll lay you off. I'll do whatever you want." Transcript at 20.

(5) On November 17, 2017, claimant was in the middle of drilling a particular well but had not yet finished the job. The employer had just hired another driller to help cover the workload. The employer had continuing work available for claimant at that time as a driller. He told claimant to think about things over the weekend and call the employer on Monday. Claimant did not call the employer on Monday or thereafter. Claimant thought the employer would stay in contact with him, but the employer did not contact claimant thereafter. The employer had to finish drilling the well claimant had started.

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

Claimant and the employer disputed the nature of the 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).

Claimant claimed the employer laid him off work, and he said "okay." Transcript at 5. The employer claimed claimant asked to be laid off work, and he said "no." Transcript at 32. Claimant's witness initially testified that the employer laid claimant off work and claimant said "okay," but then testified that the employer actually said, "I'll lay you off. I'll do whatever you want." *Compare* Transcript at 18, 20. That the employer said he would lay claimant off to "do whatever [claimant] want[ed]" him to do strongly suggests that he said he would lay claimant off work in response to claimant's request to be laid off work, and suggests that claimant was the moving party in causing the work separation in this case.

Other facts support that conclusion. On November 17th, claimant went to the employer to begin a conversation in which he expressed dissatisfaction with his hours and pay rate, during which the employer refused claimant's requests for additional work or pay, suggesting that claimant was dissatisfied with the terms of his employment. Additionally, the employer had been offering additional work to claimant on his scheduled days off, claimant was in the middle of a job the employer had to finish, and the employer had just hired a new driller to cover the workload before claimant left work, all of which strongly suggests that the employer had continuing work available for claimant and no reason to lay claimant off or otherwise terminate his employment. Considering the totality of the circumstances in evidence, it appears more likely than not that claimant could have continued to work for the employer for an additional period of time had he not asked to be laid off work on November 17th, making claimant the moving party in this work separation. We therefore conclude that claimant voluntarily left work.

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.

To the extent claimant quit work because he was dissatisfied with his work hours, he did not show good cause for leaving work. The employer had additional hours available for claimant, albeit on his regularly scheduled days off. A reasonable and prudent person who wanted increased hours would likely have considered working on his regularly scheduled days off a reasonable alternative to quitting work due to a lack of hours. Likewise, to the extent claimant left work because his pay was not increased or he was not put on salary, claimant did not show that the cost of working exceeded the \$22 per hour wage he earned or that a reasonable and prudent well driller would have considered continuing to earn that wage a situation of such gravity that (s)he had no reasonable alternative but to quit work when the employer refused to increase his pay or put him on salary.

To any extent claimant quit work because he thought he was laid off work and that the employer would remain in contact with him, it is more likely than not on this record that claimant asked to be laid off work, effectively quitting work, making it more likely than not that he did not reasonably expect the employer to contact him about returning to work. Moreover, the employer's testimony that he asked claimant to consider his options and call the employer the following Monday was unrefuted, suggesting that claimant knew or should have known that he was the one that needed to initiate contact if he wanted to return to work with the employer.

Claimant did not show that the circumstances that caused him to quit work were so grave that no reasonable and prudent person would have continued to work for the employer for an additional period of time. He therefore left work without good cause, and is disqualified from receiving unemployment insurance benefits.

DECISION: Hearing Decision 18-UI-101538 is affirmed.

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

DATE of Service: March 6, 2018

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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