

EMPLOYMENT APPEALS BOARD DECISION
2018-EAB-0247

Affirmed
Disqualification

PROCEDURAL HISTORY: On January 17, 2018, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant voluntarily left work without good cause (decision # 101018). Claimant filed a timely request for hearing. On February 13, 2018, ALJ Murdock conducted a hearing, and on February 15, 2018 issued Hearing Decision 18-UI-103395, affirming the Department's decision. On March 6, 2018, claimant filed an application for review with the Employment Appeals Board (EAB).

EAB considered claimant's argument when reaching this decision to the extent it was relevant, material and based upon information admitted into evidence at the hearing.

FINDINGS OF FACT: (1) Dan Jones Conveyor Trucks employed claimant as a driver from July 25, 2017 to August 18, 2017.

(2) When claimant began working for the employer he had concerns about the safety of the truck he was assigned to drive. He "constantly" reported safety issues to the employer. Audio recording at ~ 10:30, 12:15. On one occasion in early August, claimant sent a text message to the employer stating that the truck was "dangerous." *Id.* at 14:00. The employer received claimant's safety reports and made repairs to the vehicle.

(3) Claimant began to experience back pain that he attributed to the rough conditions in the truck, and said he needed to go to his chiropractor. The employer's dispatcher and owner told claimant to let them know when he was going to the chiropractor so they could cover his shift or send him on a route near the chiropractor's office to accommodate his appointment. Claimant indicated that he could make his appointment after hours or on a Saturday, and claimant did not ask the employer for time off to attend a chiropractor appointment.

(4) On August 14, 2017, claimant met with the owner and dispatcher to discuss things. They talked about safety concerns and claimant's back pain. Claimant asked the employer to pay him through a company he owned as though he was an independent contractor because he thought he could make more

money if he was paid that way. The employer refused, citing the employer's ownership of the truck claimant was driving. Claimant said he was interested in buying the truck and then leasing it back to the employer, but the owner did not want to sell the truck. Claimant also expressed concern that the trucks might be overloaded with materials, making them weigh more than the law allowed, but the employer assured claimant that the trucks were not overweight.

(5) Claimant last worked for the employer on August 18, 2017 and was next scheduled to work on August 21, 2017. Claimant did not report to work. When he spoke with the dispatcher, he told her that since the owner would not pay him as an independent contractor or let him buy the truck it was not going to work out for him.

CONCLUSIONS AND REASONS: We agree with the Department and 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 with that impairment who quits work must show that no reasonable and prudent person with the characteristics and qualities of an individual with such impairment would have continued to work for his employer for an additional period of time.

Claimant testified that the main reason he quit work was the unsafe equipment. Audio recording at 10:30. He later testified, however, that the final straw that caused him to quit when he did was the dispatcher's refusal to allow him time off work to attend a chiropractor appointment. *Id.* at ~ 12:15. Later in the hearing, it appeared that the event that most immediately preceded claimant's decision to quit work was the employer's refusal to pay him as a contractor or allow him to buy the truck. *Id.* at ~ 27:00, 44:00. In his written argument, claimant stated that the main reason he quit was that his truck had swerved on Skyline Boulevard, although at the hearing he testified that he did not know when that incident had occurred relative to the date he quit. *Id.* at ~ 11:00-12:00. Because the record fails to show the specific reason claimant quit work on August 21st, we will address each possible reason in turn.

To the extent claimant quit his job because the truck was unsafe or swerved on Skyline Boulevard due to mechanical problems, claimant did not show good cause for leaving. With respect to the Skyline Boulevard incident, claimant did not know when that occurred with respect to the date he quit work or that the incident was the reason he quit when he did. Although there is no factual dispute that claimant repeatedly reported mechanical and safety problems to the employer, it appears more likely than not on this record that the employer was responsive to claimant's safety concerns and made reasonably prompt efforts to fix the mechanical problems claimant reported. Moreover, the record shows that claimant asked the employer if he could buy the truck. It is unlikely that a reasonable and prudent person who

¹ Claimant had back pain, but the record fails to show that claimant's back pain constituted a permanent or long-term "physical or mental impairment" as defined at 29 CFR §1630.2(h). We therefore applied the standard of a reasonable and prudent person without impairment when reaching this decision.

considered a truck so unsafe to drive that he felt he had to quit work over it would at the same time want to purchase the truck. The preponderance of the evidence suggests that at the time he quit claimant did not consider the truck so unsafe that he had no reasonable alternative to leaving work rather than continue driving it.

To the extent claimant quit his job because the employer forced him to drive overloaded trucks, jeopardizing his driver's license, the record fails to show that claimant quit work for good cause. Claimant alleged that the trucks might be overweight, or felt overweight, but he also testified that he did not weigh the truck to determine that it was overweight. *See* Audio recording at ~ 23:00. The employer's owner testified that the trucks were not overloaded. *See* Audio recording at ~ 36:20. The evidence on that issue is no better than equally balanced; where the evidence is equally balanced, the party with the burden of persuasion, here claimant, has not met his evidentiary burden. Claimant therefore did not show good cause to quit work to avoid driving trucks he felt might be overloaded.

To the extent claimant quit work because of his back pain, claimant did not show good cause for quitting work. Although there is no dispute that claimant had back pain and wanted to visit his chiropractor for an adjustment, the evidence as to whether the employer offered to give him time off work or route him near his chiropractor's office to accommodate the appointment, or refused to allow him time off to attend the appointment, is no better than equally balanced. Claimant has therefore failed to show that he had no reasonable alternative but to quit work in order to go to the chiropractor.

Finally, it appears that the event that likely triggered claimant's decision to quit work when he did on August 21, 2017 was the owner's August 14th refusal to pay claimant through claimant's company or as a contractor, and refused to allow him to buy the truck. Claimant thought he could make more money working as a contractor than he did as an employee. However, he did not establish that a similarly situated reasonable and prudent person would consider the employer's refusal to pay him as a contractor or allow him to buy the truck so he could work as a contractor as such a grave situation that he had no reasonable alternative but to quit work rather than continuing to work as an employee.

For the reasons explained, claimant quit work without good cause. Claimant is therefore subject to disqualification from receiving unemployment insurance benefits because of this work separation.

DECISION: Hearing Decision 18-UI-103395 is affirmed.

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

DATE of Service: April 5, 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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