

EMPLOYMENT APPEALS BOARD DECISION
2018-EAB-0528

Affirmed
Disqualification

PROCEDURAL HISTORY: On April 5, 2018, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 92754). Claimant filed a timely request for hearing. On May 4, 2018, ALJ Frank conducted a hearing, and on May 8, 2018 issued Order No. 18-UI-108849, concluding that claimant voluntarily left work without good cause. On May 22, 2018, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Aerotek, Inc. employed claimant from February 14, 2018 until February 15, 2018. The employer was a temporary staffing agency and it assigned claimant to work as a general production worker for one of its clients, Eye Level. Eye Level's workplace was on Swan Island in north Portland, Oregon.

(2) During the time claimant was assigned to work at Eye Level, claimant lived in southeast Portland, Oregon. Claimant commuted to Eye Level's workplace using public transportation. On February 14, 2018, claimant reported for the first day of his assignment at Eye Level at 7:00 a.m. The length of claimant's commute by bus to Eye Level, one-way, was approximately 1.5 hours.

(3) On February 15, 2018, claimant began the commute to the second day of his assignment at Eye Level. That morning, an employer representative called claimant to ask about the first day of his assignment and claimant stated that he was on the bus traveling to Eye Level. Claimant did not mention that he was dissatisfied with the length of the commute to the assignment at Eye Level. Claimant did not mention that he was considering quitting the assignment at Eye Level due to the length of the commute. Later, while still on the morning commute to Eye Level, claimant missed a bus to which he needed to transfer to reach Eye Level. After he missed the bus, claimant went home rather than continuing on to Eye Level's workplace because he would have arrived 45 minutes late "which does not look good." Audio at ~15:43. Claimant did not notify the employer or Eye Level that he was not going to report for work that day.

(4) Later on February 15, 2018, after claimant did not report for work, Eye Level notified the employer that it was ending claimant's assignment due to his failure to report for work and failure to inform it that he was going to be absent. Eye Level was generally "pretty flexible" when workers were unable to report on time for work due to issues with public transportation, and would have allowed claimant to continue working had he notified it that he was late due to having missed a bus. Audio at ~16:52.

(5) Still later on February 15, 2018, after 1:00 p.m., the employer telephoned claimant and left him a voicemail message informing him that Eye Level would not allow him to continue on the assignment. In response, claimant left a voicemail message for the employer stating that he "could not make it" to Eye Level that day and that the commute was too long, and inquiring about an assignment closer to his home.

CONCLUSIONS AND REASONS: Claimant voluntarily left work without good cause.

The first issue this case presents is the nature of the work separation under OAR 471-030-0038(2) (January 11, 2018). 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) (January 11, 2018). 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). In the case of individuals working for a temporary agencies or employee leasing companies, the employment relationship is deemed severed at the time a work assignment ends. OAR 471-030-0038(1)(a).

While the employer notified claimant sometime after 1:00 p.m. on February 15, 2018 that Eye Level had ended his assignment, which would indicate that a work separation had been initiated by Eye Level and the employer, claimant had decided earlier that day, sometime before 7:00 a.m., not to report for work and not to notify Eye Level or the employer. The timing of these events and the substance of claimant's response to the employer's notification that Eye Level was ending his assignment, which was that he had decided to quit work, show that claimant intended to quit work at the time he had returned to his home rather than reporting for work on February 15, 2018. Since claimant was the first party to manifest an intention to sever the work relationship and to exhibit an unwillingness to continue the relationship, his work separation was a voluntary leaving on February 15, 2018.

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 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.

Based on claimant's testimony, it appears, most likely, that what triggered claimant's decision to quit on February 15, 2018 was that, while en route to Eye Level, he had missed a bus to which he needed to transfer to reach the workplace, and he did not want to report late for work. This conclusion is

buttressed by claimant's failure to mention the length of his commute or that he was considering leaving work as a result of it when he spoke to the employer's representative earlier during his commute to work that day, before he missed the bus. It does not appear that the length of claimant's commute was the actual, precipitating cause of his decision to leave work. There was no evidence that claimant's late arrival for work due to having missed a transfer on public transportation constituted a grave situation. In addition, rather than quitting work since he was going to arrive late, claimant did not explore reasonable alternatives to avoid quitting that were available to him as a matter of common sense. More specifically, claimant could have contacted Eye Level or the employer to notify at least one of them that he was going to be late or absent that day and to seek guidance on what, if anything, he could do short of quitting. On this record, claimant did not show he had good cause to quit work due to missing a transfer.

While the length and burden of claimant's commute may not have been the precipitating cause of his decision to quit, it also appears not to have been entirely separate from his rationale for quitting his assignment at Eye Level in favor of finding work nearer to his home. Claimant's commute was admittedly on the longer side. However, it does not appear that the Eye Level workplace was outside claimant's labor market, that employees in similar circumstances would not have been willing to undertake a commute of similar length, or that the production worker position at Eye Level was not suitable for claimant. There was no evidence in the record, beyond claimant's estimate of the time he would spend commuting to Eye Level, showing that under the circumstances his commute was unreasonably arduous or injurious. As well, given the circumstance of urban living and the use of public transportation for commuting, it does not appear, without more, that the length and burden of claimant's commute to Eye Level constituted a grave situation. In sum, claimant did not show good cause for leaving work when he did.

DECISION: Claimant did not prove that he had good cause for leaving work. Claimant is disqualified from receiving unemployment benefits.

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

DATE of Service: June 20, 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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