

EMPLOYMENT APPEALS BOARD DECISION
2018-EAB-0555

Affirmed
Disqualification

PROCEDURAL HISTORY: On April 23, 2018, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant voluntarily left work without good cause (decision # 155139). Claimant filed a timely request for hearing. On May 17, 2018, ALJ Schmidt conducted a hearing, and on May 21, 2018 issued Order No. 18-UI-109813, affirming the Department's decision. On May 29, 2018, claimant filed an application for review with the Employment Appeals Board (EAB).

EAB considered claimant's written argument when reaching this decision.

FINDINGS OF FACT: (1) Mathews Mechanical employed claimant as a millwright from July 24, 2017 until November 16, 2017.

(2) The employer hired claimant after the union hall dispatched him to work for it. Claimant was allowed only to work on union jobs. A union representative told claimant that the union hoped his work would make a good impression on the employer so that more work from the employer would be forthcoming to union members. However, as time passed claimant disliked working for the employer and came to prefer working only for employers who were unionized on all jobs.

(3) Beginning shortly after he was hired, claimant drove other employees to the workplace using his personal vehicle. The employer's branch manager told claimant that the employer would reimburse him for his costs in parking his vehicle if he turned in his parking receipts. When claimant complained to the employer about not receiving reimbursement for some of his parking expenses, the employer reminded him he was required to submit receipts before he would be reimbursed. The employer reimbursed claimant for all parking receipts that he submitted during his employment.

(4) On August 21, 2017, claimant and his coworkers stopped working and left the jobsite as a result of safety concerns. Very shortly after, the employer, the general contractor and union representatives, among others, visited the jobsite to resolve the safety issues. Claimant and his coworkers returned to work on August 23, 2017 after the safety issues were addressed. Thereafter, claimant would take steps

to bring in safety equipment if he thought it was needed and would personally take care of safety issues when they arose because he did not want his coworkers to be injured.

(5) As of mid-November 2017, the employer had two union jobs ongoing, the one on which claimant worked and another. Claimant had previously not been allowed to work on the second union job because he had been involved in an altercation with an employee assigned to that job. However, that employee no longer worked for the employer as of sometime before mid-November 2017, and claimant would be allowed to work on that job.

(6) On November 16, 2017, the branch manager sent claimant and his coworkers home early because the employer had run out of necessary materials for the job on which they were working. The branch manager spoke to claimant before he left the job site that day and was under the impression that claimant would report for work the next day after materials were obtained. On November 17, 2017, although the employer obtained the materials and claimant's coworkers reported for work, claimant did not report for work that day or thereafter. Also on November 17, 2017, the branch manager telephoned claimant to learn the reason for his failure to report for work, but claimant's roommate answered the call. The roommate told the branch manager that claimant had decided to stay home to prepare his house for sale. Claimant never contacted the branch manager or any other employer representative to notify the employer that he had stopped reporting for work.

(7) Sometime shortly before approximately November 30, 2017, claimant contacted the branch manager, stating that he had never been paid for some days that he had worked for the employer. Around approximately November 30, 2017, the branch manager went to claimant's house to discuss this issue. After some discussion and review of claimant's records, claimant sought pay for two days, August 16, 2017 and October 2, 2017. Upon reviewing the employer's records, the branch manager determined that claimant had called in sick on August 16, 2017 and had not submitted a timecard for October 2, 2017. Based on the employer's records, the employer did not pay claimant for either day.

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

Claimant contended that he did not quit work November 16, 2018, but was let go for lack of work because the union job on which he was working had ended. Audio at ~8:58. In contrast, the employer contended that claimant was not hired for only one union job, that the union job on which claimant had been assigned to work was not completed as of November 16, 2017, and that claimant had simply stopped reporting for work after November 16, 2018. Audio at ~19:50, ~ 21:40. The first issue this case presents is the nature of claimant's work separation. If claimant could have continued to work for the same employer for an additional period of time when the work separation occurred, the separation was a voluntary leaving. OAR 471-030-0038(2)(a) (January 11, 2018). If claimant was willing to continue to work for the same employer for an additional period of time but was not allowed to do so by the employer, the separation was a discharge. OAR 471-030-0038(2)(b).

While the testimony of the employer's witnesses about the events surrounding the work separation was straightforward and made sense, claimant's contentions about the work separation were not consistent or logical. Claimant contended at hearing not only that the union job on which he was working had completely ended by November 16, 2017, but that two or three weeks before, when claimant had asked for a "layoff slip," the branch manager had agreed to lay claimant off at the end of that job. Audio at

~11:05. If claimant's obligation to the employer was to end at the completion of the job, the reason that claimant would have requested a "layoff" or a "layoff slip" is not completely clear, since the end of the job should have automatically resulted in his layoff, and claimant stated that the union did not require a "layoff slip" before sending him to a new job. Audio at ~12:50. In addition, despite contending that he was laid off, claimant provided several reasons for *asking for a layoff* which, despite the phrasing, appeared more consistent with a decision to leave work rather than having been involuntarily let go.

As well, claimant did not dispute the testimony of the employer's witness that the employer was busy and "needed [claimant's] help" as of November 16, 2017, agreed that the employer had at least one other union job ongoing as of November 16, 2017. Nor did claimant challenge the testimony of the employer's witness that the employee on that job with whom claimant was prohibited from working had departed as of November 16, 2017, suggesting that, even if the job on which claimant was assigned had ended on November 16, 2017, continuing work was available for him. Audio at ~25:54.

Finally, during his testimony, claimant made reference at one point to "another job the employer wanted to send me to," which also suggests that the employer did not consider claimant assigned only to the job on which he was working on November 16, 2017, and also had continuing work available for him since there was a second union job. Audio at ~41:37. Given the several inconsistencies in claimant's testimony, the employer's account of the work separation appears more reliable. In sum, the preponderance of the evidence in this record is that claimant voluntarily left work on November 16, 2017 when he failed to report for work after that date.

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.

Claimant provided three reasons for having requested a layoff from the employer. These reasons were the employer's failure to pay claimant for all of the days he worked, the employer's failure to reimburse claimant for all of the parking expenses he incurred, and the employer's failure to address unsafe conditions on the job site. Although it has been concluded that claimant's work separation was a voluntary leaving and not a layoff, these reasons also appear to be the grounds for a decision on claimant's part to quit work.

Claimant and the employer's witnesses fundamentally disagreed on the facts underlying each of the reasons that claimant might have decided to leave work. With respect to the employer's failure to pay claimant for all days that he worked, while claimant stated he brought up missing pay regularly with the employer, the branch manager stated that claimant did not raise this issue until after leaving work on November 16, 2017. Audio at ~37:30, ~48:10. Claimant was unable to specify at hearing the days for which he was owed pay or the allegedly unpaid days he discussed with the branch manager on approximately November 30, 2017. Audio at ~34:17, ~36:15. In contrast, the branch manager testified

with certainty that, after meeting with claimant on November 30, 2017 when claimant's pay records were reviewed, only two allegedly unpaid days remained at issue. Of those days, the branch manager further testified that claimant called in sick and was owed no pay for August 16, 2017 and failed to submit a time card and was owed no pay for October 2, 2017. Audio at ~ 49:06. Where, as here, no reason to doubt the accuracy of either party's testimony can be discerned from the record, the facts in dispute must be resolved against claimant since he had the burden of proof in this voluntary leaving case. See *Young v. Employment Department*, 170 Or App 752, 13 P3d 1027 (2000). Based on burden of proof principles, the testimony of the branch manager is accepted as accurate about the employer's alleged failure to pay claimant for all hours that he worked. Since claimant did not raise the issue of his pay before he left work, it could not form the basis of his decision to leave work and could not constitute good cause for his having done so. As well, since it was not demonstrated that the employer failed to pay claimant any amounts owed to him, it cannot be concluded that this alleged non-payment gave rise to an objectively grave situation or that it constituted good cause good cause for claimant to leave work.

With respect to the issue of reimbursement for claimant's parking expenses, claimant testified generally that he did not receive all reimbursement owed to him without presenting any specific evidence in support of his contention. Audio at ~38:38. In contrast, the branch manager testified that claimant received reimbursement for all parking receipts he turned in to the employer. Audio at ~46:13. As above, because there is no reason to doubt the credibility of either party or their testimony on this disputed issue, and since there no corroborating evidence was offered by either party, the evidence on the issue is evenly balanced and it must also be resolved against claimant on burden of proof principles. As such, claimant did not demonstrate that the employer's alleged failure to reimburse him for his parking expenses gave rise to an objectively grave situation or constituted good cause for him to leave work.

With respect to safety issues on the job site, claimant contended generally that those issues existed throughout his employment, while the branch manager contended that they were addressed immediately, including those that led the employees to walk off the job on August 21, 2017. Audio at ~41:28, ~52:13, ~49:58, ~50:51. At points in his testimony, claimant also appeared to take the position that he acted to rectify most, if not all, safety concerns that came to his attention on the jobsite. Audio at ~49:58, ~52:52. On this record, based on burden of proof principles as well as the fact that claimant did not leave the work site at any time after August 21, 2017, the testimony of the branch manager is accepted on the matter of unsafe conditions on the job site. As such, claimant did not demonstrate that allegedly unsafe conditions on the job site gave rise to an objectively grave situation or constituted good cause for him to leave work.

On this record, claimant did not prove by a preponderance of the evidence that he had good cause to leave work when he did. Claimant is disqualified from receiving unemployment insurance benefits.

DECISION: Order No. 18-UI-109813 is affirmed.

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

DATE of Service: June 29, 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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