

EMPLOYMENT APPEALS BOARD DECISION
2018-EAB-0955

Affirmed
Disqualification

PROCEDURAL HISTORY: On August 15, 2018, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant voluntarily left work without good cause (decision # 70953). Claimant filed a timely request for hearing. On September 13, 2018, ALJ Schmidt conducted a hearing at which the employer did not appear, and on September 17, 2018 issued Order No. 18-UI-116632, affirming the Department's decision. On October 1, 2018, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) City of Medford employed claimant as a fleet maintenance mechanic from September 15, 1997 until July 12, 2018. Claimant worked principally on heavy equipment. After several years working for the employer in this capacity, claimant's knowledge had not kept up with that needed to perform work as a more generalized mechanic and he was essentially limited to the type of work he performed for the employer.

(2) Beginning around 2008, claimant perceived the workplace as becoming hostile. Around 2013, claimant began looking for employment elsewhere with the employer, outside of his department. As of that time, claimant thought the managers in his department wanted to change the regime and replace existing employees with ones they thought would be a better fit. Claimant thought the managers consistently were "brow-beating the quality of [his] work." Audio at ~15:40. Claimant experienced stress in reaction to the workplace and sought assistance through the employer's employee assistance program (EAP) on a few occasions after 2008. Claimant last saw an EAP therapist in 2016.

(3) Sometime around or before 2017, claimant and his wife were in the process of divorcing. In November 2017, claimant was charged in state court with two counts of sexual abuse in the second degree arising from incidents allegedly occurring in 2007. The alleged victim was the daughter of claimant's wife and claimant's stepdaughter, who was around 12 years old at the time of the alleged abuse. Claimant thought that his stepdaughter's mother had induced her to make the allegations against him. The charges were false and claimant had not abused his stepdaughter. Around November 2017, the employer discovered that sexual abuse charges pending against claimant.

(4) After November 2017, claimant continued to work. Some of claimant's coworkers were aware of the pending charges against claimant.

(5) After November 2017, the employer was considering whether to pursue disciplinary sanctions against claimant based on alleged violations of its code of conduct by the off-duty behavior underlying the criminal charges. Claimant's criminal defense attorney and claimant's union representative were in contact with the employer to negotiate a resolution of these employment-related matters. Sometime before May 2018, the employer amended its code of conduct to make off-duty crimes a violation of the code for employees in claimant's position. Around May 1, 2018, six months after becoming aware of the criminal charges, the employer placed claimant on paid administrative leave while it investigated the allegations against claimant.

(6) The employer scheduled a fact-finding hearing, which involved an interviewing claimant, for June 30, 2018. The criminal charges were still pending against claimant. Claimant's defense attorney advised him not to answer any questions in the interview that related to the criminal charges or the incidents underlying them. Claimant's attorney and the union representative told claimant that if he attended the fact-finding and refused to answer questions relating to the criminal charges, it was possible that the employer would discharge him for insubordination. Claimant believed that if he appeared at the fact-finding hearing he might be immediately returned to work or, if he was discharged for refusing to answer questions, he would ultimately prevail, although it could take up to six months for union processes to achieve his reinstatement to his position. Claimant believed that if he was not reinstated at the fact-finding hearing and had to initiate union processes to be reinstated, his leave would become unpaid during the up to six months it might take to secure his reinstatement.

(7) Before June 30, 2018, claimant's defense attorney and the union representative were in negotiations with the employer to resolve the pending employment-related matter and the fact-finding was deferred. Neither the attorney nor the union representative recommended to claimant that he should resign in order to avoid refusing to answer questions at the fact-finding hearing. They told claimant to "do whatever you want to do" and "if you want to fight it, we'll fight it." Audio at ~ 31:09.

(8) On July 12, 2018, claimant signed a separation agreement with the employer under which he resigned effective immediately in exchange for the employer not opposing his unemployment insurance claim. As a result of claimant's resignation, he no longer needed to appear at the fact-finding hearing. The separation agreement did not provide severance benefits to claimant. Claimant chose to resign to avoid further stress from the fact-finding and stress from the processes that he would need to invoke to regain his position in the event that he was discharged at the fact-finding. Claimant also resigned because, if he was reinstated, he did not want to explain the criminal charges to his coworkers and he thought he did not have the financial resources to withstand an unpaid leave of up to six months.

CONCLUSIONS AND REASONS: 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) (January 11, 2018). 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.

At hearing, claimant appeared confident that if he participated in the employer's fact-finding processes he ultimately would be vindicated, although he might need to achieve reinstatement through union processes. Audio at ~12:20, ~30:15, ~42:00. Claimant also stated that neither his attorney nor his union representative recommended that he resign to avoid the fact finding hearing or otherwise. Audio at ~31:00. Accordingly, the principal issues in this matter are whether the various factors cited by claimant as contributing to his decision to leave work were good cause for him to do so: the stress arising from the upcoming fact-finding; the stress from the potential need to seek reinstatement to his position; his discomfort from the possible reactions of his coworkers when he returned to the workplace; and hardship from the possibility that he would spend up to six months on unpaid leave while he sought reinstatement to his position.

Claimant described several stressful life circumstances that he was dealing with around the time he decided to leave work. With the exception of the upcoming fact-finding hearing, those circumstances had existed for several months while claimant continued to work until he was placed on administrative leave. It does not appear that claimant considered those circumstances sufficiently grave that he needed to leave work at that time or that they so impaired him that he was not able to handle his daily activities. The evidence was not persuasive that the prospect of the upcoming fact-finding, itself, would significantly increase the stress to which claimant was subjected. While claimant generally asserted that the stress he experienced in connection with the fact-finding "put me through the wringer emotionally" and he was "devastated by the whole thing," claimant was unable to describe with more particularity the concrete and specific harms or negative consequences that resulted to him from that alleged stress. Audio at ~9:57, ~35:30. As well, claimant did not establish that certain events that he anticipated would be stressful, such as his discharge for insubordination and the need for him to seek reinstatement, were more likely than not to occur. Claimant did not show by a preponderance of the evidence that a reasonable and prudent person would have left work in response to the stress that he described experiencing around the time he resigned.

With respect to the prospect of an unpaid leave of up to six months if claimant was removed from employment at the fact finding, claimant did not present evidence as to its likelihood of occurring or how long he would temporarily be in an unpaid status. Claimant also did not show how that the prospect of having no income for up to six months was good cause quitting work and reducing his income to zero for an uncertain period of time. Finally, it appeared from claimant's hearing testimony that if he were placed on unpaid leave, he could have sought other employment during the time he was in unpaid status and his income might not be temporarily reduced to zero as a result of that leave. Audio at ~41:37. On this record, claimant did not show that a reasonable and prudent person would have quit work to avoid a temporary unpaid leave of absence of up to six months with the possibility of having no income at all during that leave, particularly when the market for his specialized skills was limited and it would be difficult for him to locate new employment with new employers. Audio at ~37:45.

Claimant did not show good cause for leaving work when he did. Claimant is disqualified from receiving unemployment insurance benefits.

DECISION: Order No. 18-UI-116632 is affirmed.

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

DATE of Service: November 2, 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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