

**EMPLOYMENT APPEALS BOARD DECISION**

**2014-EAB-1374**

*Affirmed  
Disqualification*

**PROCEDURAL HISTORY:** On July 11, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant voluntarily left work without good cause (decision # 85935). Claimant filed a timely request for hearing. On August 4, 2014, ALJ Kirkwood conducted a hearing, and on August 6, 2014 issued Hearing Decision 14-UI-22860, affirming the Department's decision. On August 18, 2014, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant submitted written argument to EAB. Claimant's argument contained information that was not part of the hearing record, and failed to show that factors or circumstances beyond claimant's reasonable control prevented claimant from offering the information during the hearing. Under ORS 657.275(2) and OAR 471-041-0090 (October 29, 2006), we considered only information received into evidence at the hearing, and argument based on that evidence, when reaching this decision.

**FINDINGS OF FACT:** (1) The Bridal Gallery employed claimant from March 15, 2013 to June 20, 2014 as a bridal consultant.

(2) Claimant was paid an hourly wage, plus bonuses for his sales.

(3) Before June 17, 2014, the employer failed to give claimant permission to take two unpaid breaks in addition to lunch during shifts of more than six hours. Claimant complained to the employer that he needed additional breaks.

(4) Throughout claimant's employment, one of the two owners often referred to claimant as "her gay guy." Claimant, the female owner, and claimant's coworkers occasionally discussed sex at work. Claimant did not ask the owner to stop calling him "the gay guy," and did not complain about the

discussions about sex. Claimant often referred to himself at work as the owner's "gay guy." Transcript at 6, 32, 46.

(5) On one occasion, a tailor who worked with claimant made a derogatory remark about gay people when claimant told her details about claimant's relationship with his male partner. Claimant complained to an owner that the tailor made a rude comment to him about his sexual orientation. The employer advised claimant and the tailor to refrain from discussing personal relationships and opinions with each other.

(6) On June 16, 2014, claimant gave the employer information from the Bureau of Labor and Industries showing employees who worked more than six hours in a shift were entitled to two breaks and a lunch. The employer agreed that claimant was entitled to two breaks, plus lunch.

(7) On June 19, 2014, one of the employer's owners met with claimant to discuss the employer's dissatisfaction with claimant's attitude and conduct at work. The employer told claimant he had to "give 100% to the job," and improve his attitude and conduct at work. Exhibit 2. Claimant responded that he was uncertain he could "give 100%" and wanted to use the rest of the day to "think about it." Exhibit 2. The owner allowed claimant to take the rest of the day off from work.

(8) On June 20, 2014, claimant met with the owner again and proposed an alternate working relationship, where the employer would pay him a flat monthly rate plus a percentage of online sales by claimant. Under the proposed plan, claimant would work approximately half his schedule from home. The owner stated it would not accept claimant's proposal at that time, but would consider it again if he improved his attitude and behavior at work during the remainder of 2014. Exhibit 2. Claimant stated that the owner's response "made his decision easy," and quit. Exhibit 2.

(9) On June 20, 2014, claimant voluntarily left work due to alleged harassment based on his sexual orientation, and due to alleged retaliation for complaining about his breaks.

**CONCLUSIONS AND REASONS:** We agree with the Department and the ALJ and conclude claimant 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 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 left work due to alleged workplace harassment based on his sexual orientation, and due to the employer's alleged retaliation for complaining about his breaks. Claimant asserted in his written argument to EAB that he proposed on June 20 that he be allowed to work from home because the employer's working environment was so hostile "that he could no longer work in the store." Claimant's Argument to EAB at 2. Claimant did not establish that the workplace was a hostile work environment

such that the employer's failure to allow claimant to work from home posed a situation of such gravity that he had no reasonable alternative other than quitting when he did. It is undisputed that one of the owners often referred to claimant as "her gay guy" (Transcript at 6, 32, 46), and that sexual and personal topics were often discussed in the workplace (Transcript at 17, 18, 30, 31, 34). However, claimant had the reasonable alternative of complaining to the employer if he found the term, "her gay guy," derogatory and offensive, or if he was offended by discussions about sex and other personal matters at work. Claimant did not complain about the sexual discussions at work. Claimant testified that "on occasion" he complained about being called "the gay guy" and that he once told the owner he would rather be referred to by his name. Transcript at 9. However, the employer testified that the term was not intended to be derogatory, that claimant never complained about the term or appeared offended by the term, and that he referred to himself in the same manner. Transcript at 46-47. We find the evidence on whether claimant complained about discrimination based on his sexual orientation, at best, equally balanced. Absent a preponderance of evidence showing the employer discriminated against claimant, its failure to allow him to work from home was not a circumstance of such gravity that no reasonable and prudent person would have continued to work for his employer for an additional period of time. Moreover, claimant did not show that complaining to the employer would have been futile where the employer immediately addressed claimant's complaint when he reported the tailor's negative statement about his sexual orientation. Claimant therefore failed to establish that he quit work with good cause due to discrimination based on his sexual orientation.

To the extent claimant quit due to retaliation for having complained about having too few breaks, claimant failed to show he faced a situation of such gravity that no reasonable and prudent person would have continued to work for an additional period of time. Claimant alleged that the employer retaliated against him by reducing his hours after he complained about having too few breaks. The employer denied claimant's assertion, and its owners testified that it did not reduce claimant's hours, but, rather, that it rescheduled claimant to work the same number of hours, but on different days due to business needs. Transcript at 43-44, 58-60. The preponderance of evidence fails to support claimant's assertion that the employer reduced claimant's work hours, or otherwise retaliated against him, for having complained about his breaks. Absent a showing of retaliation, we do not find claimant faced a reason of such gravity that no reasonable and prudent person would have continued to work for his employer for an additional period of time.

In sum, claimant did not establish that he had good cause to quit due to discrimination based on his sexual orientation or retaliation. Claimant therefore failed to establish that he quit work with good cause, and is disqualified from the receipt of benefits.

**DECISION:** Hearing Decision 14-UI-22860 is affirmed.

Susan Rossiter and Tony Corcoran;  
J. S. Cromwell, not participating.

**DATE of Service:** September 23, 2014

**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 website at [court.oregon.gov](http://court.oregon.gov). Once on the website, click on the blue tab for “Materials and Resources.” On the next screen, click on the tab that reads “Appellate Case Info.” On the next screen, select “Appellate Court Forms” from the left panel. On the next page, select the forms and instructions for the type of Petition for Judicial Review that you want to file.

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