

EMPLOYMENT APPEALS BOARD DECISION
2016-EAB-0135

Affirmed
Disqualification

PROCEDURAL HISTORY: On January 8, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant voluntarily left work without good cause (decision # 161821). Claimant filed a timely request for hearing. On February 2, 2016, ALJ Murdock conducted a hearing, and on February 5, 2016, issued Hearing Decision 16-UI-52443, affirming the Department's decision. On February 8, 2016, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant submitted two written arguments to EAB, the first offering new facts that she did not present during the hearing and the second requesting that EAB consider a written statement of events that the ALJ did not allow into evidence because it was repetitious of hearing testimony. Claimant did not certify that she provided either written argument to the other parties as required by OAR 471-041-0080 (October 29, 2006). In connection with the first argument, claimant did not explain how much of that new information was relevant to the work separation. Claimant also did not explain why she was unable to present that information during the hearing or otherwise show that factors or circumstances beyond her reasonable control prevent her from doing so as required by OAR 471-041-0090 (October 29, 2006). In connection with claimant's request in the second argument that EAB consider her written statement, there was no information in it that was not encompassed in her hearing testimony. For these reasons, EAB did not consider either written argument or claimant's written statement. EAB considered only information received into evidence during the hearing when reaching this decision.

FINDINGS OF FACT: (1) Selectemp Corporation employed claimant as an employee assigned to perform work as a traffic flagger for one of its clients on October 20, 2015.

(2) On October 20, 2015, the day claimant reported for work with the employer's client, claimant did not know how long the assignment was going to last, but assumed it would be more than a single day. That day, claimant reported to the job site at 8:00 a.m. and commenced flagging on a road construction project. Claimant had a ten-minute morning break and later took a meal break from 12:30 p.m. until 1:00 p.m. After lunch, claimant resumed work. Claimant's afternoon break was scheduled for 4:10 p.m.

(3) At approximately 3:30 p.m., claimant sensed that she needed to use the restroom. Claimant's need to urinate became urgent. At 3:53 p.m., claimant called a coworker at the jobsite and asked when she would be relieved for her post so she could take a break because she needed to visit the restroom "extremely bad." Audio at ~8:28. The coworker told claimant that someone "should be there soon." Audio at ~9:30. By 4:00 p.m., claimant's need to urinate was extreme. Claimant did not have any way to contact the traffic control supervisor (TCS), who was the person on the jobsite who arranged coverage for workers' breaks, and there were no workers near her that could temporarily perform her flagging while she visited the restroom. Unbeknownst to claimant, her afternoon break was delayed from 4:10 p.m. because equipment was blocking the road and the worker who was to relieve her was unable to physically reach her location. At around this time, claimant called one of the other workers to ask about the breaks that were provided. That worker told claimant, "Sometimes [the relief] people don't come." Audio at ~17:50. At approximately 4:17 p.m., claimant called the employer's office and stated that she was "not going to be working [on this job] anymore" because she had not received an afternoon break when she had an extreme need to use the restroom. Audio at ~20:35. Claimant did not ask the employer to address her need or allow it to take any steps to ensure that she would be able to use the restroom when she urgently needed. At 5:10 p.m., an hour after claimant's break was originally scheduled, a worker arrived to relieve claimant and she was able to finally use the restroom. Claimant was offended at statements that worker made which she perceived trivialized her need to take that break.

(4) Claimant completed her workday on October 20, 2015. Claimant did not return to work, when continuing work as available.

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

A claimant who leaves work voluntarily is disqualified from the receipt of benefits unless she proves, by a preponderance of the evidence, that she had good cause for leaving work when she 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 her employer for an additional period of time.

At hearing, claimant argued, in part, that she was lawfully entitled to take three ten minute breaks on October 20, 2015 because she worked for ten hours, but was only given two breaks. Audio at ~ 25:30. However, if an employee works between six hours and one minute and ten hours, the employee is entitled to take only two ten minute rest breaks and one meal break. OAR 839-020-0050 Appendix A (January 1, 2014). On the facts as claimant recited them, she was only entitled to two ten minute rest breaks. Applying OAR 839-020-0050(6)(a), claimant was entitled to take her afternoon rest break sometime between 1:00 p.m. and 5:00 p.m. OAR 839-020-0050(6)(a)(A) states that *as the nature of the work allows* the employer shall provide the rest break approximately in the middle of each segment of four hours worked, or the major portion thereof (emphasis added). Claimant did not show that the nature of her work on the employer's road construction project did not allow the employer to provide her afternoon break later than mid-way through an afternoon of work. Even so, it appears that

claimant's afternoon break, which was at 5:10 p.m., was indeed provided ten minutes later than 5:00 p.m., the time at which that break should have been provided.

Even if the employer did not technically make a break available to claimant within the required period, its delay was only ten minutes and was attributable to the exigent circumstance of the blocked road. Claimant did not show that the employer was engaged in ongoing unlawful employment practices, either by not giving breaks at all or habitually giving untimely breaks. While unlawful employer behavior may be good cause to leave work under appropriate circumstances, when the employer's noncompliant behavior was apparently aberrational and caused by exigent circumstances beyond the employer's control, such as the blocked road in this case, such behavior does not create the type of grave circumstance that justifies a claimant to leave work.

Although claimant's distress at not being provided a rest break in time to avoid what were likely highly uncomfortable sensations was understandable, a reasonable and prudent person would not have quit when she did. A reasonable person would have spoken with the employer to learn how likely it was that the situation would repeat, and what steps, if any, she could take if it recurred. A reasonable person would not have left work before she had a reasonable basis for concluding that the situation would again happen and the employer was unwilling to take steps to avoid a recurrence. Because claimant did not take the actions of a reasonable and prudent person, she did not show grave reasons motivated her decision to leave work.

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

DECISION: Hearing Decision 16-UI-52433 is affirmed.

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

DATE of Service: March 2, 2016

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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