

EMPLOYMENT APPEALS BOARD DECISION
2016-EAB-0139

Reversed
No Disqualification

PROCEDURAL HISTORY: On December 29, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant voluntarily left work without good cause (decision # 133124). Claimant filed a timely request for hearing. On January 27, 2016, ALJ Murdock conducted a hearing at which the employer failed to appear, and on February 2, 2016 issued Hearing Decision 16-UI-52143, affirming the Department's decision. On February 5, 2016, claimant filed an application for review with the Employment Appeals Board (EAB).

We considered claimant's written argument and the entire hearing record.

FINDINGS OF FACT: (1) Convenience Management Services, LLC employed claimant from July 7, 2014 to December 13, 2015 as a customer service representative.

(2) Claimant worked eight-hour shifts. During his work for the employer, the employer regularly failed to provide claimant with meal and rest periods, and required claimant to work 30 minutes to one hour past the end of his scheduled shift.

(3) In September 2015, the employer agreed to claimant's request to reduce claimant's work schedule from five to four eight-hour shifts per week so claimant would have time to seek diagnosis and treatment of certain medical symptoms he was experiencing. In October 2015, claimant was diagnosed with late stage Lyme disease and bartonellosis, and reported the diagnosis to the employer. In November 2015, claimant began treatment for his medical conditions.

(4) On November 14, 2015, claimant became upset when the employer required that he 30 minutes past the end of his scheduled eight-hour shift. The incident prompted claimant to send an email to his manager and the employer's president complaining that the employer regularly required him to work past the end of his scheduled shift, and did not always provide him and his coworkers with meal and rest periods. In the email, claimant told the employer that it was important for claimant to keep a regular

schedule, not overwork himself, and have breaks during his shift due to his late stage Lyme disease. Exhibit 1 at 4.

(5) On November 17, 2015, the employer's district manager met with claimant in response to his complaint and told claimant that the employer would provide him with all his meal and rest periods.

(6) On November 24, 2015, claimant overheard a manager tell another employee she could not take her lunch period. The employee did not receive a lunch period during her eight-hour shift that day. Claimant saw other occasions during the next two weeks when employees did not receive their meal or rest periods.

(7) On November 26, 2015, claimant was working as a cashier for the employer. The employer had not scheduled another cashier to work during the last four hours of claimant's shift. As a result, no one was available to relieve claimant from his cash register duties so he could take the second of his two ten-minute rest periods.

(8) On December 14, 2015, claimant quit work because the employer failed to provide all his meal and rest periods.

CONCLUSIONS AND REASONS: We disagree with the Department and the ALJ and conclude that claimant quit work with 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) (August 3, 2011). The standard is objective. *McDowell v. Employment Department*, 348 Or 605, 612, 236 P2d 722 (2010). Claimant had late stage Lyme disease, a permanent or long term "physical or mental impairment" as defined at 29 CFR §1630.2(h). A claimant with that impairment who quits work must show that no reasonable and prudent person with the characteristics and qualities of an individual with such impairment would have continued to work for his employer for an additional period of time.

Claimant quit work because the employer failed to provide him all his meal and rest periods. In Hearing Decision 16-UI-52143, the ALJ concluded claimant quit work without good cause, reasoning that claimant only missed one rest period after he complained to the employer, and was not "affirmatively denied" that rest period because he did not ask for it, but instead waited for an assistant manager to tell him to take a break.¹ The ALJ reasoned that, rather than quit his job, claimant had the reasonable alternatives of complaining again the district manager or higher management, filing a BOLI complaint, and telling his manager when he needed to take a break.² We disagree.

¹ Hearing Decision 16-UI-52143 at 3.

² *Id.*

Where, as here, the record does not show the employer was exempt from the rest and meal period requirements, Oregon law requires an employer to provide an unpaid meal period of at least 30 minutes to each employee who works six or more hours in one work period, and two employer-paid rest periods of at least ten minutes for every four hours an employee works. OAR 839-020-0050(2)(a), (6)(a) (January 1, 2014). Claimant's uncontested testimony was that the employer repeatedly failed to provide him his lawful meal and rest periods during 2014 and 2015. When claimant complained to his manager and upper management, the district manager assured him the employer would remedy the problem, only to again fail to provide him with a rest period just one week later. We disagree with the ALJ's conclusion that claimant had the reasonable alternative of requesting a break on November 24; it would have been futile for claimant to request a break where the employer had not scheduled another cashier to relieve him, and it is understandable that claimant would not leave the cash register unattended. Given the employer's ongoing failure to correct its practices to ensure claimant received all his rest periods, no reasonable and prudent person with Lyme disease would have continued working for the employer. *Accord J. Clancy Bedspreads and Draperies v. Wheeler*, 152 Or App 646, 954 P2d 1265 (1998) (claimant had good cause to leave work when wage dispute was ongoing); *compare Marian Estates v. Employment Department*, 158 Or App 630, 976 P2d 71 (1999) (where wage dispute is not ongoing, and only the issue of back pay restitution continues to exist, claimant did not have good cause to quit work). Moreover, it is not reasonable to expect claimant to file a complaint with the Oregon Bureau of Labor and Industries (BOLI) when doing so means that claimant would have to continue to work without receiving his lawful meal and rest periods.

In sum, the preponderance of the evidence shows that no reasonable and prudent person with the characteristics and qualities of an individual with late stage Lyme disease would have continued to work for his employer for an additional period of time. We therefore conclude that claimant quit work with good cause. He is not disqualified from receiving unemployment insurance benefits because of this work separation.

DECISION: Hearing Decision 16-UI-52143 is set aside, as outlined above.³

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

DATE of Service: March 1, 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.

³ This decision reverses a hearing decision that denied benefits. Please note that payment of any benefits owed may take from several days to two weeks for the Department to complete.

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