

EMPLOYMENT APPEALS BOARD DECISION
2016-EAB-0391

Reversed
No Disqualification

PROCEDURAL HISTORY: On February 12, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant voluntarily left work without good cause (decision # 112644). Claimant filed a timely request for hearing. On March 25, 2016, ALJ DeLuga conducted a hearing, and on March 30, 2016 issued Hearing Decision 16-UI-56120, affirming the Department's decision. On April 6, 2016, claimant filed an application for review with the Employment Appeals Board (EAB).

EAB considered claimant's argument to the extent it was based on the hearing record.

FINDINGS OF FACT: (1) West Coast Road Construction, LLC employed claimant from August 20, 2015 to December 17, 2015.

(2) Claimant did not have a particular work location. She worked as a dump truck driver transporting materials from rock pits to various logging sites. The employer did not provide claimant with rest and lunch breaks away from her duties, but expected her to take paid breaks while her truck was being loaded or unloaded. The employer did not provide claimant with access to permanent or portable restroom facilities. When claimant required a restroom, the employer expected claimant to find a secluded area at whatever job site she was on and relieve herself in the woods.

(3) On December 17, 2015, claimant drove one mile off her delivery route to use a public restroom. The employer found claimant at the public restroom facility and yelled at her for using it instead of finding someplace to relieve herself at the job site. The employer told claimant that was why drivers carried toilet paper with them. Claimant completed her workday then approached the employer to discuss the matter again. During that conversation, the employer reiterated the expectation that claimant was not

allowed to find and use public restrooms while at work and was instead expected to find a secluded area in the woods at job sites to relieve herself. Claimant understood, based on that conversation, that the employer would not change its policies with respect to restroom breaks, and quit work effective immediately.

CONCLUSIONS AND REASONS: We disagree with the ALJ, and conclude that claimant voluntarily left work with 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.

The ALJ concluded that claimant quit work without good cause because, although she had concerns about the employer’s expectations with respect to breaks, “[n]o evidence was presented that claimant discussed her concerns with the employer’s lunch and break expectations prior to the argument with the employer on December 17, 2015,” “no evidence that claimant expressed concern to the employer that its expectations violated state law,” and “no evidence that claimant contacted the Oregon Bureau of labor and Industries regarding employer’s lunch and break expectations,” and a reasonable and prudent person would not have left work without first having done so. Hearing Decision 16-UI-56120 at 2. We disagree.

Most employers are required to provide employees with rest and meal periods during which they are relieved of duty; some employers are exempt from that requirement and must instead provide employees with paid meal periods. See OAR 839-020-0050(2) and (6). Exempt employees must still, however, provide employees with adequate time and allow them to leave their assigned work station to use restroom facilities. OAR 839-020-0050(5) and (6). The Oregon Occupational Safety and Health Division requires that employers provide reasonable accessible toilet facilities at permanent worksites, or, for mobile crews, requires that employees “have transportation immediately available to nearby toilet facilities.” OAR 437-002-0141(4). Or-OSHA defines toilet facilities to include a door, walls or partitions between fixtures. *Id.*

This record fails to show whether or not the employer was exempt from the Oregon laws and rules requiring the employer to provide employees with lunch and rest breaks away from their duties. Assuming for the sake of argument that the employer was exempt, the employer was still required to provide claimant with adequate time away from their work stations to use restroom facilities. In this case, however, the employer’s witness admitted that the employer did not provide claimant with toilet facilities. The employer also admitted that it did not allow claimant time to leave her assigned work station (e.g. her truck, her route) to access toilet facilities, but instead required her to relieve herself in the woods on job sites. In so doing, it appears more likely than not that the employer’s requirement violated Oregon labor laws.

The employer's witness argued that claimant nevertheless failed to establish good cause to quit work over the issue because, had claimant mentioned her concerns to the employer, the employer "would have gladly fixed" the issues so claimant could remain employed. Audio recording at ~28:45. The record fails to support that argument, however. On claimant's final day of work, she deviated from her route by only one mile to access what appears to have been the closest restroom facility, and the employer yelled at her for it. When she later attempted to discuss the matter with the employer, the employer reiterated that claimant was not going to be allowed to find and use restroom facilities to relieve herself. Under those circumstances, a reasonable and prudent person of normal sensitivity, exercising ordinary common sense, would conclude that further conversation with the employer about the employer's bathroom policy would be futile, and that she had no reasonable alternative but to quit work over the employer's unlawful practice.

Claimant had good cause for quitting work. Claimant is not disqualified from receiving unemployment insurance benefits because of her work separation.

DECISION: Hearing Decision 16-UI-56120 is set aside, as outlined above.¹

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

DATE of Service: April 29, 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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¹ 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.