

EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-0277

Affirmed
Disqualification

PROCEDURAL HISTORY: On January 12, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant voluntarily left work without good cause (decision # 151849). Claimant filed a timely request for hearing. On February 13, 2017, ALJ Seideman conducted a hearing and issued Hearing Decision 17-UI-76829, affirming the Department's decision. On February 28, 2017, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Verizon Wireless employed claimant as a sales representative from April 21, 2014 until October 19, 2016.

(2) When claimant was hired, the employer informed him that if he had problems with management or any of the employer's policies, he could address his concerns with his manager or district managers by calling the employer's 1-800 toll-free compliance line or by contacting the employer's human resources partners. Sometime before January 2016, when claimant worked in the employer's location in Clackamas, Oregon, claimant thought that the practices of a manager were unfair and he complained to the employer's human resources partner. Claimant thought the problem was appropriately resolved, and he was not retaliated against for bringing up his concerns. Claimant thought there was an "open channel" between the human resources partner and employees, and that over time he had developed a "good rapport" with the human resources partner. Transcript at 14, 15, 48, 49. Sometime before January 2016, claimant transferred to the employer's location in Eugene, Oregon.

(3) When claimant began working for the employer, he was allowed to take an hour break for lunch and two ten minutes breaks for each eight hours that he worked. Sometime around January 2016, a new manager assumed control at the employer's Eugene location. During 2016, several sales representatives left employment at the Eugene location. During approximately summer and fall 2016, the employer was very busy due to the launch of a new iPhone and a recall of the Samsung Note 7. Because the Eugene location was short-staffed, the manager asked employees, including claimant, to limit their lunch breaks to half an hour rather than the hour they had previously been allowed. When claimant asked the

manager if she was making a request or issuing an order, the manager replied, “Thank you for being a team player.” Transcript at 7. Claimant thought her response was “sarcastic.” Transcript at 7. Approximately once per month after January 2016, claimant did not take a lunch break because of the press of business. A few times per week, claimant did not take his ten minute rest breaks for the same reason. Claimant thought the employer’s attitude toward meal and rest breaks was unfair. Claimant did not complain about the meal and rest breaks to management, the employer’s human resources partners or the compliance telephone line.

(4) After January 2016, claimant’s schedule did not allow him to take Fridays and Saturdays off as he desired and as he had been able to do when he worked in Clackamas. Claimant wanted to have Fridays and Saturdays off, or Sundays and Mondays off, to provide childcare on those days for his girlfriend’s child. Claimant spoke to the employer’s management, and he was told it was “really hard” for the employer to give him the days off he preferred because of the volume of its business. Transcript at 9. The employer did not give claimant the days off he wanted. As a result, claimant’s girlfriend needed to quit her job in order to provide childcare for the child.

(5) In approximately late September 2016, the employer’s human resources partner visited the employer’s Eugene location to interview employees about the leadership style of the manager at that location. Although claimant was at work when the human resources partner was there, he did not speak to the human resources partner about any of his employment-related concerns because he was busy working. Later, claimant sent a text message or an email to the human resources partner stating that he wanted to speak with the human resources partner about some concerns. The human resources partner responded to claimant’s communications by stating that claimant should give him a call to arrange a time when they could meet. Transcript at 13. Claimant never called the human resources partner in response. Transcript at 15.

(6) On October 19, 2016, claimant’s manager met with claimant to discuss his career path, that his performance had deteriorated, and that he might need to select between a career with the employer and his avocation of acting. The manager did not issue to claimant a corrective action or take any disciplinary measures.

(7) After October 19, 2016, claimant did not report for work. Claimant called in or sent text messages to the employer each day stating that he was not able to report for work, usually without specifying a reason for his absence. On approximately two days during the period of claimant’s absence, he notified the employer it was due to sickness. On October 20, 21, 23 and 31, 2016, claimant’s manager sent text messages or phoned him asking about his status. Claimant did not respond. On October 31 and November 3, 2016, the employer’s human resources business partner tried to contact claimant by phone but claimant did not respond. On November 10, 2016, the human resources business partner sent claimant a text message informing him that a work separation based on job abandonment was going to be processed if he did not contact the employer. Claimant did not respond and did not contact the employer. On November 17, 2016, the employer processed claimant’s separation from work.

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

The first issue this case present is the nature of claimant’s work separation. If the employee could have continued to work for the same employer for an additional period of time, the work separation is a

voluntary leaving. OAR 471-030-0038(2)(a) (August 3, 2011). If the employee is willing to continue to work for the same employer for an additional period of time but is not allowed to do so by the employer, the separation is a discharge. OAR 471-030-0038(2)(b).

While the employer processed claimant's work separation on November 17, 2016, it did so because claimant ceased reporting for work after October 19, 2016, failed to communicate with it other than to leave messages each day stating, often without supplying a reason, that he would be absent from work and failed to respond to the employer's many attempts to obtain more information from him. At hearing, both claimant and the employer testified that claimant quit work, and claimant did not contend that the employer was unwilling to allow him to continue working if he had reported for work. Transcript at 5, 37. On this record, claimant's work separation was a voluntary leaving as of October 19, 2016, the day after which he was not willing to report for work.

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 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 noted that he disliked the management style of his manager, but did not describe any behaviors of the manager that would constitute grave reasons for him to leave work. Transcript at 40. Claimant was also displeased with his scheduled days off work since he contended that the employer's failure to allow him the days off that he desired resulted in his girlfriend needing to quit her job to provide daycare for her child. Transcript at 9. However, claimant did not present any evidence showing that the only way to prevent the girlfriend from having to quit her job was for the employer to give claimant the days off that he desired each week, or that under the circumstances no child care arrangement was reasonably practicable other than for the girlfriend to quit her job to provide care for her child. Absent these showings or similar showings, claimant did not present sufficient specific evidence to show that the manager's behavior or the employer's failure to give him the days off work that he desired were grave reasons to leave work.

Claimant's allegations about the employer's unlawful practices in failing to make lunch and rest breaks available to employees also did not establish grave reasons to leave work. First, claimant's testimony on the prevalence of the unlawful practice, as it developed during the hearing, significantly wavered. At first, claimant testified that the allegedly unlawful practices were extensive and ongoing, then that he missed lunch breaks about once per month and rest breaks approximately once per month, and then that, when he missed the breaks, it could have been an inadvertent oversight on the part of his manager or because claimant decided he was not going to take a break that was made available to him because it was so late in his shift that to do so was "pointless." Transcript at 5, 14, 32. There is insufficient evidence in this record to establish that claimant's alleged missing of breaks was more than an aberration or that the employer knew about and condoned it or prohibited claimant from taking the legally required breaks. Further, even if it is assumed that claimant's manager was knowingly depriving

employees of some required rest and meal breaks, claimant had the reasonable alternative of raising this practice with the employer's human resources partner, with whom he had an "open channel" and a "good rapport." Transcript at 14-15, 48-49. The human resources partner had earlier satisfactorily addressed problems that claimant had with the employment practices of another manager. Although claimant contended that he was unable to call the human resources partner because he was too busy at work to do so and that he did not want to risk alerting his manager that he was contacting human resources, a reasonable and prudent person in claimant's circumstances who had these concerns would have called the human resources partner after his shift was over or when he was off-duty. A reasonable and prudent person who wanted to remain employed would not have concluded that there was no reasonable alternative to leaving work when he did.

Claimant did not show that grave reasons caused him to leave work, and that he had no reasonable alternatives other than to leave work. Claimant is disqualified from receiving unemployment insurance benefits.

DECISION: Hearing Decision 17-UI-76829 is affirmed.

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

DATE of Service: April 5, 2017

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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