

EMPLOYMENT APPEALS BOARD DECISION
2018-EAB-1065

Modified
Disqualification – Effective Week 33-18

PROCEDURAL HISTORY: On October 9, 2018, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant, not for misconduct, within fifteen days of claimant's planned quit without good cause (decision # 83733). Claimant filed a timely request for hearing. On November 1, 2018, ALJ S. Lee conducted a hearing, and on November 9, 2018 issued Order No. 18-UI-119532, affirming the Department's decision. On November 14, 2018, claimant filed an application for review with the Employment Appeals Board (EAB).

EAB considered the entire hearing record and claimant's written argument in reaching this decision.

FINDINGS OF FACT: (1) Beds for Less Inc. employed claimant from July 30, 2018 until August 16, 2018 as a customer service representative in a furniture store.

(2) Claimant's employment began with a training period during which he learned how to control the employer's inventory, accept customer payments, and answer general customer service questions. During all but two of claimant's shifts, he worked directly with the customer service representative (CSR) lead as his trainer. Another staff person, not the store manager, trained claimant during the other two shifts.

(3) Every day claimant worked, he worked sufficient hours to require a meal period and two rest breaks. Although the employer's policy was that employees had two 10-minute rest breaks in addition to a 30-minute meal break per shift, the CSR lead knew claimant was not taking the 10-minute rest breaks during his shifts. He told claimant that there would sometimes not be opportunities for breaks, so he should take them when he was able to do so. The CSR lead also told claimant that he himself did not always take breaks, and due to the high volume sales environment of the store, it was difficult for employees to take breaks. He told claimant that most salespeople did not take breaks.

(4) In early August 2018, the employer hired another customer service representative trainee. The other trainee told claimant he did not need rest breaks, and did not take them. Claimant also noted that the other trainee was learning the training materials at a faster rate than claimant was learning the materials.

(5) On August 13, 2018, claimant met with the CSR lead and the store manager and told them he was concerned that he was not learning the training materials as quickly as the other trainee. The CSR lead and store manager assured claimant that he was meeting the employer's performance expectations.

(6) On August 16, 2018, claimant called the store manager and told him he was quitting because he was dissatisfied with his own job performance. The manager and claimant agreed claimant's resignation would be effective immediately.

CONCLUSIONS AND REASONS: We conclude that claimant voluntarily quit work without good cause.

The first issue in this case is the nature of the 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) (January 11, 2018). 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).

There is no dispute that claimant called the store manager on August 16, 2018 to quit. However, both the Department and the ALJ concluded that the actual work separation on August 16 was a discharge. We disagree. The record shows that more likely than not, claimant acquiesced to the manager's decision as to when his employment would end, and the manager testified that he and claimant agreed it would end on August 16. Audio Record at 29:55 to 31:01. The Oregon Court of Appeals has held that where the employer and the employee have mutually agreed to a date on which employment would end, the work separation was a voluntary leaving and not a discharge. Therefore, the record shows that actual work separation on August 16 also was a voluntary leaving, and not a discharge. *See, J.R. Simplot Co. v. Employment Division*, 102 Or App 523, 528, 795 P2d 579 (1990) (claimant's work separation was a voluntary leaving, where he gave notice of his intent to quit work, but later agreed to his supervisor's suggestion to accelerate the separation date); *Smith v. Employment Division*, 34 Or App 623, 627, 579 P2d 310 (1978) (claimant's work separation was a voluntary leaving, where she gave notice of her intent to quit work, and agreed with her employer on a mutually acceptable separation date).

The next issue is whether claimant had good cause to quit working for the employer. 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) (January 11, 2018). 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 testified he quit because he did not receive rest breaks even after he complained to his lead and the store manager. Audio Record at 19:11 to 19:45, 24:06 to 25:03. The employer witnesses testified that claimant did not complain about failing to receive rest breaks until after he quit, and told the store manager that he quit because he was dissatisfied with the rate he was learning the material during his training period. Audio Record at 26:52 to 28:36. The parties' testimony regarding the reason claimant quit work was irreconcilable. Nor was there independent evidence from either party that tended to outweigh or disprove the other party's testimony. Moreover, there is no reason apparent from the record to doubt the credibility or accuracy of the witnesses testimony. Where, as here, the evidence on disputed issues is evenly balanced, the uncertainty in the evidence must be resolved against claimant since he was the party who carried the burden of persuasion in this voluntary leaving case. *See Young v. Employment Department*, 170 Or App 752, 13 P3d 1027 (2000). Accordingly, the testimony of the employer's witnesses is accepted when it is in conflict with that of claimant and his witness and forms the basis for the findings of fact in this decision.

The record therefore shows that claimant left work because he considered the pace of his progress in learning the employer's training materials unsatisfactory. It was undisputed that the employer was satisfied and expressed only satisfaction with claimant's work performance. Nor does the record show that claimant faced any adverse employment consequences due to his performance at work. Claimant did not show that his concerns regarding his performance were a reason of such gravity that a reasonable and prudent person would not have had no reasonable alternative but to leave work. Claimant therefore did not voluntarily leave work with good cause.

Even assuming, *arguendo*, that claimant left work due to the lack of rest breaks, claimant did not have good cause to quit when he did. The record shows that the employer probably was in violation of Oregon wage and hour laws by failing to provide claimant rest breaks. Absent exemptions that do not appear to apply to the employer here, Oregon law requires employers to provide rest breaks in addition to meal periods, and not just the *opportunity* for breaks. ORS 653.261, OAR 839-020-0050. An employee may not legally waive his rights to receive required rest periods. To comply with the law, the employer must actually provide, even require, that employees take all mandated breaks. The record shows that claimant did not actually take all required breaks, and the lead worker promoted an environment that did not require claimant to take breaks, and apparently even discouraged claimant from doing so.

However, although the record shows that more likely than not the lead worker knew claimant did not take his 10-minute breaks, claimant failed to show that he had no reasonable alternative other than to leave work when he did due to the lack of rest breaks. Based on the burden of proof on claimant in this quit case, where the store manager testified that claimant never complained to him about the lack of breaks, claimant did not show by a preponderance of the evidence that the store manager knew or should have known that claimant did not receive his breaks. The employer's policy was that employees have rest breaks in addition to a meal period. The record does not show that it would have been futile for claimant to address the lack of rest breaks with the store manager as a reasonable alternative to quitting when he did. Thus, to the extent claimant left work because he did not receive rest breaks, he did not quit work with good cause.

Claimant voluntarily left work without good cause and is disqualified from receiving benefits based on this work separation. Because claimant quit work on August 16, 2018, the ALJ's Order is modified to

change the effective date of the disqualification from the week of August 26, 2018 to the week of August 12, 2018.

DECISION: Order No. 18-UI-119532 is modified.

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

DATE of Service: December 20, 2018

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.

Please help us improve our service by completing an online customer service survey. To complete the survey, please go to <https://www.surveymonkey.com/s/5WQXNJH>. If you are unable to complete the survey online and wish to have a paper copy of the survey, please contact our office.



Understanding Your Employment Appeals Board Decision

English

Attention – This decision affects your unemployment benefits. If you do not understand this decision, contact the Employment Appeals Board immediately. If you do not agree with this decision, you may file a Petition for Judicial Review with the Oregon Court of Appeals following the instructions written at the end of the decision.

Simplified Chinese

注意 – 本判決會影響您的失業救濟金。如果您不明白本判決，請立即聯繫就業上訴委員會。如果您不同意此判決，您可以按照該判決結尾所寫的說明，向俄勒岡州上訴法院提出司法複審申請。

Traditional Chinese

注意 – 本判決會影響您的失業救濟金。如果您不明白本判決，請立即聯繫就業上訴委員會。如果您不同意此判決，您可以按照該判決結尾所寫的說明，向俄勒岡州上訴法院提出司法複審申請。

Tagalog

Paalala – Nakakaapekto ang desisyong ito sa iyong mga benepisyo sa pagkawala ng trabaho. Kung hindi mo naiintindihan ang desisyong ito, makipag-ugnayan kaagad sa Lupon ng mga Apela sa Trabaho (Employment Appeals Board). Kung hindi ka sumasang-ayon sa desisyong ito, maaari kang maghain ng isang Petisyon sa Pagsusuri ng Hukuman (Petition for Judicial Review) sa Hukuman sa Paghahabol (Court of Appeals) ng Oregon na sinusunod ang mga tagubilin na nakasulat sa dulo ng desisyong ito.

Vietnamese

Chú ý - Quyết định này ảnh hưởng đến trợ cấp thất nghiệp của quý vị. Nếu quý vị không hiểu quyết định này, hãy liên lạc với Ban Kháng Cáo Việc Làm ngay lập tức. Nếu quý vị không đồng ý với quyết định này, quý vị có thể nộp Đơn Xin Tái Xét Tư Pháp với Tòa Kháng Cáo Oregon theo các hướng dẫn được viết ra ở cuối quyết định này.

Spanish

Atención – Esta decisión afecta sus beneficios de desempleo. Si no entiende esta decisión, comuníquese inmediatamente con la Junta de Apelaciones de Asuntos Laborales. Si no está de acuerdo con esta decisión, puede presentar una Petición de Revisión Judicial ante el Tribunal de Apelaciones de Oregon siguiendo las instrucciones escritas al final de la decisión.

Russian

Внимание – Данное решение влияет на ваше пособие по безработице. Если решение Вам непонятно – немедленно обратитесь в Апелляционный Комитет по Трудоустройству. Если Вы не согласны с принятым решением, вы можете подать Ходатайство о Пересмотре Судебного Решения в Апелляционный Суд штата Орегон, следуя инструкциям, описанным в конце решения.

Khmer

ចំណុចសំខាន់ – សេចក្តីសម្រេចនេះមានផលប៉ះពាល់ដល់អត្ថប្រយោជន៍គ្មានការងារធ្វើរបស់លោកអ្នក។ ប្រសិនបើលោកអ្នកមិនយល់អំពីសេចក្តីសម្រេចនេះ សូមទាក់ទងគណៈកម្មការឧទ្ធរណ៍ការងារភ្លាមៗ។ ប្រសិនបើលោកអ្នកមិនយល់ស្របចំពោះសេចក្តីសម្រេចនេះទេ លោកអ្នកអាចដាក់ពាក្យប្តឹងសុំឲ្យមានការពិនិត្យរឿងក្តីឡើងវិញជាមួយតុលាការឧទ្ធរណ៍រដ្ឋ Oregon ដោយអនុវត្តតាមសេចក្តីណែនាំដែលសរសេរនៅខាងចុងបញ្ចប់នៃសេចក្តីសម្រេចនេះ។

Laotian

ເອົາໃຈໃສ່ – ຄໍາຕັດສິນນີ້ມີຜົນກະທົບຕໍ່ກັບເງິນຊ່ວຍເຫຼືອການຫວ່າງງານຂອງທ່ານ. ຖ້າທ່ານບໍ່ເຂົ້າໃຈຄໍາຕັດສິນນີ້, ກະລຸນາຕິດຕໍ່ຫາຄະນະກຳມະການອຸທອນການຈ້າງງານໃນທັນທີ. ຖ້າທ່ານບໍ່ເຫັນດີນຳຄໍາຕັດສິນນີ້, ທ່ານສາມາດຍື່ນຄໍາຮ້ອງຂໍການທົບທວນຄໍາຕັດສິນນຳສານອຸທອນລັດ Oregon ໄດ້ໂດຍປະຕິບັດຕາມຄໍາແນະນຳທີ່ບອກໄວ້ຢູ່ຕອນທ້າຍຂອງຄໍາຕັດສິນນີ້.

Arabic

هذا القرار قد يؤثر على منحة البطالة الخاصة بك، إذا لم تفهم هذا القرار، إتصل بمجلس منازعات العمل فوراً، و إذا كنت لا توافق على هذا القرار، يمكنك رفع شكوى للمراجعة القانونية بمحكمة الإستئناف بأوريغون و ذلك بإتباع الإرشادات المدرجة أسفل القرار .

Farsi

توجه - این حکم بر مزایای بیکاری شما تاثیر می گذارد. اگر با این تصمیم موافق نیستید، بلافاصله با هیأت فرجام خواهی استخدام تماس بگیرید. اگر از این حکم رضایت ندارید، می‌توانید با استفاده از دستور العمل موجود در پایان آن، از دادگاه تجدید نظر اورگان درخواست تجدید نظر کنید.

Employment Appeals Board - 875 Union Street NE | Salem, OR 97311
 Phone: (503) 378-2077 | 1-800-734-6949 | Fax: (503) 378-2129 | TDD: 711
www.Oregon.gov/Employ/eab

The Oregon Employment Department is an equal opportunity employer/program. Auxiliary aids and services are available upon request to individuals with disabilities. Language assistance is available to persons with limited English proficiency at no cost.

El Departamento de Empleo de Oregon es un programa que respeta la igualdad de oportunidades. Disponemos de servicios o ayudas auxiliares, formatos alternos y asistencia de idiomas para personas con discapacidades o conocimiento limitado del inglés, a pedido y sin costo.