

EMPLOYMENT APPEALS BOARD DECISION
2018-EAB-1110

Affirmed
No Disqualification

PROCEDURAL HISTORY: On October 11, 2018, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant quit working for the employer without good cause (decision # 132854). Claimant filed a timely request for hearing. On November 8, 2018, ALJ Wyatt conducted a hearing, and on November 15, 2018 issued Order No. 18-UI-119775, concluding that claimant quit with good cause. On November 30, 2018, the employer filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) ARS Fresno LLC employed claimant as a fuel attendant at a service station from approximately July 2017 until August 23, 2018.

(2) Claimant earned \$10.75 per hour working for the employer. As of August 2018, claimant was working part-time for the employer, four hours per day on Mondays through Thursdays, from 3:00 p.m. until 7:00 p.m. Beginning the week of August 19, 2018, claimant's daughter would be returning to school and claimant needed to make childcare arrangements for her during those shifts from approximately 3:15 p.m. until claimant picked her up sometime after 7:00 p.m. The cost claimant would incur to provide the needed childcare for his daughter was \$10 per hour.

(3) Claimant was scheduled to work 3:00 p.m. through 7:00 p.m. on Monday, August 20 through Thursday, August 23, 2018. Claimant calculated that once he paid for childcare for his daughter, he would have net earnings of only \$3.00 for each day he worked¹ after taking the costs of childcare into account. Claimant believed that the costs he incurred in commuting to work, including fuel and vehicle insurance, exceeded \$3 per day. Claimant concluded that the costs of working shifts of four hours would exceed the compensation he received from working the shifts.

(4) On Thursday, August 16, 2018, after his shift was over, claimant left a letter for the manager of the service station on the manager's desk. In the letter, claimant explained to the manager that it did not

¹ For 4 hours of work, claimant would earn \$43 (4 hours x \$10.75) and childcare costs for those 4 hours would be \$40 (4 hours x \$10). \$43 less \$40 = \$3 earned per day net of childcare costs.

make economic sense for him to work shifts that lasted only four hours in light of his childcare and other costs, and that he was not willing to work four hour shifts any longer. Claimant informed the manager that he was willing to work only if the employer scheduled him for eight hour or longer shifts. Claimant thought that working eight hours or longer would yield enough pay to offset the costs he would incur as a result of working. The manager did not contact claimant in response to his letter.

(5) On Monday and Tuesday, August 20 and 21, 2018, two of his regular workdays, claimant called in to determine if he was scheduled for eight hour workdays, as his letter had requested, or if his shifts were still shown as being four hours. Claimant spoke with the employee who answered the phone, and was told that he had not been scheduled to work eight hour shifts on either of those days, and the schedule showed him to be working four hour shifts. Claimant told the employee that he was not going to report for work on August 20 and 21 because the hours he was scheduled to work had not been changed to eight hours.

(6) On Wednesday, August 22, 2018, claimant went to the workplace to speak with the manager about why his work hours were not changed. The manager told claimant that when he did not report for work on Monday and Tuesday, August 20 and 21, the district manager had advised her to fire claimant if he was not willing to continue working four hour shifts. Claimant did not report for work on August 22 and 23. The employer thought that by not reporting for scheduled work after August 16, claimant had abandoned his job. Claimant's name was removed from the schedule sometime after August 23.

CONCLUSIONS AND REASONS: Claimant voluntarily left work with good cause.

Claimant contended that he was willing to work for the employer if he was scheduled for eight hour shifts, and that the employer discharged him by not changing his scheduled hours and by the manager telling him that she had been advised to fire him. Audio at ~10:21. The employer's witness contended that claimant abandoned his job by failing to report for scheduled work when the employer would not schedule him for the shifts that he preferred. Audio at ~20:17. Accordingly, the first issue this case presents is the proper characterization 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).

Assuming the manager told claimant on Wednesday, August 22 that the district manager had advised her to discharge claimant for failing to report for the four hour shifts he was scheduled to work, that does not end the inquiry into the nature of the work separation. Under OAR 471-030-0038(2), how one party might have denominated the work separation is less relevant to its proper characterization than the willingness or unwillingness of the parties to continue the work relationship.

By the letter claimant left for the manager after his August 16 shift, claimant issued an apparently non-negotiable ultimatum to the employer about the circumstances under which he was willing to continue working for it. The evidence in the record shows that the employer was willing to allow claimant to continue working four hour shifts for it. However, by his calls to the employer and his subsequent failures to report for work on August 20 through 23 when the employer did not acquiesce to his demands and did give him eight our shifts, claimant reinforced that he was unwilling to continue working for the

employer if his demand was not met. As such, claimant was the first party to manifest an intention to sever the work relationship, albeit initially contingent on the employer's refusal to meet his demands. In addition, after the employer refused to alter claimant's schedule to the eight hour shifts he demanded, its subsequent processing of the work separation as job abandonment strongly suggests that it was processing the separation based claimant's apparent decision to voluntarily leave, and not that it was initiating an involuntary discharge of claimant. Based on the totality of the record, claimant's work separation was a voluntary leaving as of August 23, 2018, the final day on which he was scheduled for and refused to work a four-hour shift, and after which the employer processed claimant's work separation.

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's contentions as to the costs he would incur to work for the employer after his daughter returned to school were not challenged. If the cost of working exceeded the remuneration received, as claimant contended would be the case if he continued to work four hour shifts or shifts shorter than eight hours, a reasonable and prudent person would have considered his circumstances grave. While claimant might not have followed the employer's procedures for requesting a change to his schedule before quitting work, it appears on this record that doing so likely would have been unsuccessful. On August 16 and 22, claimant notified the manager that given the costs he was going to incur to work after his daughter returned to school, he was going to lose money if he worked less than eight hour shifts and, effectively, that he would be required to quit if he continued to be scheduled for four hour shifts. While knowing of claimant's fiscal constraints and his need for lengthier shifts if his continuing to work for the employer was to make economic sense, the employer did nothing to change the schedule for over a week, but continued to schedule him for four hour shifts. Given the employer's attitude as shown on the record, it likely would have been futile for claimant to pursue a schedule change through the employer's formal procedures. The record therefore fails to show that pursuing a schedule change through those procedures was a reasonable alternative to claimant leaving work when he did due to the financial exigencies caused by the shifts that the employer scheduled him to work after his daughter returned to school.

Claimant established that he quit working for the employer with good cause. Claimant is not disqualified from receiving unemployment insurance benefits based on this work separation.

DECISION: Order No. 18-UI-119775 is affirmed.

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

DATE of Service: December 28, 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 الاستئناف 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.