

State of Oregon
Employment Appeals Board
875 Union St. N.E.
Salem, OR 97311

EMPLOYMENT APPEALS BOARD DECISION
2019-EAB-0014

Reversed
Disqualification

PROCEDURAL HISTORY: On October 31, 2018, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant voluntarily left work without good cause (decision # 140218). Claimant filed a timely request for hearing. On December 19, 2018, ALJ Wyatt conducted a hearing, and on December 27, 2018 issued Order No. 18-UI-121849, reversing the Department's decision and concluding that claimant voluntarily left work with good cause. On January 2, 2019, the employer filed an application for review with the Employment Appeals Board (EAB).

Both parties' written arguments contained information that was not part of the hearing record, and failed to show that factors or circumstances beyond their reasonable control prevented them from offering the information during the hearing. Under ORS 657.275(2) and OAR 471-041-0090 (October 29, 2006), we therefore did not consider the parties' new information, and considered only information received into evidence at the hearing when reaching this decision.

FINDINGS OF FACT: (1) Better Built Sheds employed claimant from approximately 2015 to August 27, 2018. Claimant's regular duties included using a company-owned truck to pick up supplies from a lumberyard and transport them to customers' properties, where he would build sheds.

(2) Over time claimant developed a variety of concerns about his working conditions.¹ He thought the owner regularly paid him late and that the owner subjected him to hostile working conditions. He also had difficulty at times picking up supplies from the lumberyard because the employer sometimes overextended his credit and the lumberyard would refuse to allow claimant to pick up supplies. The owner was often unaware of his exact account balance at the lumberyard and when notified his credit

¹ In addition to the concerns identified in finding of fact (2), claimant alleged at the hearing that the employer also lacked worker's compensation insurance and that the owner was trying to sell the business. The information upon which claimant based those allegations did not become available to claimant until after the work separation, however, so they did not factor into his decision to quit work. Those allegations therefore are not material to our decision about whether claimant had good cause for quitting work, and will not be discussed further.

was overextended, the owner would “go down” to the lumberyard and “pay some on the bill.”² After the owner paid the lumberyard would release supplies to claimant. Claimant found the situation frustrating, especially when he had pre-loaded the supplies into his truck and had to unload them when he found out the owner did not have enough room on his account to cover the cost of them.

(3) On August 27, 2018, claimant drove the company-owned truck to a job site. The truck’s transmission stopped functioning properly. Claimant was able to return the truck to the owner, but the owner determined that it would take the transmission shop up to six weeks before they could repair the truck. Claimant would not have access to the company-owned truck until it was repaired, and did not know how he could continue working if he could not use that truck to transport supplies to his job sites.

(4) The owner had another truck for his own use. The owner was physically capable of either transporting himself or being transported to the lumberyard to “go down” there to pay the bill, and was willing to pick up supplies for claimant’s assignments and transport them to the job sites. Once the truck claimant used broke down on August 27th, however, claimant told the owner to call him when the truck was repaired and he had work. Claimant never returned to work after August 27th.

(5) After August 27th the owner called claimant and asked what it would take for claimant to complete a particular work assignment. Claimant told the owner that he would do the assignment if the owner paid him \$3,000. He did not place any other conditions on his willingness to work, such as use of a functioning company-owned truck, changes to the employer’s pay practices, or changes in the owner’s behavior. The owner thought that \$3,000 was approximately triple what he would have paid claimant to do the work at his normal hourly rate, and did not give claimant that work assignment.

(6) After claimant refused the offered assignment the owner changed the locks at his business. At some subsequent time the owner engaged in talks with another business interested in potentially buying the owner’s business and expressed interest in selling.

CONCLUSIONS AND REASONS: We disagree with the ALJ and conclude that claimant voluntarily left work without good cause.

Claimant indicated at the hearing that he was not certain if he quit work or was fired. 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).

Claimant did not at any point tell the owner he quit work, and the owner did not tell claimant he was discharged. Rather, the parties’ intent must be inferred from their actions. When claimant stopped reporting to work on August 27th, he told the owner to call him when the truck was fixed and he had more work.³ He did not make it clear to the employer at that time that he was not going to return to work

² Audio recording at ~ 35:16.

³ Claimant testified that although he left work because of the employer’s truck’s transmission problem and refused the employer’s offer of another assignment, he also noted that the owner changed the locks on the shop and was trying to sell the business. However, the preponderance of the evidence suggests that the owner changed the locks on the shop and engaged in an attempt to sell the business after claimant stopped reporting to work, and not before.

at all. However, claimant's August 27th intent became clear when the owner subsequently offered him an assignment and he refused. Claimant's refusal of additional work suggests that his intent when he left work on August 27th was not just to remain off work until the truck was repaired or until the owner could offer him additional work, it suggests that when he left on August 27th he did so with the intent to quit his job. In contrast, the owner expressed a willingness to continue employing claimant after the August 27th truck breakdown by offering claimant that additional work assignment. Because claimant could have continued to work for the employer for an additional period of time after August 27th but chose not to do so, the work separation was a voluntary leaving. Because August 27th was the date upon which claimant left his job, that is the effective date of the voluntary leaving.⁴

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). 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.

The ALJ concluded that claimant voluntarily left work with good cause because he "thought that there would be no work he could perform until the company vehicle was repaired," which would take up to six weeks. The ALJ wrote, "I am persuaded that claimant faced ongoing difficulties working for the employer, primarily due to the employer's financial difficulties. Claimant reasonably quit work when it appeared that he would be going several weeks without earnings, which was a grave situation. I am not persuaded that reasonable alternatives were available to claimant after the company vehicle broke down and was not going to be repaired for a lengthy period of time."⁵ We disagree.

There is no dispute that the company-owned truck claimant usually used was out of commission while waiting for the transmission shop to repair it. Nor is there meaningful dispute that claimant's working conditions, including the owner's behavior and the business's financial problems, were unpleasant and/or concerning to claimant. However, those issues did not amount to a grave situation that left claimant with no reasonable alternative but to quit.

⁴ The ALJ stated that when the owner offered claimant the additional assignment it was as "not offered as part of claimant's regular hourly employment," apparently because the owner offered claimant a piece-rate instead of his normally hourly rate. See Order No. 18-UI-121849 at 2 fn. 2. We disagree. The way in which claimant left his job on August 27th was ambiguous, and included claimant's invitation for the owner to call him when there was work. Because of that ambiguity it was likely unclear to the owner that claimant had actually quit his job on August 27th. The fact that the owner extended claimant an offer for an additional assignment, or was willing to incentivize the work by paying claimant more than usual, therefore does not suggest that the owner was negotiating with claimant to work as a contractor or engage in a new term of employment. It is more likely than not that the owner was simply doing as claimant invited and offering him work when it became available as an extension of the employment relationship claimant had, albeit ambiguously, ended on August 27th.

⁵ Order No. 18-UI-121849 at 3.

Although the prospect of going weeks without earnings might have been grave, the record clearly shows that that condition did not exist. The company-owned truck had broken down when claimant was transporting supplies to a job site. He therefore knew or should have known that there was at least one job available for him despite the truck's transmission problem – the job for which he had just transported materials. The owner had other jobs lined up for claimant, too, as suggested by the fact that the owner offered claimant an assignment within days of the truck breaking down. The preponderance of the evidence shows that the truck's mechanical problems did not leave claimant without the potential to work and have earnings from his job with the employer.

Claimant expressed concern at the hearing that without use of the company-owned truck he could not have picked up supplies from the job sites and transported supplies to job sites. He indicated that the owner had a truck and it would have worked if the owner had transported supplies to the job sites for him, except the owner “couldn't even walk” and therefore could not have gotten the supplies for him.⁶ The owner agreed that he had physical impairments that affected his mobility, and that he could not have built sheds himself. However, the owner also testified during the hearing that when necessary he would “go down” to the lumberyard to pay his bill. That suggests that he was capable of either driving or being driven to the lumberyard and capable of going into that business to pay his bill. That also suggests that the owner would likely have been capable of going to the lumberyard to pick up supplies and driving or having them driven to job sites, as well. On this record, we cannot conclude that the owner was incapable or unwilling to transport supplies to job sites in his own truck, even if he was not capable of loading and unloading those materials or building sheds himself. Given claimant's agreement that he could have continued to build sheds and work for the employer if the owner had provided supplies, we cannot conclude on this record that claimant's inability to use the company-owned truck prevented him from working or would have caused him to go weeks without earnings from working for the employer. It was a reasonable alternative for claimant to continue working for the employer, while the owner transported supplies when needed, until the transmission shop completed repairs on the truck.

Even if we assumed for the sake of argument that the owner could not or would not have been able to drive supplies to claimant's job sites, the outcome of this decision would remain the same. Claimant testified that the proximate cause of his decision to quit work was his loss of use of the company truck, and suggested that the loss of the truck was a grave situation, especially given his other concerns about the owner's behavior, late pay, and the owner's financial difficulties. However, claimant also said he would have resumed working for the employer if the owner paid him \$3,000 for the additional assignment. Put another way, although claimant was not willing to continue working for the employer for \$20 per hour, he was in fact willing to work under the same conditions he alleged were so bad he had to quit if he was paid \$3,000. That suggests that the conditions claimant cited as the basis for his decision to quit work were not actually of such gravity that he had to quit when he did.

Claimant voluntarily left work without good cause. He is therefore disqualified from receiving unemployment insurance benefits because of this work separation.

DECISION: Order No. 18-UI-121849 is set aside, as outlined above.

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

⁶ Audio recording at ~ 48:35.

DATE of Service: February 7, 2019

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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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 desisyon.

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 ໄດ້ ໂດຍປະຕິບັດຕາມຄຳແນະນຳທີ່ບອກໄວ້ຢູ່ຕອນທ້າຍຂອງຄຳຕັດສິນນີ້.

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.

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