

EMPLOYMENT APPEALS BOARD DECISION
2019-EAB-0063-R

Request for Reconsideration Allowed
Order No 19-UI-122323 Affirmed on Reconsideration
Disqualification

PROCEDURAL HISTORY: On December 7, 2018, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant voluntarily left work without good cause (decision # 130659). Claimant filed a timely request for hearing. On January 8, 2019, ALJ Meerdink conducted a hearing, and on January 9, 2019 issued Order No. 19-UI-122323, affirming the Department's decision. On January 17, 2019, claimant filed an application for review with the Employment Appeals Board (EAB). On February 11, 2019, EAB issued Appeals Board Decision 2019-EAB-0063, affirming Order No. 19-UI-122323. On February 11, 2019, claimant filed a request for reconsideration of EAB decision 2019-EAB-0063.

REQUEST FOR RECONSIDERATION: OAR 471-041-0145 provides that any party may request reconsideration to correct an error of material fact or law, among other things. The request is subject to dismissal unless it includes a statement that a copy was provided to the other parties, and is filed within 20 days of the date the EAB decision was mailed. Claimant filed a timely request for reconsideration the day the EAB decision was issued, and alleged that EAB made material errors of fact or law in the original decision. His request for reconsideration is therefore allowed. This decision is issued pursuant to EAB's authority under ORS 657.290(3).

FINDINGS OF FACT: (1) Dollar Tree employed claimant as a floor associate – freight person from October 19, 2018 to November 15, 2018.

(2) The employer originally hired claimant to work part-time on Thursdays, Fridays, and sometimes Saturdays. Saturdays were “iffy” since the time of hire. Transcript at 17. The number of hours was variable because company policy limited the number of available hours the store manager could schedule people to work.

(3) On Friday, October 19, 2018 and Saturday, October 20, 2018, claimant worked a total of 9 hours. On October 20, 2018, the store manager asked claimant if he could work Wednesday October 24, 2018. Claimant agreed to work.

(4) On Wednesday, October 24, 2018, Thursday, October 25, 2018, Friday, October 26, 2018, and Saturday, October 27, 2018, claimant worked a total of 15.2 hours.

(5) At that end of that week claimant told the store manager that he did not want to work any additional Wednesdays. The timing of the Wednesday shift could fluctuate with only a few days' notice. Claimant felt like being on-call to work a shift with a fluctuating start time meant the employer was dictating his whole Wednesday and had to be illegal. He was not willing to work that shift after the first time. At some point claimant also told the store manager that he did not want to work Saturdays anymore.

(6) On Thursday, November 1, 2018, claimant worked a four-hour shift. The employer did not have any additional shifts available for claimant that week because claimant had limited his availability to Thursdays and Fridays.

(7) On Thursday, November 8, 2018 and Friday, November 9, 2018, claimant worked a total of 8 hours.

(8) At some point claimant talked to the assistant store manager about his reduced hours, and the assistant store manager spoke with the store manager. The store manager told the assistant store manager that he could not schedule claimant for additional shifts because claimant was not available to work Wednesdays and Saturdays, but that the store manager gave claimant shifts when he could. The assistant store manager related to claimant that the store manager would not give claimant additional shifts because claimant could not commit to working Wednesdays.

(9) Claimant was dissatisfied with his hours. He felt the store manager was retaliating against him for not working Wednesdays by reducing his hours on other days, even though the store manager continued to schedule him to work the Thursdays and Fridays he had originally agreed to work. He disliked interrupting his normal sleep cycle to wake up early for shifts only once or twice a week, particularly related to early Wednesday freight shifts.

(10) Claimant had concerns about the way the store manager treated him. He received conflicting information about what to do and what his production expectations were from the store manager and assistant store manager, and when he questioned each about the unrealistic production expectations each alleged the other had set the standard. Claimant felt as though the store manager was to blame for setting unrealistic goals and was setting him up to be written up or fired.

(11) The employer next scheduled claimant to work a four-hour shift on November 15, 2018. Claimant did not report to work for that shift. He woke up for his shift but felt like, "oh, I don't want to see [the store manager] today" and that it was not worth going to work for a four-hour shift. Transcript at 24. The assistant store manager called claimant about the missed shift, and claimant said he was not going to work for the employer any longer.

CONCLUSIONS AND REASONS: On reconsideration, we adhere to our original decision as explained herein, and reaffirm Order No. 19-UI-122323. Claimant voluntarily left work without good cause and is disqualified from receiving unemployment insurance benefits.

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.

The preponderance of the evidence is that claimant quit work because he objected to working the part-time hours associated with the part-time job he sought and accepted, and objected to a limited schedule that he himself set. He also had unconfirmed suspicions that the store manager had retaliated against him, and, ultimately, felt like it was not worth interrupting his other activities and sleep schedule for his part-time job with the employer. None of those objections was based on an objectively grave situation that left claimant with no reasonable alternative but to quit work.

With regard to claimant's schedule, or the store manager retaliating against claimant for refusing to work Wednesdays, claimant was hired to work Thursdays, Fridays, and Saturdays. He knew Saturdays were "iffy," and at one point told the store manager he did not want to work Saturdays. That means claimant's normal work schedule, which he agreed to and helped establish, was Thursdays and Fridays. From his date of hire, the employer scheduled claimant to work every Thursday and all but one Friday. The fact that the employer did not schedule claimant to work one day of his normal shift during his term of employment does not suggest or establish that the store manager had cut claimant's hours or retaliated against him.

With respect to working variable shifts on Saturdays, claimant alleged the employer engaged in an unlawful employment practice. Claimant is mistaken. Neither Oregon nor federal law prohibit employers from schedule employees to variable shifts. For example, Oregon law provides that employers may schedule employees to remain on-call for an entire shift without paying them. The employer may even require the employees to carry a mobile device and be ready to report to work at a moment's notice, even though being on-call causes some degree of limitation in the employee's ability to use the time effectively for their own purposes. *See e.g.* ORS chapter 653; OAR 839-020-0041(2). In this case, the employer provided several days' notice of which hours claimant would have to work on Wednesday, which is far less limiting than what the law actually allows. Claimant did not show that the employer engaged in unlawful scheduling practices.

With respect to claimant's concerns about the store manager retaliating against him by setting unrealistic performance expectations for him, the record fails to show that the store manager was doing so. The store manager testified that he did not set those goals for claimant. Transcript at 31. Claimant testified that the store manager and assistant store manager blamed each other for setting the unrealistic goals. Transcript at 33. Claimant did not establish that he experienced repercussions for failing to meet the unrealistic goals, or indeed that the unrealistic goals were ever enforced. *See* Transcript at 22. It was likely unpleasant or frustrating to work with a store manager and assistant store manager who gave claimant conflicting instructions or set unrealistic goals, but claimant did not establish that the situation was so grave that no reasonable and prudent person could have continued to work for the employer because of it.

In his January 22, 2019 written argument to EAB claimant argued that he just wanted to work the original 3 days he was hired to work, "Thursdays, Fridays and Saturdays if there is enough work" but the store manager was not responsive. The record shows it is more likely than not that the employer scheduled claimant to work every Thursday, all but one Friday, and one Saturday, until claimant asked

not to work Saturdays anymore. The employer also offered to schedule claimant to work Wednesdays, and he refused after working one Wednesday. On the whole, the record shows that it was claimant, not the employer, who limited claimant's work hours. Claimant alleged that the store manager was "a verbal abuser" and the law should not require him to work for a verbal abuser. The law does not require individuals to work under abusive working conditions; however, on this record, claimant did not establish that his working conditions or the store manager engaged in verbal or other abuse of him.

Finally claimant argued that the store manager was not a trustworthy witness at the hearing, alleging that the store manager lied about the work schedule and made claimant lie about his citizenship, and that the store manager was ultimately fired by the employer as a result. Transcript at 7, 18; claimant's request for reconsideration. The preponderance of the evidence in the record does not substantiate claimant's allegations. With respect to the store manager's testimony about the work schedule, the record shows that the store manager testified initially when the schedules were posted and then clarified his testimony that the Wednesday schedules were variable. The testimony as presented does not suggest that the store manager was lying about the schedule or when it was posted. Likewise, claimant's allegation that the manager made him lie about his citizenship status was not substantiated by any objective evidence in the record. The record fails to show that the store manager lied during the hearing or was prone to dishonesty. Regarding the store manager's alleged discharge, claimant did not present any evidence substantiating the basis for his allegations or substantiating that the store manager's treatment of claimant or testimony about claimant's work separation was the cause of any such work separation. Claimant's allusions to misconduct on the part of the store manager are inadequate evidence to prove that such misconduct did, in fact, occur.

For claimant to establish that he had good cause for quitting his job with the employer, he must have established that his working conditions were so grave that no reasonable and prudent person would have continued working for the employer for an additional period of time. We have considered all of claimant's testimony, his written argument, and his request for reconsideration, and we understand claimant's opinions with respect to the store manager, his employment at Dollar Tree, and about whether his work separation should justify him receiving unemployment insurance benefits. Although it is clear that some of the working conditions were frustrating, and clear that claimant thought the work hours unduly interfered with his normal sleep and activities schedules, claimant did not establish that the situation was so "grave" that he had to leave work rather than suffer them. He therefore did not establish good cause for quitting work, and he is disqualified from receiving unemployment insurance benefits because of this work separation until such time as he requalifies for benefits under Employment Department law.

DECISION: On reconsideration, Order No. 19-UI-122323 is re-affirmed.

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

DATE of Service: February 22, 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

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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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