

EMPLOYMENT APPEALS BOARD DECISION
2019-EAB-0559

Reversed
No Disqualification

PROCEDURAL HISTORY: On May 9, 2019, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant voluntarily left work without good cause (decision # 154220). Claimant filed a timely request for hearing. On June 3, 2019, ALJ Monroe conducted a hearing, and on June 11, 2019, issued Order No. 19-UI-131460, affirming the Department's decision. On June 17, 2019, claimant filed an application for review with the Employment Appeals Board (EAB).

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

FINDINGS OF FACT: (1) Garner Construction WBE Inc., acting as a subcontractor, employed claimant from April 8, 2019 until April 10, 2019 as an elevator operator for a general contractor constructing a building.

(2) The year preceding April 8, 2019, three employees had been operating three elevators for passengers and carts on the worksite where claimant began work. On April 8, 2019, the employer hired claimant and one other employee, who was an apprentice elevator operator, to operate two elevators for passengers and carts over fifteen floors for the 200 workers and carts on the worksite. There was a third elevator operator that ran an elevator for freight only.

(3) On April 8, 2019, during the orientation for her position, claimant was given her supervisor's name and was told that her onsite human resources contact was a crane operator. Claimant's supervisor worked for the general contractor, and the crane operator worked for Garner Construction WBE Inc. Claimant asked her supervisor, who was the site boss, how she would get coverage for her rest and meal breaks. The site boss told claimant that she and the other elevator operators needed to "figure that out amongst [them]selves." Transcript at 6.

(4) Due to the volume of work, claimant and the other passenger elevator operator were unable to keep up with the demand for the elevators. The workers using the elevators began to act "hostile" toward claimant and the other operator. Transcript at 6. They did not follow the elevator rules, including giving

priority to workers with carts, and would get in the elevator going the wrong direction to secure a spot when the elevator reversed direction. Because the elevators were so busy, when claimant or the other passenger elevator operator had a scheduled rest or lunch break, the other operator became “overwhelmed” because the workers were becoming “angry [and] impatient.” Transcript at 6. Because the elevators were in such high demand, claimant and the other operator did not take all of their rest and meal breaks on April 8, 9, or 10, 2019. Claimant did not agree to work through her breaks, paid or unpaid.

(5) On April 8 and 9, 2019, claimant asked her supervisor, the site boss, to help her get coverage for her rest and meal breaks. Claimant asked her supervisor if the general contractor would begin to use the third passenger elevator, which it had not used since claimant began work. The supervisor told claimant it would be used if needed, but did not start the third passenger elevator running again for the workers. Claimant was not able to speak to her on-site human resources representative because he was inaccessible, working in a crane, during her entire shift.

(6) Claimant told the workers who complained to her about the wait for the elevators to tell their bosses that the elevators were overloaded. Claimant also asked multiple forepersons who used her elevator to tell her supervisor that she and the other passenger elevator operator needed help. On April 8 or 9, 2019, another manager, who was the site superintendent, rode in claimant’s elevator and commented to claimant about the conditions, “[T]his is not right. This is crazy. This . . . isn’t working.” Transcript at 11. Claimant asked the site superintendent to tell claimant’s supervisor that the elevator operators needed help.

(7) On April 10, 2019, during her rest break, claimant called her supervisor and went to his office. She told him that the elevator operators needed help immediately. He responded, “[W]ell, give me a couple of weeks.” Transcript at 6-7. Claimant told him that they needed help that day. The supervisor responded to claimant to “give him a couple of days.” Transcript at 7. Claimant responded, “[N]o . . . we need help today and I really want help at lunchtime . . . because this isn’t working.” Transcript at 7. The supervisor responded, “[L]et me see what I can do.” Transcript at 7. Claimant’s supervisor never told claimant to talk to anyone else about the elevator problem.

(8) Later on April 10, 2019, after claimant had spoken to her supervisor, a worker went onto claimant’s elevator and told claimant she was not doing her job correctly, “was in [claimant’s] face,” and told claimant she would report claimant to the site boss. The worker complained about the elevator to the site boss. The site boss called claimant on a two-way radio that was audible to everyone in the elevator and told claimant, “[P]eople are complaining that you guys aren’t doing your job right.” Transcript at 8. Claimant responded, “[T]hat’s because we don’t have enough coverage. Everything’s getting backed up. People are getting angry. I can only get two carts in here or three max at a time. Every floor has carts and numerous people waiting. We need more help.” Transcript at 8.

(9) Later on April 10, 2019, when it was time for claimant to take her lunch break, no additional assistance arrived to cover claimant during her lunch break. Claimant called her supervisor and asked if he was sending someone to help. When he replied that he was not sending someone to cover her lunch break, claimant told him that it was “falling to pieces” at the work site and was “so backed up [the operators could not] even keep track of what floor [they] needed to go to.” Transcript at 9. Claimant told her supervisor, “I can’t take it anymore.” Transcript at 9. The supervisor responded, “[O]kay. I’ll be

right over.” Transcript at 9. Claimant continued to work until he arrived. The supervisor did not say he had help for claimant or that she should take her lunch. He gave claimant a paper to sign stating that she was quitting work. Claimant signed the paper and left work.

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

A claimant who leaves work voluntarily is disqualified from the receipt of benefits unless they prove, by a preponderance of the evidence, that they had good cause for leaving work when they did. ORS 657.176(2)(c); *Young v. Employment Department*, 170 Or App 752, 13 P3d 1027 (2000). “Good cause . . . is such that a reasonable and prudent person of normal sensitivity, exercising ordinary common sense, would leave work.” OAR 471-030-0038(4) (December 23, 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 their employer for an additional period of time.

The order under review determined that claimant quit work without good cause because she had the reasonable alternative of communicating with the subcontractor employer, rather than the general contractor’s onsite managers, before she quit, and did not show that contacting the employer directly would have been futile. The record does not support this conclusion.

To the extent claimant quit work because the employer did not provide uninterrupted rest and meal breaks, claimant left work with good cause. OAR 839-020-0050(2)(a) (July 19, 2018) provides that an employer must, for each work period of between six to eight hours, provide to an employee a meal break of thirty continuous minutes “during which the employee is relieved of all duties.” OAR 839-020-0050(6)(a) states that an employer must, for each four hour segment of work, provide an employee a rest period of not less than ten minutes “during which the employee is relieved of all duties.” The record shows that claimant’s lunch and rest breaks did not always occur or were interrupted. Claimant did not take breaks because the passenger elevators were overloaded and the workers were hostile even when claimant did not leave for her breaks. The employer’s operations manager contended that the employer would pay claimant for her missed breaks, but claimant asserted that she never agreed to work through her breaks and that she “really need[ed] a break” under the circumstances. Transcript at 40. Claimant testified that the position did not allow her to leave “for a single minute to make a phone call or run to the bathroom,” and that “you have to get away from [the position] for 20 minutes or half an hour or go crazy.” Transcript at 39, 40. It appears likely that the employer’s break policy was unlawful. While there are certain narrow exceptions to the break requirement, there is insufficient evidence in the record to support the applicability of these exceptions. *See* OAR 839-020-0050(3), (4), (5), (7), (6)(b).

The record also shows that the failure to provide uninterrupted rest and lunch breaks was a condition that was likely to recur, and that it would have been futile for claimant to complain directly to Garner Construction WBE Inc. The Court of Appeals has recognized that it may be good cause for a claimant to leave work when on an ongoing basis, an employer has engaged in practices that violate Oregon wage and hour laws. *J. Clancy Bedspreads and Draperies v. Wheeler*, 152 Or App 646, 954 P2d 1265 (1998) (where unfair labor practices are ongoing or there is a substantial risk of recurrence, it is not reasonable to expect claimant to continue to work for an indefinite period of time while the unfair practices are handled by BOLI); *compare Marian Estates v. Employment Department*, 158 Or App 630, 976 P2d 71 (1999) (where unfair labor practices have ceased and the only remaining dispute between claimant and

the employer is the resolution of the past issues, it was reasonable for claimant to continue working for the employer while litigating the claim).

Here, the employer failed to provide claimant lawful breaks despite claimant having repeatedly informed her supervisor, the site boss, that she was not getting them. The employer's operations manager testified that had claimant complained to her about the working conditions, she would have "suggested" to the site boss that he add another passenger elevator operator, and speculated that she "believed" the general contractor would have done so. Transcript at 30, 32. However, the record shows that claimant had herself asked the site boss about the third passenger elevator, the site boss stated that it would be used if needed, but had not begun using the elevator despite knowing from claimant and other workers that the current number of elevators was insufficient. The preponderance of the evidence shows that claimant complaining to employer's operations manager so that the manager could make the same "suggestion" to the site boss likely would have been futile. No reasonable and prudent person would continue working indefinitely for an employer who failed to provide breaks on an ongoing basis. On these grounds, claimant demonstrated good cause for leaving work when she did.

Claimant quit work with good cause. She is not disqualified from receiving unemployment insurance benefits because of her work separation.

DECISION: Order No. 19-UI-131460 is set aside, as outlined above.¹

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

DATE of Service: July 23, 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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¹ This decision reverses an order that denied benefits. Please note that payment of benefits, if any are owed, may take approximately a week for the Department to complete.



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 ໂດຍປະຕິບັດຕາມຄໍາແນະນໍາທີ່ບອກໄວ້ຢູ່ຕອນຫ້າຍຂອງຄໍາຕັດສິນນີ້.

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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