

EMPLOYMENT APPEALS BOARD DECISION
2019-EAB-0960

Reversed
No Disqualification

PROCEDURAL HISTORY: On September 6, 2019, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant quit work without good cause, and was disqualified from benefits effective August 11, 2019 (decision # 93613). On September 10, 2019, the Oregon Employment Department (the Department) served notice of a second administrative decision, replacing decision # 93613, concluding claimant quit work without good cause, and was disqualified from benefits effective August 4, 2019 (decision # 111848). On September 11, 2019, claimant filed a timely request for hearing on decision # 111848. On September 25, 2019, ALJ Snyder conducted a hearing, and on October 3, 2019 issued Order No. 19-UI-137486, concluding claimant quit work without good cause, and was disqualified from benefits effective August 11, 2019. On October 7, 2019, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Tannerite Sports LLC employed claimant as its Tannerite Outlet Store manager from August 2016 to August 9, 2011. The employer's owner and chief executive officer (DT) was claimant's supervisor.

(2) As the outlet store manager, claimant was expected to manage all aspects of the store, including purchasing and paying for store inventory, coordinating staff schedules, entering employee hours into the payroll system and reporting income and expense information to the employer's in-house accountant (SC). The employer established a separate bank account for the outlet store to enable claimant to make and keep track of inventory purchases, and pay vendors and store utility bills. The employer held claimant responsible for store's revenue and profitability. Although claimant had the responsibilities of store manager, the employer paid him an hourly rate. Besides claimant, the outlet store had two other employees, one full-time and one part-time. The store's regular hours were Monday through Saturday, 9:00 a.m. to 6:00 p.m., although the store also was open on Sundays during the summer.

(3) During the final year of claimant's employment, the employer experienced financial difficulties. In February of 2019, DT hired a "turn-around specialist" (JL) to help increase the employer's profitability, although employees were told she had been hired to replace the employer's marketing manager who had

quit. Exhibit 1 (Declaration of SC). Shortly after JL was hired, JL directed claimant to lay off his part-time employee, reduce the hours of his full-time employee, and stop working overtime himself, while also directing claimant to not cut the store's operating hours. DT and JL told claimant that the outlet store would be closed if it did not become more profitable and that he was to find ways to increase the store's sales. The store became short-staffed, effectively forcing claimant to work after regular store hours unloading merchandise and stocking shelves, and working at weekend gun shows with his remaining employee to promote the business and attract new customers. Claimant's long hours caused extreme family stress.

(4) In approximately March of 2019, SC noticed that claimant's reported hours decreased from approximately 60 hours per week to 40 hours per week. She questioned him, and claimant he responded that he was not reporting his actual hours because he was afraid he would lose his job if he did not adhere to JL's instructions not to work overtime. SC reported to DT and JL what claimant had told her and that he was working many hours for which he was not being paid. Exhibit 1 (Declaration of SC). Claimant also had complained to DT that he had been working seven days a week for many weeks because of the employer's "budget crisis." Transcript at 11-12.

(5) During 2019, DT regularly removed funds from the store's separate bank account to cover corporate expenses, making it nearly impossible for claimant to purchase inventory to keep the store's shelves stocked with merchandise. When DT complained to claimant about customer complaints about the lack of merchandise, claimant responded that his criticism was unjustified because he could not order merchandise if he did not have the necessary funds.

(6) Around August 1, 2019, the employer terminated claimant's only full-time employee for a suspected theft and his part-time employee notified claimant that she would be quitting in the near future. Claimant recruited a new employee and arranged for the person to take a drug test. On August 2, 2019, in a meeting, claimant told DT and JL about the new hire and the other employee's plan to leave, but was told to not hire anyone because only one person was needed for the store. Claimant was the only store employee that remained. In that meeting, JL reiterated to claimant that claimant was responsible for everything that occurred at the store.

(7) On August 7, 2019, claimant sent JL and DT an email outlining his complaints against JL because she was making decisions about the store without including him in the process. No one responded. On August 8, 2019, claimant spoke to DT by phone and again complained about JL assuming day-to-day management duties at his store without his involvement and asked DT to clarify to JL that he was the manager and should not be taken out of management decisions. He also discussed his need for another employee and the excessive hours he had been working and would have to continue working because of his staff shortage. DT responded like he had in the past before failing to take any action, "I'll take care of it." Transcript at 27. Claimant concluded his complaints would not be resolved.

(8) On August 9, 2019, upon arriving at the store, claimant learned from his remaining part-time employee that JL had authorized a non-store employee to remove cash from the store's till and directed the employee to not tell claimant about it. Later that day, claimant quit because he was no longer willing to work excessive hours without pay, have his authority as manager undermined, risk being blamed for financial discrepancies over which he had no control, and because his circumstances at work were causing him undue stress at home.

CONCLUSIONS 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 concluded that claimant voluntarily left work without good cause, stating:

While claimant was understandably frustrated to have a newly hired employee make significant business decisions that Claimant had previously been solely responsible for, I am not persuaded that this amounted to a situation so grave that Claimant had no reasonable alternative but to leave work. To the extent that Claimant left work because he felt the turnaround specialist’s business choices required him to work extra hours without pay, Claimant was never asked that or directed to work additional hours without pay, and was solely responsible for reporting his own hours into the payroll system.

Order No. 19-UI-137486 at 3. However, the record does not support the order’s reasoning. The record shows that claimant’s difficulty with the turnaround specialist was not simply “frustration” with her assumption of decision-making previously left to him. Her actions undermined his authority, forced him into a situation that required him to work well over 40-hours per week, and left him at risk to being blamed for till discrepancies that she caused.

The record shows that there were repeated weeks for which the employer knowingly failed to pay claimant his full wages when due. DT denied that claimant ever complained to him about working excessive hours and not being paid for those hours. Transcript at 24-25. Although that was disputed by claimant, DT did not dispute that the employer’s in-house accountant had directly told him in April or May of 2019 that claimant was working many hours over 40 each week without reporting them because he did not want to lose his job. Nor did he dispute that after the store became short-staffed, first in February and then again in August of 2019, when claimant became the only store employee, claimant was effectively forced to work more than 40 hours to keep the outlet store running and that, as a matter of common sense, DT and JL had to have been aware of the situation in which claimant had been placed as a result. By failing to pay claimant the full amount of wages due on his scheduled payday, the evidence suggests it is likely that the employer violated Oregon’s wage and hour laws.¹ That condition

¹ See e.g. OAR 839-020-0010; OAR 839-020-0012; OAR 839-020-0040.

OAR 839-020-0040 (January 1, 2014) provides, in relevant part, as follows:

(2) Work requested or required is considered work time. Work not requested, but suffered or permitted is considered work time.

(3) Work performed for the employer but away from the employer's premises or job site is considered work time. If the employer knows or has reason to believe that work is being performed, the time spent must be counted as hours worked.

was also more likely than not ongoing despite claimant's efforts to correct the situation by complaining to the employer, and the accountant's direct disclosure of claimant's unpaid work hours to both DT and JL. No reasonable and prudent person would continue working indefinitely for an employer who failed to pay him for all the hours he worked on an ongoing basis.²

The record also shows that claimant had serious concerns that JL's authorization that cash be removed from the store's till, for which claimant was responsible, and then directing employees to not inform claimant about the removal, undermined his authority and left him vulnerable to be discharged for financial discrepancies outside of his control. No reasonable and prudent store manager in claimant's circumstances, after repeatedly and unsuccessfully requesting that the CEO to direct JL to involve him in any store decision-making, would conclude that it was reasonable to continue to work under those circumstances, particularly where, as here, the circumstances left claimant vulnerable to being accuse of theft and jeopardized his reputation for honesty.

For the foregoing reasons, it is more likely than not on this record that claimant voluntarily left work with good cause. Claimant is not disqualified from receiving unemployment insurance benefits on the basis of his work separation.

DECISION: Order No. 19-UI-137486 is set aside, as outlined above.³

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

DATE of Service: November 14, 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.

(4) It is the duty of the employer to exercise control and see that the work is not performed if it does not want the work to be performed. The mere promulgation of a policy against such work is not enough.

² See *J. Clancy Bedspreads and Draperies v. Wheeler*, 152 Or App 646, 954 P2d 1265 (1998) (claimant had good cause to leave work when wage dispute over employer's illegal practices was ongoing and not likely to stop); *Cavitt v. Employment Division*, 105 Or App 81, 803 P2d 778 (1990) (an employer's repeated wage violations was good cause for claimant to leave work because "[n]o one should be expected to continue working for an employer who pays with bad checks"); *Marian Estates v. Employment Department*, 158 Or App 630, 976 P2d 71 (1999) (claimant did not have good cause to leave work when the employer's allegedly unlawful wage practices had not continued and were not ongoing at the time of the leaving and only the issue of the amount of restitution for back pay continued).

³ 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.

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 Empleo. Si no está de acuerdo con esta decisión, puede presentar una Aplicación 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.