

EMPLOYMENT APPEALS BOARD DECISION
2020-EAB-0664

Modified
Late Request for Hearing Allowed
No Disqualification

PROCEDURAL HISTORY: On June 22, 2020, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant quit work without good cause and was disqualified from receiving unemployment insurance benefits effective August 4, 2019 (decision # 102745). On July 13, 2020, decision # 102745 became final without claimant having filed a timely request for hearing. On August 5, 2020, claimant filed a late request for hearing. On October 2, 2020, ALJ Smith conducted a hearing, and on October 9, 2020 issued Order No. 20-UI-155085, allowing claimant's late request for hearing and affirming decision # 102745. On October 18, 2020, claimant filed an application for review with the Employment Appeals Board (EAB).

WRITTEN ARGUMENT: Both claimant's and the employer's written arguments contained information that was not part of the hearing record, and did not 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 (May 13, 2019), EAB considered only information received into evidence at the hearing when reaching this decision.

LATE REQUEST FOR HEARING: Based on a *de novo* review of the entire record in this case, and pursuant to ORS 657.275(2), the portion of the order under review allowing claimant's late request for hearing is **adopted**. The remainder of the decision addresses whether claimant had good cause to quit work.

FINDINGS OF FACT: (1) Top Form Contracting Inc. employed claimant as a construction lead carpenter and project manager from January 4, 2019 until August 7, 2019.

(2) During the period that claimant worked for the employer, the employer did not regularly require claimant or other employees to take the rest breaks and meal breaks required by law.¹ While claimant worked for the employer, he never took a lunch break longer than about 20 minutes. Transcript at 33.

¹ See ORS 653.261; OAR 839-020-0050 (November 30, 2018).

(3) Claimant did not complain about the lack of required breaks to the employer's owner because he was concerned that doing so would be "disruptive to the job site." Transcript at 38. Similarly, claimant did not file a complaint with the Bureau of Labor and Industries (BOLI) or any other government agency because he was concerned that doing so would cause "disunity" at work. Transcript at 41. However, claimant spoke with his lead worker, who claimant believed was the owner's work partner. The lead worker did not respond to claimant's complaint. Transcript at 37, 51.

(4) On or around August 5, 2019, claimant worked a 10-hour shift beginning at 7:00 a.m. The temperature at the jobsite reached approximately 96 degrees, and claimant was not given a break until 2:00 p.m. that day. Transcript at 33. At that point, claimant determined that he would no longer be able to continue working for the employer under such conditions.

(5) On August 7, 2019, claimant quit work because the employer did not provide regular breaks as required by law.

CONCLUSIONS AND REASONS: Claimant quit 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) (September 22, 2020). "[T]he reason must be of such gravity that the individual has 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 their employer for an additional period of time.

The order under review concluded that claimant quit work without good cause because he ". . . did not bring his concerns to his supervisor and therefore did not give his supervisor an opportunity to resolve claimant's concerns." Order No. 20-UI-155085 at 4. The record does not support this conclusion. The record shows that claimant quit work with good cause.

The evidence in the record establishes that while the employer permitted claimant and his coworkers to take rest and meal breaks if they needed a break or their lunch, the employer did not require or even encourage employees to take breaks, and the culture of the workplace likewise appears to have discouraged employees from taking breaks. Transcript at 33, 41, 50. Per OAR 839-020-0050(2) (November 30, 2018), the employer was required to provide their employees with a 30-minute meal break ". . . after the conclusion of the second hour worked and completed prior to the commencement of the fifth hour worked" during the August 5, 2019 shift. Likewise, per OAR 839-020-0050(6), the employer was required to provide their employees with a rest break of at least 10 minutes ". . . approximately in the middle of each segment of four hours or major part thereof worked in a work period."² Because the employer did not provide either a rest or a meal break during the first seven hours

² OAR 839-020-0050 provides exceptions to the rest and meal break requirements set forth in the rule. For example, an employer may not be required to provide a meal break to an employee if the employer meets their burden to show that doing so ". . . would impose an undue hardship on the operation of the employer's business . . ." OAR 839-020-0050(3). Because

of the August 5, 2019 shift, their failure to do so was a violation of law. The testimony of both parties indicated that this was typical of the employer's operational habits. The repeated failure to require rest and meal breaks constituted a grave situation for claimant.

In finding that claimant did not seek reasonable alternatives prior to quitting, the order under review suggested that claimant had the reasonable alternatives of either bringing his concerns to his supervisor, or filing a complaint with a regulatory agency such as BOLI. Order No. 20-UI-155085 at 4. However, the record shows that claimant complained about the lack of mandated breaks to his lead, who did not respond. Transcript at 37. Further, while claimant did not directly raise his concerns with the owner of the company, the owner's testimony suggests that doing so would have been futile. The owner testified that they would not have denied claimant breaks if claimant had requested them, indicating both that the employer was aware of the practice of not requiring employees to take legally mandated breaks, and that the employer believed that the onus to take breaks as needed was on individual employees. Transcript at 50, 52, 53.

Even assuming claimant understood that the owner would permit him to take breaks as needed, the testimony of both parties suggests that the employer's workplace culture discouraged the practice in favor of "being tough" or adhering to the employer's "work ethic." Transcript at 35, 50. When taken as a whole, it is reasonable to infer that the owner, at minimum, knowingly permitted workplace practices that discouraged workers from taking breaks. The record therefore shows that raising with the owner concerns about taking breaks would not have been a reasonable alternative to quitting.

Regarding claimant's failure to report the employer's violations to BOLI or another agency prior to quitting, the record does not support the conclusion that doing so would have been a reasonable alternative to quitting. *See 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). The conditions that claimant described—inadequate breaks during long shifts and hot weather—may have eventually been adequately addressed had he filed a complaint with BOLI, but he would in the meantime have continued to endure illegal and potentially dangerous working conditions. Such an option does not constitute a reasonable alternative to quitting.

For the foregoing reasons, claimant quit work for good cause and is not disqualified from receiving unemployment insurance benefits.

DECISION: Order No. 20-UI-155085 is modified, as outlined above.

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

the record does not show that the employer met any of the exceptions set forth in the rule during the periods at issue in this case, those exceptions are presumed not to apply to the present matter.

DATE of Service: November 25, 2020

NOTE: This decision modifies 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.

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 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 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 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.

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