EO: 200
BYE: 202432

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

829
VQ 005.00

EMPLOYMENT APPEALS BOARD DECISION
2024-EAB-0171

Affirmed
Disqualification

PROCEDURAL HISTORY: On December 13, 2023, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant voluntarily quit work without good cause and was therefore disqualified from receiving unemployment insurance benefits effective July 23, 2023 (decision # 141226). Claimant filed a timely request for hearing. On January 17, 2024, ALJ Smith conducted a hearing at which the employer failed to appear, and on January 24, 2024 issued Order No. 24-UI-246396, affirming decision # 141226. On February 12, 2024, claimant filed an application for review with the Employment Appeals Board (EAB).

WRITTEN ARGUMENTS: Claimant submitted a written argument on March 7, 2024. The argument consisted of a cover sheet, a three-page argument memorandum pleading, and a 5-page text message thread attached as an exhibit. In the argument, claimant requested EAB consider the 5-page text message thread as part of its review. Written Argument at 3. The five-page text message thread was not part of the hearing record. The thread is a more extensive version of a two-page text message thread that claimant faxed to the Office of Administrative Hearings (OAH) late in the day on January 16, 2024 for the purpose of offering it as evidence at the hearing scheduled for the morning of the next day. Audio Record at 5:29. However, at the time of the hearing, the two-page text message thread had not yet been uploaded by staff into OAH's system. Audio Record at 7:24. During the preliminary portion of the hearing, the following exchange occurred between the ALJ and claimant's counsel:

> ALJ Smith: All right. And I just checked my system and I'm not surprised given, uh, that I don't have anything given that the staff have been out of the office with the weather. What we can do, we've got just your, you're the appealing side and you're the side that's kind of here and is gonna present evidence. So, what I would suggest in terms of being

> expeditious is that, uh, you have the texts to refer to in your questions and he, your client has them to refer to in his answers. And it may not be that the level of detail that you might normally expect for some other types of litigation is going to be necessary. I'll get a general sweep in my questions. And that may be as far as I need to go to determine the eligibility for benefits. But we'll play that by ear.
>
> Counsel: Okay, sounds good Your Honor.

Audio Record at 7:18 to 8:22. The ALJ then took claimant's sworn testimony, with an opportunity for claimant's attorney to examine claimant. Audio Record at 9:57 to 28:45. Near the end of the hearing, the ALJ asked, "Counsel, in terms of your ability to present the case on your client's behalf, do you feel like there's been a full and fair opportunity to present that case?" Audio Record at 28:53. Claimant's attorney did not inquire further about the two-page text message thread. Rather, claimant's attorney stated, "Yeah," made a brief argument, and stated, "So with that, I think that, uh, you know, I think there's been a full hearing." Audio Record at 28:57 to 29:33. The ALJ adjourned the hearing, and the two-page text message thread was not admitted into evidence.

Thus, claimant's attorney could have made alternative arrangements, such as emailing the two-page text message thread to the ALJ during the hearing or requesting that the record be held open until the ALJ had received the thread and could rule upon whether to admit it, but counsel failed to do so and acquiesced to the ALJ's suggestion to proceed with testimonial evidence only. Therefore, the five-page text message thread attached to claimant's argument, which, in any event, was more extensive than the two-page text message thread claimant faxed to OAH on January 16, 2024, represents information that is not part of the hearing record. Claimant has not shown that factors or circumstances beyond his reasonable control prevented him 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. Other than the five-page text message thread attached to the argument, EAB considered claimant's argument when reaching this decision.

The employer submitted a written argument on March 15, 2024. Because the employer's argument was not received by EAB within the time period allowed under OAR 471-041-0080(1), the argument was not considered by EAB when reaching this decision. OAR 471-041-0080(2)(b). On February 16, 2024, EAB mailed notice of receipt of claimant's application for review to claimant, claimant's attorney, and to the employer. OAR 471-041-0080(1) required the parties to submit their written argument by March 7, 2024, which was 20 days from the notice of receipt. The employer's attorney was not copied on the notice of receipt because EAB was not notified that the employer was a represented party.[1] However, because EAB sent the employer notice of receipt of claimant's application for review, the employer failed to show good cause for extending the time period to file a written argument. OAR 471-041-0080(4)(a)(A). For these reasons, EAB did not consider the employer's argument when reaching this decision.

FINDINGS OF FACT: (1) Cold Frame, LLC employed claimant from December 18, 2020 until July 25, 2023. Claimant worked as a cannabis cultivator for the employer. Claimant's work was overseen by his supervisor, and the supervisor reported to the employer's owner.

[1] The record as of February 16, 2024 did not show that the employer was a represented party.

(2) Claimant worked full-time for the employer. His shifts were scheduled from 8:30 a.m. to 5:00 p.m. with a lunch break at 12:30 p.m. and two 15-minute breaks: one in the morning at 11:00 a.m. and another in the afternoon at 3:00 p.m.

(3) At some point during claimant's tenure with the employer, the supervisor told claimant and a few of his coworkers that if the workers were more than 10 to 15 minutes late for work in the morning, they would be denied their 15-minute morning break.

(4) On multiple occasions thereafter, the supervisor denied claimant his morning break after he arrived late to work in the morning. Four of claimant's coworkers were also denied their morning breaks for being late. In addition, one of these coworkers was "assigned undesirable tasks as a result of his tardiness," such as washing pots. Audio Record at 18:38. Washing pots was one of that coworker's regular tasks.

(5) On July 24, 2023, a car accident occurred on claimant's route to work, which caused traffic congestion that delayed claimant's morning arrival. Claimant recognized he would be more than 15 minutes late and was concerned that the supervisor would deny him his morning break. While in traffic, claimant texted the supervisor, describing the accident and explaining that he would be late.

(6) Claimant arrived at work at 9:30 a.m., an hour late. Upon his arrival, claimant went to the supervisor and "tried to state [his] reasoning," that the accident had caused him to be late. Audio Record at 15:35. The supervisor told claimant it was claimant's fault for being late and to stop arguing with him. The supervisor also made a statement to the effect of, "There's not really much point in telling the owner about this 'cause he's not going to agree with you either." Audio Record at 15:53.

(7) At 10:30 a.m. that morning, the supervisor sent a text to claimant stating that claimant could not take his morning break.

(8) The owner was present at the workplace on July 24, 2023. However, claimant did not raise the denial of his morning break with the owner. Based on his supervisor's statements to claimant when claimant tried to explain why he was late, claimant thought the supervisor had "told [claimant] pretty much that there was no point in talking to [the owner]" about the denial of claimant's break. Audio Record at 16:55. Additionally, claimant believed the supervisor tended to "strong arm" the owner and "bully him a little bit." Audio Record at 17:45. Claimant was also concerned that the supervisor would retaliate against him if he complained to the owner that he did not get a morning break.

(9) The next morning, July 25, 2023, claimant texted the supervisor again, sending the supervisor a link to an article about the crash the day before. In the text, claimant stated that he was not arguing but standing up for himself when he knew he was correct. The supervisor sent a response text stating, "Congratulations about being the last person to work every day," and, "Stop fucking texting me." Audio Record at 24:48. Claimant sent a response text stating that he was resigning "effective immediately." Audio Record at 12:30.

(10) Claimant quit work on July 25, 2023, because the supervisor did not let him take a morning break on July 24, 2024.

CONCLUSIONS AND REASONS: Claimant voluntarily left work without 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.

Claimant quit on July 25, 2023, because his supervisor refused to let him take his morning break on July 24, 2023. Specifically, at hearing, claimant testified, "Ultimately it was the denial of my morning break when I had worked the greater portion of my morning shift which led me to quitting." Audio Record at 16:12.

To deny a morning break to an employee who works the major portion of their morning work segment likely violates Oregon law. Per OAR 839-020-0050(6)(a) (effective November 30, 2018), absent exceptional conditions not present here, "for each segment of four hours or major part thereof worked in a work period," an employee is entitled to "a rest period of at least ten continuous minutes[.]" On July 24, 2023, claimant was an hour late for work, but nonetheless worked from 9:30 a.m. to 12:30 p.m. that morning, three hours of work that amounted to the major portion of his four-hour morning work segment (8:30 a.m. to 12:30 p.m.). Claimant was therefore entitled to a morning break of at least 10 minutes. Accordingly, more likely than not, the employer subjected claimant to treatment that was in violation of OAR 839-020-0050(6) when claimant's supervisor denied claimant his morning break on July 24, 2023.

The record shows that the supervisor denied claimant his morning break after he arrived late to work in the morning on multiple occasions over the course of his tenure with the employer. The employer therefore likely subjected claimant to treatment that was in violation of OAR 839-020-0050(6) on numerous occasions. Given these prior instances of being denied his morning break, at the time claimant quit on July 25, 2023, he faced a substantial risk of recurrence of being subjected to treatment that violated OAR 839-020-0050(6). Thus, being subjected to treatment that violated OAR 839-020-0050(6) and the substantial risk of future violations presented claimant with a grave situation. *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).

Nevertheless, claimant failed to establish that he had good cause to quit based on this reason because claimant failed to pursue the reasonable alternative of raising the denial of his morning break with the employer's owner. Claimant could have asked the owner to reverse the supervisor's decision to deny

claimant's morning break on July 24, 2023, or reported the matter to the owner after July 24, 2023. Doing so could potentially have led the owner to end the supervisor's practice of denying morning breaks to claimant for being late to work. The record does not show that the owner was aware of the supervisor's practice of denying morning breaks. No evidence was offered showing that the owner conveyed the practice of denying breaks either orally or in writing to claimant or his coworkers. Claimant testified that the supervisor told him and some coworkers about the practice of denying breaks "directly." Audio Record at 26:02, 27:49. Although claimant testified that four of his coworkers had also resigned "in the period of years" before him and that he believed they had also been denied breaks, claimant did not state that the denial of breaks was a reason the coworkers quit. Audio Record at 21:06, 25:43. Thus, their quitting does not tend to show that the owner should have known about the break issue from employees who had quit. Moreover, claimant specifically testified that he was not aware of any coworkers having brought concerns about the break-denial issue to the owner. Audio Record at 28:18.

Further, claimant did not establish that raising the denial of his morning break with the owner would have been futile. At hearing, claimant testified that he thought it was pointless to talk to the owner about the matter because the supervisor had made a comment to the effect of, "There's not really much point in telling the owner about this 'cause he's not going to agree with you either." Audio Record at 15:53. However, the supervisor said this to claimant at 9:30 a.m. when claimant was attempting to explain why he was late. The supervisor did not advise that he was denying claimant's break until a text message later that morning. Therefore, it is plausible that the supervisor's comment was meant to convey that if claimant went to the owner to explain that his late arrival should be excused because it was caused by a traffic accident, the owner, like the supervisor, would not agree with claimant.

Regardless of what precisely was meant by the supervisor's statement, the comment was too vague and ambiguous to have caused a reasonable and prudent person to believe that raising the matter with the owner would be futile. Although claimant testified that the supervisor tended to "strong arm" the owner and "bully him a little bit," it is speculative to conclude based on that testimony that the owner would have deferred to the supervisor's decision to withhold claimant's break. Audio Record at 17:45. Claimant did not produce evidence of the owner ignoring employee complaints when brought to his attention. Given that claimant has the burden of proof, the lack of evidence regarding what would occur had claimant or a coworker complained to the owner tends to defeat, rather than establish, claimant's claim. *Compare Or. Pub. Util. Comm'n v. Emp't Dep't* , 267 Or.App. 68, 74-75, 340 P.3d 136, 140-41 (Or. App. 2014) (where claimant had the burden to prove that a reasonable and prudent person with asthma would have no reasonable alternative but to leave work, had earlier success with medical care, and submitted no evidence that he could not have sought medical care, "the lack of evidence defeats, rather than establishes, claimant's claim"). Claimant's general testimony regarding how the supervisor treated the owner is not sufficient to conclude that the owner would not have responded to correct an unlawful workplace practice had it been brought to his attention.

Claimant also expressed that he was concerned that if he complained about missing his break to the owner, the supervisor would retaliate against him. At hearing, claimant offered one example of alleged retaliation by the supervisor. Claimant testified that the supervisor assigned an employee to do "undesirable tasks," such as washing pots, "as a result of [the coworker's] tardiness." Audio Record at 18:38. Washing pots was one of the coworker's regular tasks and it was imposed not because the coworker had raised a workplace matter with the owner but because the coworker had been late to work.

Thus, it is not evident that this was an example of retaliation for complaining about the supervisor's conduct to the owner. In any event, the single example of the supervisor assigning a regular work task to a coworker for being late is not sufficient to conclude that claimant would have faced retaliation from the supervisor for discussing the denial of his break with the owner. Accordingly, the record does not show that the risk of retaliation would have prevented a reasonable and prudent person from raising with the owner the issue of the denial of his morning break before voluntarily leaving work.

For these reasons, the record does not show that it would have been futile for claimant to raise the matter of the denial of his break with the owner. Because claimant failed to pursue the reasonable alternative of raising the matter with the owner, he did not meet his burden to show that the denial of his break on July 24, 2023 or the risk of future denials was a reason of such gravity that he had no reasonable alternative but to quit on July 25, 2023. Accordingly, to the extent that claimant quit work for this reason, claimant voluntarily quit work without good cause.

At hearing, claimant testified that the denial of his morning break when he had worked the greater portion of his morning shift was "ultimately" why he quit. Audio Record at 16:12. However, the denial of claimant's break occurred on July 24, 2023. It was not until the morning of July 25, 2023, "after [the supervisor] failed to see [claimant's] reasoning," that claimant "ended up telling" the supervisor by text message that he was quitting, which claimant did "in response to some of the things [the supervisor] said." Audio Record at 12:25 to 13:38. In particular, on the morning of July 25, 2023, claimant again texted the supervisor, sending the supervisor a link to an article about the traffic accident the day before. Audio Record at 24:00. In the text, claimant stated that he was not arguing, but standing up for himself when he knew he was correct. Audio Record at 24:38. The supervisor sent claimant an objectively rude response text to which claimant responded, "I quit effective immediately." Audio Record at 14:20.

To the extent claimant quit work because his supervisor refused to agree with claimant's view that his July 24, 2023 late arrival was not his fault, or because of the supervisor's rude tone and use of foul language in his final text messages to claimant, claimant quit work without good cause. The supervisor's failure to agree with claimant and his characterization of claimant as argumentative did not present claimant with a situation of such gravity that he had no reasonable alternative but to quit. Similarly, while the supervisor's tone and use of foul language was rude, claimant failed to show that he had been subjected to abuse, name-calling, threats of harm, or similar treatment that might amount to a grave situation. Furthermore, claimant failed to show that use of foul language or the occasional rude or sarcastic remark was atypical at the workplace or was not a commonplace feature of claimant's communication style with the supervisor. As such, claimant voluntarily left work without good cause to the extent he resigned for these reasons.

For the reasons discussed above, claimant voluntarily quit work without good cause and is disqualified from receiving unemployment insurance benefits effective July 23, 2023.

DECISION: Order No. 24-UI-246396 is affirmed.

S. Serres and D. Hettle;
A. Steger-Bentz, not participating.

DATE of Service: <u>March 20, 2024</u>

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.

Please help us improve our service by completing an online customer service survey. To complete the survey, please go to https://www.surveygizmo.com/s3/5552642/EAB-Customer-Service-Survey. You can access the survey using a computer, tablet, or smartphone. If you are unable to complete the survey online and need 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 – 本判决会影响您的失业救济金。 如果您不明白本判决， 请立即联系就业上诉委员会。 如果您不同意此判决，您可以按照该判决结尾所写的说明，向俄勒冈州上诉法院提出司法复审申请。

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 فورا، 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 دستورالعمل موجود در پایان آن، از دادگاه تجدید نظر اورگان درخواست تجدید نظر کنید.

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