

EMPLOYMENT APPEALS BOARD DECISION
2018-EAB-1191

Affirmed
Disqualification

PROCEDURAL HISTORY: On November 14, 2018, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant voluntarily left work without good cause (decision # 84018). Claimant filed a timely request for hearing. On December 13, 2018, ALJ Meerdink conducted a hearing, and on December 17, 2018 issued Order 18-UI-121358, affirming the Department's decision. On December 27, 2018, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant submitted a written argument that was accompanied by copies of text messages that she allegedly exchanged with the regional manager and others. Claimant tried to offer many of those messages into evidence at the hearing, but they were not admitted because they were not available to the ALJ. Claimant stated she had sent them to the ALJ and the employer in advance of the hearing, but they had either not been received or processed by the Office of Administrative Hearings (OAH) as of the time of the hearing. The employer also stated it had not received those messages by the time of the hearing. However, claimant read at length from the text messages during the hearing without objection by the employer, and stated that she would have liked the ALJ to have seen the texts as a guide to her testimony. Audio at ~15:07, ~15:30, ~16:37, ~17:09, ~18:16, ~24:00, ~29:45, ~42:06.

OAR 471-041-0090(1) (October 29, 2006) allows EAB to receive into evidence exhibits offered, but not admitted at the hearing as necessary to complete the record. EAB has marked the text messages that duplicated the messages that claimant attempted to offer and read from during the hearing as EAB Exhibit 1. EAB has admitted those text messages into evidence because they are needed to complete a full and accurate record. A copy of EAB Exhibit 1 is provided to the parties along with this decision. Any party that objects to the admission of EAB Exhibit 1 into evidence must submit such objection to this office in writing, setting forth the basis for the objection, within ten days of our mailing this decision. Unless such objection is received and sustained, EAB Exhibit 1 will remain in the record.

In its narrative, claimant's written argument also contained other information that was not part of the hearing record, as well as a copies of text messages that claimant did not attempt to offer into evidence at the hearing. However, clamant failed to show that factors or circumstances beyond her reasonable

control prevented her from attempting to offer this new information at the hearing as required by OAR 471-041-0090(2) (October 29, 2006). For this reason, EAB did not consider on review the new information that claimant sought to present for the first time by way of her written argument.

FINDINGS OF FACT: (1) Vision Precision Holdings LLC employed claimant from August 27, 2018 until October 26, 2018.

(2) On September 17, 2018, claimant assumed the position of sales manager at one of the employer's stores. In this position, claimant was expected to train an employee, WH, to become a manager. Claimant and WH had a poor working relationship. Claimant thought WH was aggressive and mistreated customers. On several occasions, claimant complained to the store manager and the regional manager about WH's behavior.

(3) On October 24, 2018, claimant thought WH aggressively acted out when she was discussing work-related matters with him. After that interaction, claimant called the regional manager about how she should handle WH's behavior and the regional manager told claimant to contact claimant's manager, who was the brand manager. After that call concluded and as claimant was leaving the breakroom to walk toward the sales floor, WH walked past claimant on the threshold to the breakroom. WH's body came in close proximity to claimant's body as he entered the breakroom. WH then went into the breakroom, gathered his belongings, and proceeded to go to the sales floor where claimant thought he again misbehaved.

(4) On October 24 at 12:30 p.m., after the incident with WH, claimant sent a text message to the regional manager that described WH as having "almost pushed me out of the way" when entering the breakroom. EAB Exhibit 1. Claimant later had a conference call with the regional manager and the employer's human resources department in which she stated that WH had "brushed her shoulder" as he entered the breakroom. Audio at ~36:33. The employer's human resources department began an investigation of claimant's allegations about WH's behavior. When claimant later spoke with the human resources department during the investigation, claimant described WH as having "shoulder-checked her" as he entered the breakroom on October 24. Audio at ~37:03. Claimant did not tell the human resources department that she was afraid of WH. Before October 24, claimant had not perceived WH as physically aggressive.

(5) On October 25, 2018, claimant was working and WH showed up for a previously scheduled meeting. Claimant sent a text message to the regional manager at 7:54 a.m. that morning asking if she could send WH home because she did not feel "comfortable" working with WH after his behavior the day before. Audio at ~12:30-13:00; EAB Exhibit 1. The regional manager told claimant she could not send WH home because the human resources department had not suspended WH and had not decided on a resolution to claimant's complaints about WH. The meeting was to discuss a customer's complaint that WH had mistreated the customer and the customer's family. In reaction to that discussion, WH stated, "Give him [the customer] my address. I'll show him." Audio at ~20:16. Claimant considered WH's comment threatening toward the customer.

(6) Later on October 25, the human resources department concluded the investigation, and found that claimant and WH had acted unprofessionally in their previous interactions. The human resources

department also decided that although both claimant and WH would be issued warnings, neither would be discharged.

(7) On October 26, 2018, claimant was scheduled to work with WH beginning sometime after 11:00 a.m. That morning at 9:35 a.m., claimant sent a text message to the regional manager asking if there was “any update” on WH because he was scheduled to work that day. EAB Exhibit 1. The text message stated that claimant did not want to work with WH because he was “aggressive” and she was “afraid” of him. Audio at ~17:23; EAB Exhibit 1. The regional manager responded to claimant that HR had investigated the matter, WH was not going to be suspended or discharged, and claimant was required to continue working with him. The regional manager also instructed claimant to call HR if she had any questions or concerns, and provided claimant with HR’s phone number.

(8) Thereafter, claimant did not call the human resources department. Although it was the middle of her workday, she performed the necessary store closing procedures, locked the store, and left shortly after 11:00 a.m., before WH reported for his shift, with the intent not to return to work. On October 26, claimant quit work because she did not want to work with WH. After quitting work, claimant called the manager of the regional manager and complained about WH. That manager did not take action on claimant’s behalf.

CONCLUSIONS AND REASONS: Claimant voluntarily left work without good cause.

A claimant who leaves work voluntarily is disqualified from the receipt of benefits unless she proves, by a preponderance of the evidence, that she had good cause for leaving work when she 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 her employer for an additional period of time.

It was obvious from the record that claimant disliked working with WH. However, claimant contended that she left work when she did on October 26 because WH had physically “shoulder-checked” into her on October 24 and thereafter she was afraid to work with him, as she was scheduled to do on October 26. Audio at ~11:20, ~43:26. However, claimant did not initially characterize WH’s behavior on October 24 as involving aggressive or threatening physical contact. When first describing to the regional manager what WH had done shortly after the interaction with WH, claimant stated only that WH “almost pushed me out of the way;” when describing it later the same day to the human resources department, it became WH having “brushed her shoulder;” and when describing it a second time to the human resources department, apparently during its investigation, it had intensified to become WH “shoulder-checked” her. EAB Exhibit 1; Audio at ~36:33; Audio at ~37:03. The escalating pattern of claimant’s descriptions over time suggests embellishment and casts doubt on the accuracy of claimant’s later descriptions. It does not make sense that claimant would initially misreport the nature of the contact to the regional manager with whom she had been sharing her complaints about WH since September 17, and characterize it as less extreme than it actually was. Exhibit 1. It also does not make sense claimant could confuse a “shoulder-check” with no contact or with a “brush.” Given claimant’s conflicting

evidence about what happened on October 24 and whether WH was physically aggressive, claimant did not meet her burden to show, more likely than not, that WH “shoulder-checked” her, deliberately made physical contact with her body, or was physically aggressive. A reasonable and prudent person, under the circumstances claimant initially described, would not have objectively considered WH a physical threat to her safety, would not have been afraid of him, and would not have left work because she perceived a threat to her safety.

While claimant might have disliked WH’s work style, aside from her contentions about WH having “shoulder-checked her” claimant did not describe other circumstances that, if proved, a reasonable and prudent person would have considered objectively grave. Claimant did not meet her burden to show good cause for leaving work when she did. Claimant is disqualified from receiving unemployment benefits.

DECISION: Order No. 18-UI-121358 is affirmed.

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

DATE of Service: February 1, 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 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 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 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 محكمة 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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