

EMPLOYMENT APPEALS BOARD DECISION
2019-EAB-0006

Affirmed
Disqualification

PROCEDURAL HISTORY: On November 6, 2018, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant voluntarily left work without good cause (decision # 71241). Claimant filed a timely request for hearing. On December 7, 2018, ALJ L. Lee conducted a hearing, and on December 12, 2018, issued Order No. 18-UI-121114, concluding that claimant voluntarily left work without good cause and modifying the disqualification date to September 23, 2018. On December 31, 2018, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant submitted written argument to EAB. Claimant's written argument contained new information about action the state and employer took to correct inadequate staffing levels at the employer's nursing home after claimant left work. Claimant offered that information to reinforce her testimony at hearing regarding the gravity of the working conditions at the nursing home. OAR 471-030-0090(2) (October 29, 2006) provides, in relevant part, that EAB will only consider new information that is material to EAB's determination. Because EAB determined that claimant faced a grave situation at work due to inadequate staffing based on the hearing record, it is not necessary for EAB to consider the new information provided in claimant's argument. The new information is not therefore material to EAB's decision, and EAB did not consider it in making this decision. EAB considered the rest of claimant's written argument to the extent it was based on the hearing record.

FINDINGS OF FACT: (1) Regency Pacific Management employed claimant from November 14, 2016 until September 27, 2018 as a charge nurse at the employer's nursing home.

(2) Claimant normally worked 32 hours per week, including Fridays from 6:00 a.m. to 2:00 p.m., and Saturdays and Sundays from 7:00 a.m. to 7:00 p.m. The nursing home where claimant worked usually had 28 to 32 residents. The director of nursing services was claimant's supervisor.

(3) Claimant was dissatisfied with her working environment because the nursing home was often understaffed during claimant's shifts. The employer used a staffing agency as a resource for additional staff when it did not have enough of its own employees to work. The nursing home administrator was supposed to call the agency if additional staff was needed, but often failed to do so. Claimant sometimes called the staffing agency herself when there was inadequate staff for the weekend. Claimant complained repeatedly throughout her employment to her supervisor and administrator about the inadequate staffing.

(4) During September 2018, the employer began a new system where one employee was in charge of calling the staffing agency to request additional weekend staff if it appeared as though the nursing home would be short-staffed with its regular employees. Also during September 2018, the administrator and the director of nursing services went to the nursing home on the weekend when it was short-staffed, but claimant believed their presence was not useful because they did not perform resident care.

(5) Claimant was also dissatisfied with her working environment because the nursing home would run short on supplies such as sterile gloves, causing claimant to have to search for sterile gloves to use for patient care. On September 1, 2018, claimant began a supply list, but noticed the employer failed to purchase the items for two weeks. The employer purchased the gloves from Amazon two weeks later because its regular supplier did not have the gloves in stock.

(6) Claimant was also dissatisfied because the residents' medication prescriptions were not refilled before claimant's weekend shifts. Due to inadequate staff, the nurses did not have time to complete orders for medication, including narcotics for patients in chronic pain. Claimant "barely had time" to follow up on the orders for narcotics because she was assisting residents. Transcript at 19.

(7) On or about September 1, 2018, claimant yelled at an aide to come help her with changing the bedding on a resident's bed. The aides had failed to check the resident all day, and the resident's bedding was soaked with urine. Claimant felt frustrated at the time because the nursing home was short-staffed and the aide was joking with a resident rather than working.

(8) On Friday, September 14, 2018, the administrator and claimant were looking at the staff scheduled for the day. The administrator commented to claimant, "[T]he [staffing] board looks good," because there were sufficient staff scheduled to work that day. Transcript at 26. Claimant replied, "[Y]eah, it does today. I would imagine we won't have that many this weekend." Transcript at 26. Claimant noted that the administrator appeared displeased with claimant's response.

(9) Later on September 14, 2018, the administrator called claimant into his office and gave her a written reprimand. He told her the reprimand was for displaying a poor attitude at work and because some aides had complained about how claimant treated them. Claimant's supervisor was present at the meeting. The administrator told claimant that it was her "first and final warning," and that he was displeased with the "attitude" claimant exhibited when she made the comment about staffing earlier that day. Transcript at 26, 32. The administrator also told claimant that an aide had complained that claimant yelled at her.

Claimant presumed the complaint came from the aide she had yelled at to help her on September 1, 2018.

(10) Claimant responded to the warning by stating that she was going to resign. Claimant's supervisor told claimant, "[N]o, no, no, no. You come back. Go take a break and come back and talk to me." Transcript at 27. Claimant spoke with the supervisor after a break and the supervisor asked claimant not to leave work because the employer needed her. Claimant agreed not to resign. The supervisor gave claimant the rest of the day off work as a sick day.

(11) As claimant was leaving the nursing home on September 14, 2018, she saw that a state employee entered the nursing home. Claimant understood that she was there in response to a complaint regarding staffing in the nursing home. Claimant did not speak with the state employee. A coworker gave claimant the state employee's telephone number.

(12) On September 15, 2018, claimant returned to work. She noted that there were too few staff people on duty. Claimant never spoke with the state employee who arrived to investigate the complaint on September 14.

(13) Claimant was scheduled to work September 28 through 30, 2018. On September 27, 2018, claimant's supervisor called her and told her that a staff person from the staffing agency used by the employer had reported to the agency that they had witnessed claimant yelling at a resident. The supervisor told claimant that the employer would not report the incident of alleged abuse if claimant resigned. The supervisor did not tell claimant that the employer would discharge claimant if she chose to continue working. The supervisor also promised to pay claimant her accrued vacation time and provide a good recommendation if claimant resigned.

(14) Claimant recalled that she had spoken to the resident in a "stern" voice before, but had not yelled at the resident. Transcript at 50-51. Claimant did not believe that the complaint against her would be substantiated, but did not want to undergo the complaint investigation. Claimant also feared that if she continued to work in the employer's understaffed working environment, she might make a mistake that could affect her nursing license and a resident's safety. On September 27, 2018, claimant resigned by telling the supervisor that she resigned. She considered her verbal resignation effective immediately.

(15) On September 28, 2018, claimant sent her supervisor a text message to confirm that the employer would pay her accrued vacation and provide a good recommendation. The supervisor asked claimant to provide her resignation in writing, "to keep all things clear," and assured claimant that the employer would provide the vacation pay and letter of recommendation. Exhibit 5, pages 1-2, 5. Claimant responded that she "thought [she] had already resigned when [she and the supervisor] were talking on the phone [on September 27]," and stated that she would provide the letter the next morning. Exhibit 5, page 3.

(16) Also on September 28, 2018, claimant called the nursing home to speak with the staff she had worked with there. They told claimant that the nursing home was understaffed again that day.

(17) On September 29, 2018, claimant sent her supervisor an email containing a written letter of resignation and requesting paid sick leave for September 28, 29 and 30. Exhibit 6, page 1. The email

stated that claimant would have someone else turn in the sick leave forms and that claimant “did not plan on entering the building because it would be “too hard on me.” Exhibit 6, page 1. The resignation letter stated that claimant’s resignation was effective October 1, 2018 and “due to unsafe and intolerable working conditions.” Exhibit 6, page 2. Claimant became nervous when the supervisor did not respond again about the vacation pay and letter of recommendation and believed the supervisor may have disliked claimant’s stated reason for resignation.

(18) On September 30, claimant gave her supervisor a revised letter of resignation that did not state a reason for her resignation, but still stated that her resignation was effective October 1, 2018. Exhibit 6, page 2. The employer denied claimant’s request for sick leave pay for September 28, 29 and 30.

CONCLUSIONS AND REASONS: We agree with the ALJ and conclude claimant voluntarily left work without good cause.

Claimant voluntarily left work because she did not want to undergo an investigation regarding a complaint of alleged abuse against a resident. Claimant also alleged that she left work to avoid returning to a working environment where the inadequate staffing increased the risk that claimant might make an error that could affect her license or a resident’s safety. Although claimant believed the allegation of abuse against the resident was “trumped up,” she did not dispute that she resigned. Transcript at 61. The parties’ view of the work separation is consistent with the definition of a voluntary leaving under OAR 471-030-0038(2) (January 11, 2018).

However, the first issue is to determine the date of claimant’s work separation. Claimant testified that she “thought [she] had resigned on [September 27, 2018] verbally on the phone with [her supervisor].” Transcript at 20. The record shows claimant was not willing to continue working after that date. See OAR 471-030-0038(2)(a). Although she called the workplace to speak with her coworkers on September 28 and learned that the employer was understaffed that day, the record does not show that claimant was willing to report to work that day. When the supervisor asked for a letter of resignation on September 28, claimant stated her “effective” date of resignation was October 1, 2018, so that she could ask for sick leave pay for September 28, 29 and 30. Claimant’s attempt to change her resignation date does not show she was willing to continue working for the employer the weekend of September 28, just that she wanted sick leave for those days. The employer denied claimant’s request for sick leave. Despite claimant’s attempt to change the effective date of her resignation, her voluntary leaving occurred on September 27, 2018, when claimant resigned verbally. The record does not show that the parties subsequently agreed to a later date of resignation.

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). 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.

Claimant testified that despite the working conditions she had not quit before the complaint incident on September 27 because she liked the work schedule, hoped the employer would hire additional staff, and liked the residents of the nursing home. Transcript at 63. Claimant testified that until she was informed of the abuse allegation on September 27, she was planning to work on September 28, and “continue to hope that things [would] get better.” Transcript at 63. Thus, although claimant was dissatisfied with her working conditions at the nursing home, the incident that prompted claimant to leave work when she did was the complaint of abuse from a temporary staff person who alleged that claimant yelled at a resident. Claimant was confident that a state investigation would not find that she had abused a resident, but did not want to undergo a state investigation for abuse of a resident. Claimant testified that she believed the allegation of abuse, like the reprimand she received on September 14, was retaliation for claimant having complained about working conditions. Transcript at 27, 51, 66. However, the record does not show that the September 14 discipline or September 27 allegation of abuse, or the employer’s statements about referring the complaint to the state for investigation, were retaliatory or designed to force claimant to quit. The September 14 reprimand was based on incidents that claimant identified, and claimant admitted to having been “snarky” and “short” in her conduct. Transcript at 43, 68. Claimant’s supervisor also asked claimant not to quit when claimant initially stated she would resign on September 14. Nor does the record show that the allegation of claimant yelling at a resident was designed to force claimant to quit. The supervisor did not state that the employer would discharge claimant if she did not quit, thus the record shows that claimant had the option of continuing to work despite the allegation of abuse. The record does not show that an investigation itself would have posed a situation of such gravity that no reasonable and prudent person would have continued to work for her employer for an additional period of time, nor did claimant show that she had good cause to quit work on September 27 because of the allegation of abuse.

Assuming claimant quit, in part, due to the ongoing staffing problem and related problems with inadequate supplies and medication at the nursing home, claimant showed that she faced a grave situation at work. Claimant complained repeatedly about the problems to the nursing home administrator and the director of nursing. The employer made some changes in September 2018 to improve the weekend staffing at the nursing home by having one person assigned to contact the staffing agency each weekend, and having the administrator and director of nursing work on weekends. However, the record shows those changes did not correct the weekend staffing shortages because staffing was still inadequate the weekend claimant left work. However, rather than quitting when she did, claimant had the reasonable alternative, and obligation as a mandatory reporter, of reporting her concerns regarding staffing, medication and supplies to the Department of Human Resources. Claimant testified regarding an incident she witnessed that probably qualified as neglect that claimant should have reported to the state.¹ Claimant’s testimony also implied other incidents of neglect.²

Claimant had the opportunity to speak with a state representative on September 14 about inadequate staffing at the nursing home, without claimant herself initiating the complaint, when a state surveyor visited the nursing home. Claimant chose not to speak to the state representative at that time because it was “awkward,” and claimant was “not the one who wanted to leave my job.” Transcript at 48.

¹ Claimant testified regarding an incident she witnessed where the staff did not check a resident “all day long” and the resident had not been changed “all day” after being incontinent. Transcript at 34, 66.

² Claimant testified that she did not have narcotics when she arrived for her shift for three residents who required narcotics for chronic pain. Transcript at 13.

However, claimant had the representative's telephone number and could have called the representative to discuss her concerns, especially when the staffing problem continued after the representative's visit on September 14, but chose not to do so. Thus, to the extent claimant left work because of the inadequate staffing at the nursing home, claimant did not show that no reasonable and prudent person would have continued to work for her employer for an additional period of time without first reporting the inadequate staffing to the state and providing the state with her information regarding that matter.

Claimant did not show good cause for leaving work when she did. Claimant is disqualified from receiving unemployment insurance benefits.

DECISION: Order No. 18-UI-121114 is affirmed.

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

DATE of Service: February 6, 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

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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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