

EMPLOYMENT APPEALS BOARD DECISION
2019-EAB-0303

Reversed ~ Revocada
No Disqualification ~ No Descalificación

PROCEDURAL HISTORY: On December 4, 2018, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant voluntarily left work with good cause (decision # 75535). The employer filed a timely request for hearing. On February 19 and March 6, 2019, ALJ Scott conducted a hearing, and on March 13, 2019, issued Order No. 19-UI-126327, concluding claimant voluntarily left work without good cause. On March 25, 2019, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) JP Morgan Chase Bank employed claimant from November 14, 2016 until November 15, 2018 as a bank teller. The employer has 15 or more employees.

(2) Claimant processed bank transactions for customers at her assigned teller service window in the employer's bank. Claimant had venous insufficiency, which limited her ability to stand continuously throughout her shift. Exhibit 1. Claimant also had told her branch manager that she had a history of a kidney transplant. Until July 26, 2018, claimant used a chair at her teller window and was able to perform her duties. On July 26, the employer sent the chair to another bank branch. Claimant did not have a chair to use at her teller window and began to experience frequent pain in her leg from standing continuously while working.

(3) In early September 2018, claimant told the branch manager about the leg pain she was experiencing. The manager told her she could use a small chair the bank used for moving items in the branch. The chair was lower than the bank counter and too low for claimant to see out of her teller window. Claimant asked for a high chair like the chair her branch had sent to the other branch in July 2018. The manager told claimant to submit a request for a "medical accommodation." Transcript (March 6, 2019) at 10.

(4) Sometime between September 7 and September 21, 2018, claimant gave the lead teller at her branch a letter from her doctor stating that due to medical reasons including venous insufficiency, she requested a chair to use during her shifts. Exhibit 1. The lead teller told claimant to send the request to human resources. On September 21, 2018, claimant sent her request to the employer's human resources and its

department of resources for the disabled. Human resources told claimant that the employer would provide a chair, and that it would communicate with claimant's branch manager about the chair. On September 27, 2018, the employer approved the chair request. Typically, a special order for equipment took "up to a month" to receive. Transcript (March 9, 2019) at 11.

(5) On October 2, 2018, claimant had a shortage of \$2,100 in her cash box at the end of her shift. The employer began an investigation to discover the cause for the shortage. Claimant was dissatisfied that the branch manager did not assist her with reviewing videotape to see what caused the loss.

(6) After she requested the chair from human resources, claimant asked the branch manager most days she worked if he knew when she would receive the chair. Claimant contacted human resources about the chair and they told her to talk with the bank manager about the chair. The manager never told claimant when she would receive the chair. After asking about the chair on numerous occasions, claimant asked the branch manager if she could purchase a chair and bring it to work. The branch manager told claimant the employer would not authorize her to purchase her own chair.

(7) Claimant experienced pain that was "intolerable" in her leg from standing continuously while working. Transcript (February 19, 2019) at 10-11.

(8) Claimant asked the branch manager repeatedly for information about the employer's investigation about the October 2 cash shortage. The branch manager told claimant that the employer could discharge her because of the cash shortage. Claimant had never received any warnings or been disciplined by the employer.

(9) The bank branch where claimant worked had a window to serve disabled customers that was lower than the other teller windows. A teller could use a lower chair at that lower window. Claimant did not ask the employer to assign her to that teller window. The employer did not offer to assign claimant to work at the lower teller window.

(10) On November 15, 2018, claimant had a discussion with the branch manager about the October 2 shortage. Claimant understood from the discussion that if she did not quit work, the employer would discharge her. As of November 15, 2018, the employer had not received the chair it had ordered, or otherwise provided claimant with a chair she could use at her teller window, or communicated with claimant about when the chair was expected to arrive or whether she needed a different accommodation until the chair arrived.

(11) On November 16, 2018, claimant voluntarily left work because the employer failed to provide a chair for her to use at her teller window, and to avoid a potential discharge for the October 2, 2018 cash shortage.

(12) In January 2019, the branch manager investigated what happened to the chair the employer had ordered for claimant, and learned that it was unavailable because it was backordered by the manufacturer.

CONCLUSIONS AND REASONS: Claimant voluntarily left work with 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 P2d 722 (2010). Claimant had venous insufficiency, a permanent or long-term “physical impairment” as defined at 29 CFR §1630.2(h). A claimant with such impairment who quits work must show that no reasonable and prudent person with the characteristics and qualities of an individual with such impairment would have continued to work for the employer for an additional period of time.

The order under review concluded that claimant quit work due only to the employer’s failure to provide her with a chair by November 15, 2019, and that she did not have good cause to quit for that reason.¹ The order concluded that claimant’s medical condition created a grave situation, and that claimant pursued a reasonable alternative to quitting by requesting a chair as a reasonable accommodation.² However, the order also concluded that the employer took “reasonable steps” to accommodate claimant, and that claimant “did not pursue any other temporary alternatives while she waited for the chair.”³ The order concluded that asking to use the lower teller window and a lower chair was a reasonable alternative that claimant should have pursued instead of leaving work when she did, reasoning that the language of OAR 471-030-0038(4) (that a reasonable and prudent person of normal sensitivity, exercising ordinary common sense, would have no reasonable alternative but to leave work) implied that it was claimant’s responsibility to pursue reasonable alternatives and not the employer’s obligation to offer them.⁴ However, the record does not support those conclusions.

The record contains conflicting evidence about whether the branch manager told claimant to quit if she wanted to avoid being discharged, or if the manager merely told claimant that the October 2 shortage in claimant’s cash box could potentially result in discharge. Transcript (March 6, 2019) at 6-7, 27-28, 36. However, despite the inconsistent testimony, the record shows that claimant left work in part to avoid being discharged because of the October 2 cash shortage. To the extent claimant quit work to avoid discharge, the record does not show that claimant quit work with good cause. Even had the branch manager told claimant she was about to be discharged due to the cash shortage, the record does not show her potential discharge would have been for misconduct, because there was no evidence she was consciously indifferent to the employer’s expectations, or even aware she engaged in conduct that caused the outage. Because claimant had no prior discipline, viewed objectively, claimant’s discharge was not inevitable. Nor does the record show that being discharged would have been a particularly onerous burden, either specifically for herself or generally for individuals in her profession. The record

¹ Order No. 19-UI-126327 at 4-5.

² *Id.* at 4.

³ *Id.* at 5.

⁴ *Id.* at 4-5.

does not show that the possibility of being discharged was such a grave situation that no similarly situated reasonable and prudent person with the characteristics and qualities of claimant's impairment would have continued working for the employer for an additional period of time.

However, claimant also left work because the employer failed to provide a reasonable accommodation for claimant's medical condition, and the record shows it is more likely than not that claimant had good cause to quit when she did. Based on this record, it appears that as of the time that claimant left work, the employer was violating Title I of the Americans with Disabilities Act of 1990 (ADA)⁵ and Oregon disability law requiring the employer to engage in an interactive process to provide reasonable accommodation to claimant to enable her to perform her teller duties equally with the other tellers.

The ADA and Oregon disability law require an employer to provide reasonable accommodation to a qualified employee with a disability⁶, unless to do so would cause undue hardship.⁷ Once a qualified employee requests an accommodation, the employer has a mandatory obligation to engage in an interactive process with the employee to identify and provide appropriate reasonable accommodations that are effective in enabling the employee to perform the employee's job duties. *Humphrey v. Memorial Hospitals Association*, 239 F.3d 1128, 1137 (9th Cir., 2001). The interactive process requires communication and good-faith exploration of possible accommodations between employers and individual employees. *Id.* The employer's obligation to engage in the interactive process continues where the employer is aware that the initial attempt to accommodate an employee is failing and further attempts are necessary. *Humphrey* at 1138.

Claimant's physical impairment, venous insufficiency, limited her ability to stand continuously to perform her teller duties. Until July 2018, claimant had used a chair high enough for her to use at her assigned teller window, enabling her to perform her duties such that her branch manager described her as a "model employee." Transcript (March 6, 2019) at 9. After the employer removed the chair from claimant's branch, claimant's leg often "hurt . . . a lot," and the pain became "intolerable." Transcript (February 19, 2019) at 13.

In early September 2018, claimant asked her branch manager for a chair to use while performing her work duties at her teller window. Claimant followed the employer's procedures to provide medical documentation and request the chair from human resources. The employer initiated the interactive process, approved claimant's request, and ordered a chair. The record shows that human resources told claimant it would provide a chair and directed claimant to communicate with her branch manager about the chair, which claimant did "almost all of the days" that she worked. Transcript (February 19, 2019) at 10. Claimant thus fulfilled her obligation to notify the employer that she needed accommodation and to engage with the employer as required, consistent with how a reasonable and prudent person in need of accommodation would likely act under similar circumstances. However, despite asking her branch manager repeatedly about the status of the chair and the passage of two months since her initial request

⁵ 42 U.S.C. Sec. 12101-12117, 12201-12213 (1994).

⁶ A qualified individual with a disability is defined as an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds." *Dunlap v. Liberty Natural Products*, 878 F.3d 794, 799 (9th Cir., 2017) (citation omitted).

⁷ 42 U.S.C. Sec. 12112(b)(5)(A).

for accommodation, the employer did not provide the chair, inform claimant when she would receive the chair, find a different chair, or continue the interactive process with claimant to find an appropriate temporary accommodation. Although the delay was due to the manufacturer, and not the employer, after the normal time to receive the chair had passed, the employer knew or should have known that its initial attempt to provide a chair was not succeeding, triggering a duty on the employer's part to explore further arrangements to reasonably accommodate claimant's condition. The employer did not do so. The record does not show that the chair was so specialized that the employer could not have ordered it from another source. The employer could have continued the interactive process and, for example, attempted to purchase the chair elsewhere, permitted claimant to purchase her own chair, or offered the alternative of assigning claimant to the lower teller window used to serve disabled customers. On this record, it appears that the employer's failure to continue the interactive process with claimant to provide a reasonable accommodation amounted to a violation of the ADA.

The Oregon courts and EAB have consistently held that employees are not required to endure oppressive and unlawful employment practices to avoid being disqualified from unemployment benefits for leaving work without good cause, particularly where the oppressive or unlawful practices are likely to be ongoing and persistent. *See McPherson v. Employment Division*, 285 Or 541, 557, 591 P2d 1381 (1979) (claimants not required to remain working in an ongoing oppressive work environment to avoid being disqualified from benefits due to a voluntary leaving); *J. Clancy Bedspreads and Draperies v. Wheeler*, 152 Or App 646, 954 P2d 1265 (1998) (employer's persistent, ongoing unlawful working conditions may constitute good cause for leaving working without claimant's attempt to obtain voluntary employer compliance with the law). On this record, the employer's failure to engage in an interactive process and provide a reasonable accommodation after placing the initial chair order was likely an oppressive situation or unlawful employment practice. Based on the lack of response claimant received from the branch manager and human resources, the circumstances were also likely ongoing. No reasonable and prudent person in claimant's position would have opted to remain at work and endure an unlawful practice. Nor would a reasonable and prudent person with claimant's condition have considered continuing to follow up with the employer while waiting indefinitely for a job accommodation and experiencing "intolerable" pain at work a reasonable alternative to leaving work due to the lack of accommodation. Therefore, claimant had good cause to leave work when she did.

Claimant had good cause to leave work when she did. Claimant is not disqualified from receiving unemployment insurance benefits based on this work separation.

DECISION: Order No. 19-UI-126327 is set aside, as outlined above. *La Orden de la Audiencia 19-UI-126327 se deja a un lado, de acuerdo a lo indicado arriba.*

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

DATE of Service: May 2, 2019

NOTE: This decision reverses an order that denied benefits. Please note that payment of benefits, if any are owed, may take approximately one week for the Department to complete.

***NOTA:** Esta decisión revoca una orden judicial que negó beneficios. Por favor tenga en cuenta que, si le deben beneficios, el Departamento puede tomar aproximadamente una semana para pagar esos beneficios.*

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.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.

***NOTA:** Usted puede apelar esta decisión presentando una solicitud de revisión judicial ante la Corte de Apelaciones de Oregon (Oregon Court of Appeals) dentro de los 30 días siguientes a la fecha de notificación indicada arriba. Ver ORS 657.282. Para obtener formularios e información, puede escribir a la Corte de Apelaciones de Oregon, Sección de Registros (Oregon Court of Appeals/Records Section), 1163 State Street, Salem, Oregon 97310 o visite el sitio web en courts.oregon.gov. En este sitio web, hay información disponible en español.*

Por favor, ayúdenos mejorar nuestros servicios por llenar el formulario de encuesta sobre nuestro servicio de atención al cliente. Para llenar este formulario, puede visitar <https://www.surveymonkey.com/s/5WQXNJH>. Si no puede llenar el formulario sobre el internet, puede comunicarse con nuestra oficina para una copia impresa de la encuesta.



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 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
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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.