

EMPLOYMENT APPEALS BOARD DECISION
2019-EAB-0360

Affirmed
No Disqualification

PROCEDURAL HISTORY: On February 6, 2019, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant but not for misconduct (decision # 154151). The employer filed a timely request for hearing. On March 18, 2019, ALJ Shoemake conducted a hearing, and on April 4, 2019, issued Order No. 19-UI-127608, concluding claimant voluntarily left work with good cause. On April 10, 2019, the employer filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Lakeview Senior Living, an assisted living and memory care facility for seniors, employed claimant as a medication aide from December 19, 2018 to January 9, 2019.

(2) Claimant suffered from sciatica since 2016, when she was first treated for the condition. When “triggered,” the condition left her unable to walk. Audio Record ~ 21:30 to 22:30. When claimant applied for employment with the employer, she only applied for work as a medication aide, which was less physically demanding than work as a caregiver. Caregiver work required the ability to “toilet, shower, change and physically [handle] residents” up to eight hours per day, which claimant was unable to do because of her sciatica. Audio Record ~ 21:30 to 22:30.

(3) On January 8, 2019, while still in training, claimant made a medication error by administering insulin to a resident that was not supposed to receive insulin. The resident had to be admitted to intensive care at a local hospital as a result. Before she left work that day, claimant left her supervisor a note that stated, “I’m guessing you don’t want me back Wednesday. I am terribly sorry for the incident with [the resident]. This is not good at all. Best regards....” Audio Record ~ 9:40 to 9:55.

(4) On January 9, 2019, the supervisor contacted claimant and told her that although the employer would not allow her to work as a medication aide any longer, it would allow her to continue to work as a caregiver. Claimant declined that position because she was unable to perform its required duties. However, claimant did not disclose her sciatica condition to the employer, and did not request an accommodation for her condition to enable her to perform caregiver work.

CONCLUSIONS AND REASONS: Claimant voluntarily left work with good cause.

Work Separation. The first issue is the nature of the work separation. If the employee could have continued to work for the same employer for an additional period of time, the work separation is a voluntary leaving. OAR 471-030-0038(2)(a) (December 23, 2018). If the employee is willing to continue to work for the same employer for an additional period of time but is not allowed to do so by the employer, the separation is a discharge. OAR 471-030-0038(2)(b).

Claimant believed that she was discharged on January 9, 2019, when the employer told her that it would no longer allow her to work as a medication aide because of her medication error on January 8, 2019. Audio Record ~ 13:00 to 14:00. The Department also concluded that the work separation was a discharge after finding that claimant was “fired” on January 9, 2019. Decision # 154151. However, “work” means the continuing relationship between an employer and employee, and is not defined in terms of the particular position held by an individual. OAR 471-030-0038(1)(a). Claimant admitted that on January 9, 2019, the employer offered her the opportunity to continue to work for the employer as a caregiver instead of as a medication aide and that she declined that opportunity. Audio Record ~ 19:30 to 21:30. Because claimant could have continued to work for the employer for an additional period of time in a different position but was unwilling to do so, the work separation was a voluntary leaving.

Voluntary Leaving. A claimant who leaves work voluntarily is disqualified from the receipt of benefits unless the individual proves, by a preponderance of the evidence, that the individual had good cause for leaving work when she or he 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). Claimant had suffered from sciatica since 2016, likely a permanent or long-term “physical or mental impairment” as defined at 29 CFR §1630.2(h). A claimant with that 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.

Order No. 19-UI-127608 concluded that claimant quit work with good cause, reasoning that “quitting her job because she could not physically perform it amounted to a situation so grave as to leave her with no reasonable alternatives but to quit.” Order No. 19-UI-127608 at 2-3. The record supports this conclusion because the preponderance of the evidence in the record shows that the employer had only caregiver work available to claimant, which claimant was physically incapable of performing, and there was no evidence that any employer accommodation could have made it possible for claimant to perform caregiver work. Accordingly, disclosing her sciatica and requesting accommodations likely would have been futile rather than likely to result in reasonable alternatives to quitting.

ORS 657.190 provides that in determining whether any work is suitable for an individual, the Department shall consider, among other factors, “the degree of risk involved to the health, safety and morals of the individual...as well as their... physical fitness and prior training, [and] experience.” The nature of the employer’s caregiving work, which required the ability to “toilet, shower, change and physically [handle] residents” up to eight hours per day was not work that claimant was physically capable of performing given her sciatica, which when “triggered,” left her unable to even walk.

Accordingly, performing such work would have created a substantial degree of risk to claimant's health and safety. More likely than not, the nature of the employer's caregiving work was unsuitable for claimant and, for that reason as well, left her with no reasonable alternative but to quit when she did.

When the ALJ asked the employer if it had any position besides a caregiver position to offer claimant, the employer's witness responded that she was "not sure." Audio Record ~ 26:20 to 26:45. Accordingly, an option other than a caregiver position was, at best, only speculative at the time claimant quit. For that reason, there is insufficient evidence in this record to establish that a transfer to a different, less physically demanding position was an available and reasonable alternative for claimant. *See Gonzales v. Employment Department*, 200 Or App 547, 115 P3d 976 (2005) (evidence insufficient to show claimant's possible transfer to a different job was a reasonable alternative when no evidence that employer actually checked and confirmed that such a job was available and that claimant was qualified and capable of performing that job). Nor was there any evidence on this record that the employer could have accommodated claimant's sciatica condition by eliminating the toileting, showing, changing, and other physical aspects of caregiving work had she requested such an accommodation.

Viewing the record as a whole, claimant demonstrated that her circumstances were grave and that, when she quit work, no similarly situated reasonable and prudent person with the characteristics and qualities of an individual with her impairment would have concluded that there was a reasonable alternative to quitting. Claimant voluntarily left work with good cause is not disqualified from receiving unemployment insurance benefits based on this work separation.

DECISION: Order No. 19-UI-127608 is affirmed.

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

DATE of Service: May 17, 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 بمحكمة 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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