

EMPLOYMENT APPEALS BOARD DECISION
2019-EAB-0379

Affirmed
Disqualification

PROCEDURAL HISTORY: On March 8, 2018, Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant voluntarily left work without good cause (decision # 132208). On March 12, 2019, the Oregon Employment Department (the Department) served notice of an administrative decision replacing decision # 132208 that also concluded claimant voluntarily left work without good cause (decision # 91417). Claimant filed a timely request for hearing on decision # 91417. On March 28, 2019, ALJ S. Lee conducted a hearing, and on April 8, 2019 issued Order No. 19-UI-127751, affirming the Department's decision. On April 17, 2019, claimant filed an application for review with the Employment Appeals Board (EAB).

The employer submitted a written argument, but failed to certify that it provided a copy of the argument to the other parties as required by OAR 471-041-0080 (October 29, 2006). The argument also contained information not offered into evidence during the hearing, and the employer did not show, as required by OAR 471-041-0090 (October 29, 2006), that factors or circumstances beyond its reasonable control prevented it from doing so. For these reasons, EAB did not consider the employer's argument or the new information in it when reaching this decision.

FINDINGS OF FACT: (1) Newport Ave Market & Alpine Foods employed claimant from March 10, 2018 until December 27, 2018, last as grocery freight clerk.

(2) Claimant liked working as a freight clerk because her work hours were from 7:00 a.m. until 3:30 p.m., which allowed her to fulfill her personal obligations of assisting an elderly woman and taking care of her duties as a dog breeder.

(3) Sometime before November 13, 2018, claimant was diagnosed with skin cancer and was scheduled to receive treatments for that condition. Around that date, claimant submitted a physician's certification for a leave due to a serious health condition. The physician's certification stated that claimant was not incapacitated for continuous period and did not need to be absent from work, but she required a reduced work schedule of six to eight hours per day for four days per week from November 13, 2018 through January 13, 2019. The certification also stated that claimant might need to miss some work due to

medical appointments. The certification further stated that claimant would need light duty work or more frequent breaks during the period she was on a reduced work schedule. On November 17, 2018, the employer authorized claimant's reduced work schedule under the Oregon Family Leave Act (OFLA).

(4) Between November 17 and December 13, 2018, claimant sometimes called in sick due to treatments for skin cancer that she was receiving and sometimes needed to leave work early due to pain. When claimant was unable to perform freight clerk work or able to work only reduced hours as a freight clerk, the employer had difficulty finding other employees to provide coverage and get all the necessary freight clerk work done.

(5) On December 13, 2018, claimant met with the general manager and another member of management, who told claimant that the employer wanted to move her to a cashier position. At that time, the employer had already assigned another employee to work as freight clerk in place of claimant. The employer wanted to change claimant to a position that was less strenuous than that of freight clerk because, on occasion, the freight position required heavy lifting that the employer was concerned she might not be able to accomplish while receiving treatment. The employer also claimant to work as a cashier because it would be easier for the employer to cover claimant's absences if she was a cashier than it was when she was working as the freight clerk. The shifts for the cashier position would begin between 10:00 a.m. and noon and would end between 7:00 p.m. and 9:00 p.m., which would interfere with claimant performing her personal obligation. Claimant told the employer representatives that she did not want to change positions and did not want to do cashier work. The general manager told claimant they would talk about returning her to the freight clerk position when her period of being on a reduced work schedule and medical restrictions ended. Claimant thought that the employer was not ever going to let her return to work as a freight clerk.

(6) Sometime on or around December 13, 2018, claimant asked to take December 18, 2018 through December 22, 2018 off from work due to skin cancer treatments. The employer approved claimant's request for time off.

(7) On December 17, 2018, claimant was scheduled to work a shift training as a cashier. However, claimant spoke with the lead cashier sometime before December 17 about not working the training shift. Claimant understood the lead cashier to tell her that she did not need to report for the shift on December 17, 2018 because she probably would not retain what she learned on that one shift until she returned to work after December 22, when her current series of cancer treatments had concluded. Claimant understood the lead cashier to mean that the employer was not going to schedule her for further work until after January 13, 2019, the date her reduced schedule under OFLA ended.

(8) On December 26, 27 and 29, 2018, the employer scheduled claimant for work training as a cashier. Claimant called in sick on December 26. Claimant did not report for work on December 27 and did not call the employer about her absence. On December 28, 2018, the general manager called claimant, and left a message for claimant inquiring why she was not reporting for work. Claimant did not receive that message. On December 29 claimant did not report for work and did not call the employer about her absence.

(9) On December 31, 2018, the general manager decided that claimant's failure to report for work or call in for the scheduled shifts on December 27 and 29, and failure to respond to his message of December

28, indicated that claimant had decided to quit work. Around December 31, 2018, the employer sent claimant a letter enclosing her final paystubs and stating the employer had processed a work separation since claimant had not reported for scheduled shifts. Claimant did not contact the employer about the letter or to state that she had not known of the shifts or that she thought no shifts would be scheduled for her until after January 13.

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

The first issue this case presents is the nature of the work separation. Claimant contended that the employer discharged her around December 31, 2018 when it sent her the letter and pay stubs and the employer contended that claimant quit work when she failed without explanation to show up for scheduled shifts on December 27 and 29, 2018. Transcript at 5, 14, 31. The standard for characterizing the work separation is set out at OAR 471-030-0038(2) (December 23, 2018). 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). 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 did not contend that the employer ever stated that she was discharged, fired, terminated or the like. The employer did not contend that claimant ever stated that she was quitting work. However, the employer had transferred claimant to a position she did not want. She did not work any cashiering shifts or begin training. When the employer informed claimant by the letter sent around December 31, 2018 that it interpreted claimant's failure to report for scheduled work without notice as evidencing claimant's intention to quit work, claimant did not respond, notify the employer that the interpretation was incorrect, or indicate she thought she was approved to take time off until her treatment ended. Transcript at 14. Because of this objective manifestation of an intention to quit, claimant's work separation most likely was a voluntary leaving as of December 27, 2018, the first date she failed to report for scheduled work without notice.

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). Claimant had skin cancer, which might be considered a permanent or long-term "physical or mental impairment" as defined at 29 CFR §1630.2(h).¹ 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 her employer for an additional period of time.

¹ The evidence is inconclusive as to whether claimant's condition should be considered an "impairment" within the meaning of the rule, since as described on this record the condition appears to have lasted approximately two months in duration. However, for the sake of this decision, we have assumed *arguendo* that skin cancer is at least a long-term condition that affects the skin, and was thus an "impairment" under 29 C.F.R. §1630.2(h).

Because claimant contended the employer discharged her, she did not provide any clear reasons for leaving work. Based on the record, it appears that claimant disliked that her job duties were changed from freight clerk to cashier, and believed that the employer would not allow her to return to work as a freight clerk after her OFLA certification ended even if she was fit to perform that work and could attend work whenever scheduled. However, the employer established that its business needs necessitated that the employer change claimant's job duties while she was working a reduced schedule under OFLA, by scheduling an employee with the physical capacity and scheduling flexibility necessary to do the freight clerk work, which claimant did not have at the time. While claimant was correct that she had the right to be restored to the freight clerk position or an equivalent position when her period of OFLA certification ended, her OFLA certification period had not ended at the time she quit, and she did not show more likely than not that the employer intended to permanently assign her to cashier duties despite her restorative rights under OFLA. *See* ORS 659A.171(1). In short, claimant did not show that the employer likely was acting in violation of claimant's OFLA protections when it assigned her to work as a cashier during the period in which she was working on reduced schedule and under medical restrictions. The situation was not one of gravity at the time claimant quit.

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

DECISION: Order No. 19-UI-127751 is affirmed.

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

DATE of Service: May 24, 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 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 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 ໄດ້ ໂດຍປະຕິບັດຕາມຄໍາແນະນໍາທີ່ບອກໄວ້ຢູ່ຕອນທ້າຍຂອງຄໍາຕັດສິນນີ້.

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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