

EMPLOYMENT APPEALS BOARD DECISION
2019-EAB-0406

Reversed
No Disqualification

PROCEDURAL HISTORY: On March 1, 2019, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant voluntarily left work without good cause (decision # 80407). Claimant filed a timely request for hearing. On April 2, 2019, ALJ Murdock conducted a hearing at which the employer did not appear, and on April 5, 2019 issued Order No. 19-UI-127709, affirming the Department's decision. On April 25, 2019, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant submitted written argument with her application for review. However, claimant's argument contained information that was not part of the hearing record, and failed to show that factors or circumstances beyond claimant's reasonable control prevented claimant from offering the information during the hearing. Under ORS 657.275(2) and OAR 471-041-0090 (October 29, 2006), EAB considered only information received into evidence at the hearing when reaching this decision.

FINDINGS OF FACT: (1) Stonemor GP LLC employed claimant as a family services counselor from August 20, 2018 until December 19, 2018. Claimant sold prepaid burial arrangements to individuals.

(2) The employer guaranteed that claimant would receive minimum wage for his services, and provided commissions and bonuses to claimant based on sales he generated. If claimant did not receive commissions and bonuses, he experienced financial hardship.

(3) By October 2018, claimant had personally observed that his supervisor, C, was sexually harassing female employees. Claimant thought that the harassed females were too intimidated to report C's behavior to other management or the employer. Ultimately, claimant reported C's behavior to C's supervisor, J. J told claimant that he would address C's behavior. In approximately October 2018, C removed claimant as a counselor to a family that, due to claimant's efforts, had agreed to purchase burial arrangements and handled the purchase himself. As a result, claimant was deprived of the commission that he was due on the sale. Claimant complained to J about C's actions. J assured claimant that such behavior by C would not happen again.

(4) Continuing into November 2018, C continued to sexually harass female employees. Beginning in early November and after, claimant continued to report C's behavior to J. When it did not appear that J had taken steps to control C's behavior, claimant reported C's behavior and J's inaction to J's supervisor, D. Also in November, claimant spent many hours dealing with a large family interested in making a very significant purchase, in the amount of \$50,000. Claimant would earn approximately \$10,000 in commission on that sale. On the morning in late November when the family was going to sign the sales contract in claimant's presence, C sent an email to claimant informing him that he was no longer the counselor to that family, and another counselor had been assigned. As a result, claimant was deprived of the commission that he had earned. Claimant reported what C had done to J and D. Despite J's previous assurance to claimant that such a situation would not recur, J and D appeared to take no direct actions to rectify the situation, but merely told claimant that he needed to contact the human resources department about the situation.

(5) After claimant contacted D about C and J's behavior, C stopped notifying claimant of internet sales leads and walk-ins interested in making purchases. C stopped having claimant attend morning sales meetings. C's actions significantly interfered with claimant's ability to generate sales and earn commission income and bonuses. Claimant perceived the actions of C and J's failure to take action as hostile.

(6) Around late November or early December 2018, claimant contacted the employer's human resources department. Claimant told a human resources representative about C's harassing behavior toward female employees and how C had divested him of commissions in October and November by removing him and assigning another counselor to transactions when the only remaining work was to sign the sales contract. The representative told claimant that she would investigate.

(7) Around early December 2018, the hostility claimant perceived in the work environment intensified. On one occasion, C approached claimant and stated, "I'm tired of your bullshit. I am a lot bigger than you and I can promise you don't want to go down that road." Transcript at 19. Claimant assumed C had become aware of his complaints and was threatening him. Claimant contacted D about C's comment and D told him to report it to the human resources representative.

(8) Claimant reported C's threatening statement to the human resources department. The human resources representative told claimant that she would make it part of the investigation. After making the report to human resources, claimant did not perceive that C or J's hostility toward him was lessening. Claimant thought it likely that he would never receive any commission compensation for the \$50,000 sale he had generated and completed all work on in November. Around this time, claimant contacted the human resources representative about the status of the investigation. The representative told claimant, "[I]t's an investigation. It doesn't happen overnight. It's going to take some time and they're working on it." Transcript at 16.

(9) Sometime around mid-December 2018, claimant decided that he was going to quit work on December 21, 2018 due to the commissions he believed he was owed and was not going to receive, and the hostility he perceived while at work. Subsequently, claimant observed C sexually harassing a new female employee. Claimant thought C was not going to stop behaving inappropriately toward female

employees, or being hostile toward claimant. On December 19, 2018, claimant notified the employer that he was quitting work effective immediately.

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

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

In Order No. 19-UI-127709, it was concluded that claimant voluntarily left work without good cause. The Order first noted that claimant had made reports to the human resources department of his supervisor’s behavior toward female employees that claimant believed was inappropriate as well as the behavior of the supervisor that claimant believed had deprived him of commissions to which he was entitled. Without considering the gravity of claimant’s situation, the Order then concluded that claimant did not show good cause for leaving work because he had “the reasonable alternative to quitting work of permitting the human resources manager to complete her investigation and report to her any ongoing activities by the supervisor that he felt should be added to his complaints.” Order No. 19-UI-127709 at 2. However, the Order is not supported by the record and must be reversed.

At the outset, the employer did not appear at hearing and claimant presented the only evidence on the factors that caused him to quit work. It was unchallenged that C deprived claimant of significant commissions to which he was entitled on two occasions during the four months he was employed, despite the assurances of C’s supervisor after the first time that it would not happen again. It was unchallenged that after claimant reported C’s offensive behaviors and J’s failure to curb them to upper management, C began excluding claimant from sources and activities that would generate sales and commission income for him, thereby likely compounding the financial hardship he experienced from C’s behavior. It was unchallenged that, despite claimant’s complaints about C to J and D, C openly threatened claimant and when claimant reported that threat to D, no direct action was taken by D to halt or temper C’s behavior. Rather, claimant was referred to human resources, and when claimant followed up on the report he had made to human resources, claimant was told the matter was being investigated, but no direct action appeared to have been taken to control C’s behavior toward claimant in the interim. On these facts, the ongoing nature of C’s behavior and the failure of management or human resources to take effective steps to curb that behavior constituted a grave situation for claimant.

While Order No. 19-UI-127709 suggested that claimant should have waited to quit until human resources had finished the investigation of C and reported any additional offensive behavior by C while the investigation was pending, the evidence does not show that human resources was likely to take steps to curb C’s behavior in the interim. No reasonable and prudent person, exercising ordinary common sense, would continue to work indefinitely for an employer where he was subjected on an ongoing basis to behavior that deprived him of significant commission income, excluded him from sales and

commission sources, and threatened him. On these facts, it was not reasonable to expect claimant to continue to work while waiting for the conclusion of a human resources investigation when that delay would subject him to continued harms from C for an indefinite period of time.

Claimant voluntarily left work with good cause. he is not disqualified from receiving unemployment insurance benefits based on his work separation from the employer.

DECISION: Order No. 19-UI-127709 is set aside, as outlined above.

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

DATE of Service: May 31, 2019

NOTE: This decision reverses an order that denied benefits. Please note that payment of any benefits owed may take from several days to two weeks for the Department to complete.

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.

Employment Appeals Board - 875 Union Street NE | Salem, OR 97311
 Phone: (503) 378-2077 | 1-800-734-6949 | Fax: (503) 378-2129 | TDD: 711
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