

EMPLOYMENT APPEALS BOARD DECISION
2019-EAB-0426

Affirmed
Request to Reopen Granted
Disqualification

PROCEDURAL HISTORY: On January 23, 2019, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant quit working for the employer without good cause (decision # 112104). Claimant filed a timely request for hearing. On February 11, 2019, the Office of Administrative Hearings (OAH) served notice of a hearing scheduled for February 25, 2019. OAH sent the notice of hearing to the employer's address of record with the Department. On February 25, 2019, the employer failed to appear at the hearing, and on February 27, 2019, ALJ F. Scott issued Order No. 19-UI-125372, concluding that the employer discharged claimant, but not for misconduct. On March 19, 2019, the employer filed a timely request to reopen the hearing. On April 11, 2019, ALJ Murdock conducted a hearing, and on April 12, 2019 issued Order No. 19-UI-128134, granting the employer's request to reopen and affirming decision # 112104 by concluding that claimant quit working for the employer without good cause. On May 1, 2019, claimant filed a timely application for review of Order No. 19-UI-128134 with the Employment Appeals Board (EAB).

EAB considered the entire hearing record. Claimant submitted written argument but did not certify that she provided a copy of her argument to the other parties as required by OAR 471-041-0080(2)(a) (October 29, 2006). Therefore, EAB did not consider claimant's written argument when reaching this decision.

FINDINGS OF FACT: (1) Padma LLC owned The Dehn Bar and employed claimant from April 2016 until December 30, 2018 as a bartender at The Dehn Bar. Claimant and the owner had been friends for more than 25 years.

(2) On September 20, 2018, claimant's coworker was at The Dehn Bar, not working, and consuming alcohol. The coworker was "betting" patrons in the bar that he could "sleep with" claimant. Transcript (February 25, 2019) at 10. Later, the coworker approached claimant and was "grabbing [claimant] and rubbing himself up against [claimant], and [she] shoved him away." Transcript (April 11, 2019) at 18.

(3) On September 21, 2018, claimant complained to the owner that the coworker had been drinking in the bar on his day off and behaved inappropriately toward claimant. Claimant did not tell the owner that the coworker had touched her. The owner responded that the coworker needed to apologize. The owner told the coworker that his conduct had offended claimant. After the incident, the coworker “was just not speaking to [claimant],” and claimant found it “not pleasant” to work with the coworker. Transcript (April 11, 2019) at 18. Claimant complained about how the coworker was acting toward her and the owner told claimant, “You guys need to work things out.” Transcript (February 25, 2019) at 6. About one month after the incident occurred, the coworker apologized to claimant for his conduct the night of the incident.

(4) On December 30, 2018, claimant saw the employer’s new cook trying to light a kitchen stove in The Dehn Bar. Claimant thought that the stove had not been used in three years and that it might “blow up.” Transcript (April 11, 2019) at 14. Claimant sent a text message to the owner stating, “You cannot just light an oven without having the gas company check it out especially since it hasn’t been lit in over 3 years.” Exhibit 1 (April 11, 2019)¹. The owner replied by text message stating, “Yes you can and it’s not your f-ing problem! Do you call them every time you light your bbq? Worry about making the place better not whining about shit that isn’t your problem!! . . . And actually it was fixed and working 9 months ago. . .” Exhibit 1 (April 11, 2019). Claimant responded, “I quit!” Exhibit 1 (April 11, 2019).

(5) On approximately January 3, 2019, claimant went to The Dehn Bar to get her paycheck. Claimant asked the owner if she could have her job back, and he told claimant she could not have her job back.

(6) The employer’s address of record with OAH was the address belonging to the employer’s owner at 473 Delmar Dr. N, Salem, OR 97303-6017. The employer used that address for government and legal documents. The mailbox at the employer’s address was a regular, unlocked street mailbox at the owner’s home. The owner had experienced mail delivery problems in the past, including one occasion when the owner did not receive a tax bill mailed to the owner’s address.

(7) The employer did not receive the notice of hearing for February 25, 2019 in the mail. The employer learned of the February 25 hearing when it received Order No. 19-UI-125372.

CONCLUSIONS AND REASONS: The employer’s request to reopen the February 11, 2019 hearing on decision # 112104 is granted. Claimant quit working for the employer without good cause.

Request to Reopen. ORS 657.270(5) provides that any party who failed to appear at a hearing may request to reopen the hearing, and the request will be allowed if it was filed within 20 days of the date the hearing decision was issued and shows good cause for failing to appear. “Good cause” exists when the requesting party’s failure to appear at the hearing arose from an excusable mistake or from factors beyond the party’s reasonable control. OAR 471-040-0040(2) (February 10, 2012).

The employer did not appear for the February 11, 2019 hearing because it did not receive the notice for the hearing. ORS 40.135(1)(q) provides that a letter duly directed and mailed is presumed to have been

¹ Order No. 19-UI-125372 states incorrectly that no exhibits were admitted at the February 25, 2019 hearing. The ALJ left the record open for claimant to provide OAH a copy of text messages between claimant and one of the employer’s owners on December 30, 2018 and January 18, 2019. The ALJ marked and referred to Exhibit 1, the text message copies, in the order. A copy of Exhibit 1 shall be mailed to the parties with this decision.

received by the intended recipient in the regular course of the mail. However, that presumption may be rebutted by circumstantial evidence suggesting non-receipt. The employer had previously had mail delivery problems, including a lost or stolen tax bill. Given the evidence of prior problems receiving mail, the record contains sufficient circumstantial evidence to show the likelihood that the employer did not receive the notice of the February 11 hearing. The employer's failure to attend that hearing was therefore the result of factors beyond its reasonable control, and the record shows there is good cause to reopen the hearing. The employer's request to reopen the February 11 hearing on decision # 112104 is granted.

Voluntary Quit. 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) (December 23, 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 her employer for an additional period of time.

Claimant quit work because the owner sent her a rude text message containing foul language on December 30, 2018. Although the owner's text message was unprofessional, the record does not show by a preponderance of the evidence that the owner regularly used foul language or was rude to claimant such that it created a grave situation for claimant at work. To the extent that claimant left work because the owner sent claimant a rude, unprofessional text message on December 30, claimant did not demonstrate that the final incident constituted a circumstance 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.

To the extent claimant left work because a coworker made unwelcome sexual advances toward her, claimant did not show that she had good cause to leave work when she did. Claimant's complaints about her coworker were justified. However, the record does not show that the coworker's offensive behavior was ongoing. It occurred once, three months before claimant quit work. The coworker apologized, and the record does not show that he continued to offend claimant after he apologized. To the extent claimant was dissatisfied with how the owner handled her complaints, claimant did not show that the owner knew the coworker had touched her. To the extent claimant left work because of the coworker's conduct toward her, the record does not show that the coworker's conduct constituted a circumstance of such gravity at the time she quit that a reasonable and prudent person of normal sensitivity, exercising ordinary common sense, would have no reasonable alternative but to leave work when claimant did.

For the foregoing reasons, the record does not show that no reasonable and prudent person in claimant's circumstances would have continued to work for claimant's employer for an additional period of time. Claimant quit work without good cause, and is disqualified from receiving unemployment insurance benefits.

DECISION: Order No. 19-UI-128134 is affirmed.

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

DATE of Service: June 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.

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.



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
 Phone: (503) 378-2077 | 1-800-734-6949 | Fax: (503) 378-2129 | TDD: 711
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.