

EMPLOYMENT APPEALS BOARD DECISION
2019-EAB-0464

Reversed
No Disqualification

PROCEDURAL HISTORY: On April 8, 2019, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant voluntarily left work without good cause (decision # 144241). Claimant filed a timely request for hearing. On May 1, 2019, ALJ Scott conducted a hearing, at which claimant and the employer's representative appeared.¹ On May 3, 2019, the ALJ issued Order No. 19-UI-129319, affirming the Department's decision. On May 14, 2019, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Greystar Management Services LP employed claimant as a leasing professional from May 25, 2018 to March 18, 2019.

(2) In the fall of 2018, claimant had skin conditions and was given a doctor's note instructing her not to use cosmetics. Claimant's manager was aware of claimant's skin condition and that she was receiving medical treatment for it. The manager nevertheless made cruel personal remarks about claimant's appearance, including "Your face looks like I hit you with my truck" and to go to the bathroom to "fix your face." Transcript at 11. The manager tried to tell claimant that the employer's policies required that she wear lip-gloss and mascara even though the employer had no such policy and other employees never wore makeup to work. The manager's statements made claimant cry. Claimant complained to her manager's manager and received an apology from the manager, but felt hurt by the manager's verbally abusive comments.

(3) Later during claimant's employment, a vendor sexually harassed claimant at work until he was discharged for it. An assistant manager repeatedly belittled and mocked claimant, and the behavior continued until the assistant manager was discharged for making threats of physical violence toward claimant after calling her "bitch" and chasing claimant out of the office. Transcript at 27. Because of the manager's verbal abuse, followed by the sexual harassment and threats of physical violence from a

¹ The ALJ stated in Order No. 19-UI-129319 that the employer did not participate in the hearing. However, the employer's representative did make an appearance at the time set for the hearing and chose to disconnect from the hearing conference call when the employer's witnesses did not call in to participate in the hearing.

manager, claimant began to feel unsafe at work. Claimant also did not trust her manager or manager's manager, particularly after she was written up for absences and having violating boundaries with a coworker by telling him that the assistant manager had tried to beat her up as an apology for the coworker having been required to stay late since claimant left early due to that incident.

(4) On March 14, 2019, claimant required an emergency medical procedure to resolve a ruptured tubal pregnancy. She asked for the time off work, and the managers refused. Claimant did not know what to do because she had to go to the appointment. She began to cry, and left the office. She sat in her car for a little while, and then returned to the office to ask for a copy of her personnel file. Claimant spoke with the managers, who asked her if she really wanted to quit. Claimant said she did not have a choice. The managers then relented and authorized claimant to take the time off work she needed and return to work on March 18th.

(5) On March 18, 2019, claimant returned to work. That morning, claimant's manager told claimant to remove her black fingernail polish. The employer did not have a policy prohibiting employees from wearing black fingernail polish, and had never before taken issue with claimant's choice of nail polish color. The employer did have a policy prohibiting highly stylized nail designs but never enforced that policy when other employees violated it. Transcript at 7. Claimant felt that the manager was once again "picking on" her by treating her differently than the manager treated others. Transcript at 6-8.

(6) Shortly after she told claimant to remove her fingernail polish, claimant's manager approached claimant again. Claimant had been pregnant and her emotions were raw. The manager put her arms around claimant, hugged her, and would not let go. She stated, "I know it's been a hard couple weeks and we're going to get through it. Just know that I love you and I care about you truly. And, you know, I'm extra hard on you because . . . I want to see you succeed." Transcript at 33. Claimant and her manager were not friends, and claimant did not want to be hugged or touched by her manager. She felt like she could not object or tell her manager not to touch or hug her because she "was afraid that she would give me a repercussion. Or it would . . . escalate to something that wouldn't be good." *Id.*

(7) During claimant's lunch break, claimant called human resources to report her manager's unfair instruction to remove the fingernail polish, and the inappropriate hug. The human resources person with whom claimant spoke did not offer any alternatives, but instead suggested to claimant that she not return to work, and told claimant that she would not blame claimant if she quit. Claimant quit work immediately, and did not return to the workplace.

CONCLUSIONS AND REASONS: Claimant voluntarily left work with good cause, and is not disqualified from receiving unemployment insurance benefits because of her work separation.

A claimant who leaves work voluntarily is disqualified from the receipt of benefits unless they prove, by a preponderance of the evidence, that they had good cause for leaving work when they did. ORS 657.176(2)(c); *Young v. Employment Department*, 170 Or App 752, 13 P3d 1027 (2000). "Good cause . . . is such that a reasonable and prudent person of normal sensitivity, exercising ordinary common sense, would 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 their employer for an additional period of time.

Order No. 19-UI-129319 concluded that claimant did not have good cause to quit work, because although claimant had been sexually harassed and threatened with physical violence by other employees, the employer had resolved those concerns prior to claimant quitting work, and her remaining concerns about her manager's arbitrary request to change her appearance and inappropriate workplace hug were not grave situations. Order No. 19-UI-129319 at 3. The Order stated that, rather than quit work, claimant could have objected to the hug, removed her fingernail polish, or asked her manager to reconsider the instruction to remove it. *Id.* The Order concluded, "A reasonable and prudent person would likely have been looking for another job based on the level of dissatisfaction that claimant was experiencing" but "nothing in this record indicates that there was a compelling reason for claimant to leave work at the time she left work when she could have stayed until she found other employment." *Id.*

As a preliminary matter, it is well-settled law that continuing to work until finding another job is not a reasonable alternative to quitting work because not only is it true in every case that the claimant could have done so, it is beside the point. *See Hill v. Employment Dep't.*, 238 Or. App. 330, 243 P.3d 78 (2010); *Warkentin v. Employment Dep't.*, 245 Or. App. 128, 261 P.3d 72 (2011); *Campbell v. Employment Dep't.*, 245 Or. App. 573, 263 P.3d 1122 (2011); *Strutz v. Employment Dep't.*, 247 Or. App. 439, 270 P.3d 357 (2011); *Campbell v. Employment Dep't.*, 256 Or. App. 682, 303 P.3d 957 (2013) (so stating).

At the time claimant quit work, her manager had once told claimant that her face "looks like I hit you with my truck" because of claimant's medical conditions, told claimant to "fix your face," apologized for that only when made to do so, tried to deny claimant time off work to attend an emergency medical appointment, and again arbitrarily told claimant to change her physical appearance even though nothing about claimant's appearance violated the employer's policies or dress code. Her manager's manager had been involved in denying claimant permission to attend an emergency medical appointment. Claimant, who had been subjected to sexual harassment and a threat of physical assault in the workplace that left her feeling unsafe at work, was then subjected to unwanted physical contact from the same manager who had repeatedly tried to arbitrarily control claimant's physical appearance. A reasonable and prudent person who had been subjected to unsafe behavior from coworkers, and then experiences arbitrary and erratic behavior from her manager, would have considered the managers' behaviors to amount to a violation of trust, and would have considered the situation grave.

When claimant felt unsafe and concerned about her manager's behavior toward her that day, and sought assistance with the issue from human resources, the human resources employee did not make any suggestions about how to address the issue, or resolve claimant's concerns. Instead, the human resources person told claimant she understood her concerns and suggested that claimant not return to work. The human resources person's response to claimant's concerns suggested that there likely were no reasonable alternatives that would resolve claimant's concerns short of quitting work. *See accord Early v. Employment Dep't.*, 247 Or. App. 321, 360 P.3d 725 (2015) (the employer's failure to offer claimant alternatives "implicitly suggest[s] that there were none" and, therefore, that further attempts to resolve the issue would have been futile). It does not appear on this record that claimant had reasonable alternatives to leaving work.

Claimant quit work for a reason of such gravity that she did not have reasonable alternatives to quitting. She therefore is not disqualified from receiving unemployment insurance benefits because of her work separation.

DECISION: Order No. 19-UI-129319 is set aside, as outlined above.

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

DATE of Service: June 18, 2019

NOTE: This decision reverses an order that denied benefits. Please note that payment of benefits, if any are owed, may take approximately a week 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 ໂດຍປະຕິບັດຕາມຄໍາແນະນໍາທີ່ບອກໄວ້ຢູ່ຕອນຫ້າຍຂອງຄໍາຕັດສິນນີ້.

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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