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State of Oregon
Employment Appeals Board
875 Union St. N.E.
Salem, OR 97311

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EMPLOYMENT APPEALS BOARD DECISION
2019-EAB-0597

Modified
Late Request for Hearing Allowed
No Disqualification

PROCEDURAL HISTORY: On April 4, 2019, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant voluntarily left work without good cause (decision # 93741). On April 24, 2019, decision # 93741 became final without claimant having filed a timely request for hearing. On May 14, 2019, claimant filed a late request for hearing. On May 20, 2019, the Office of Administrative Hearings (OAH) mailed notice of a hearing scheduled for June 3, 2019. On June 3, 2019, ALJ Snyder conducted a hearing, and on June 11, 2019 issued Order No. 19-UI-131420, allowing claimant's late request for hearing and affirming decision # 93741. On June 28, 2019, claimant filed an application for review with the Employment Appeals Board (EAB).

In her written argument, claimant requested that EAB consider additional evidence under OAR 471-041-0090 when reaching this decision; given the outcome of this decision, claimant's request is moot. EAB considered claimant's written argument when reaching this decision only to the extent it was relevant and based upon the record.

Based on a *de novo* review of the entire record in this case, and pursuant to ORS 657.275(2), the portion of the order under review allowing claimant's late request for hearing is **adopted**.

FINDINGS OF FACT: (1) Providence Health & Services Oregon employed claimant, last as Senior Manager of Benefits, Products, and Implementation, from February 2001 to March 7, 2019.

(2) Claimant last worked in approximately August 2018. She became ill and unable to work, and began a leave of absence under the Family Medical Leave Act. Claimant exhausted her leave of absence, and the employer placed her on "leader time off" leave. Transcript at 18. At the end of February 2019, claimant exhausted her leader time off.

(3) When claimant's leaves of absence were exhausted, she was still too ill to return to work. Claimant had sought other work with the employer but could not find an available position suitable for her health issues and need for accommodations. Claimant's medical providers had not released her to return to work, and claimant did not know when she might recover sufficiently to return to work.

(4) Claimant spoke with human resources about her employment status. Human resources told claimant that her only option to extend her employment would be to submit an extended accommodations claim, which would allow her to maintain her employment status without pay and without continued receipt of medical or dental benefits.

(5) Claimant had previously struggled to manage the employer's leave of absence processes. Claimant's experiences navigating those processes had exacerbated her illness, and claimant did not want to continue those efforts to maintain employment without pay or benefits, and without any idea when she might be able to resume working.

(6) Human resources could not see any benefit to claimant to maintain employment under those terms, and told claimant that the employer was going to terminate her employment. Effective March 7, 2019, claimant's employment was terminated.

CONCLUSIONS AND REASONS: Claimant's work separation is not disqualifying.

The first issue is whether claimant quit or was discharged. 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).

The determining factor of whether a work separation is a voluntary leaving or discharge is whether continuing work was available at the time of the work separation. The order under review concluded that there was, because claimant "could have continued her employment by extending her accommodations claim." Order No. 19-UI-131420 at 4. The record is ambiguous about the nature of the separation, however.

The parties both mentioned that claimant extending the accommodation leave period for some period of time and maintaining employment was an option. The employer's witness testified that claimant "could have" remained employed if she had done so. Transcript at 25. "Work" is defined as "the continuing relationship between an employer and an employee," and not in terms of an employee's actual ability to perform work. *See* OAR 471-030-0038(1)(a). Since claimant might have extended that relationship by pursuing an extension, the facts of this case suggest that claimant might have quit work.

However, the employer's witness also testified, "I said at that point that we would need to terminate employment unless there was - you know, there wasn't any accommodation that could be made." Transcript at 25. The availability of continuing work was therefore contingent upon there being "any accommodation that could be made," and there is no evidence suggesting that there was since claimant was too ill to work, had been since August 2018, and was unable to predict when or even if she would

be able to resume work for the employer. Those circumstances suggest that no continuing work was actually available to claimant at the time of the work separation, and that she was discharged.

Ordinarily the failure of a record to contain facts sufficient to establish the nature of the work separation would require remand. In this case, however, it is unnecessary because regardless whether claimant quit or was discharged the evidence is conclusive that the work separation was not disqualifying.

If the employer discharged claimant, ORS 657.176(2)(a) requires a disqualification from unemployment insurance benefits only if the discharge was for misconduct connected with work. “As used in ORS 657.176(2)(a) . . . a willful or wantonly negligent violation of the standards of behavior which an employer has the right to expect of an employee is misconduct. An act or series of actions that amount to a willful or wantonly negligent disregard of an employer's interest is misconduct.” OAR 471-030-0038(3)(a).

Any discharge in this case would be the result of claimant being too ill to work, and unable to identify when she would recover her health enough to resume employment. Claimant’s ill health was not “a willful or wantonly negligent violation of the standards of behavior which an employer has the right to expect” of her, nor was it “[a]n act or series of actions that amount to a willful or wantonly negligent disregard of an employer's interest.” If the employer discharged claimant, it was not for misconduct.

If claimant quit work, ORS 657.176(2)(c) requires a disqualification from benefits only if claimant quit work without good cause. “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). Claimant had what is more likely than not a permanent or long-term “physical or mental impairment” as defined at 29 CFR §1630.2(h). A claimant with an impairment who quits work must show that no reasonable and prudent person with the characteristics and qualities of an individual with such an impairment would have continued to work for their employer for an additional period of time.

Any voluntary leaving in this case would be for good cause. Claimant was too ill to work. Seeking a transfer was not a reasonable alternative because she had tried to do so and could not find suitable work that would accommodate her condition. Pursuing an additional leave of absence was not a reasonable alternative for her because the process she had to navigate to do so exacerbated her illness.

Even if the employer could have helped claimant extend her leave of absence without aggravating her health condition, doing so still was not a reasonable alternative for claimant. The Oregon Court of Appeals has long held that under certain circumstances a protracted unpaid leave of absence is not generally considered a reasonable alternative to leaving work. For example, in *Taylor v. Employment Division*, 66 Or App 313, 674 P2d 64 (1984), the court held that the claimant had good cause to leave work when he had been suspended without pay for over a month, and there was no end in sight to the suspension. Emphasizing the fact that the claimant’s suspension was without pay and that he therefore had no possibility of work-related income as long as it lasted, the court wrote, “It is difficult to understand how the referee could require claimant to continue “working” at a job where he was doing no work, for which he was receiving no pay, and for which he would receive no pay until a lengthy appeals process, possibly including judicial review, was over.” *Taylor*, 66 Or App at 316. Likewise, in *Sothras v. Employment Division*, 48 Or App 69, 616 P2d 524 (1980), the court held that the claimant had good

cause to leave work. The claimant in that case had been attacked in her home, and was unable to return to work or reside in the town where the assault and attempted murder had occurred thereafter. After being on an unpaid leave of absence for more than a month, claimant quit her job. The court concluded that claimant had good cause to quit her job, noting that more than four months after the attack claimant still could not return to work or stay in the town where the attack had occurred. The court held, “In this situation, a protracted, unpaid leave of absence is not a ‘reasonable alternative’ to leaving work and being unemployed; indeed it is not an alternative at all.” *Sothras*, 48 Or App at 77.

Turning to the facts of this case, at the time claimant quit she had already been on leaves of absence from her job for over six months without recovering sufficiently to return to any job with the employer, and without even recovering sufficiently to be able to foresee a time when she might be able to do so. Any additional leave of absence would not only be unpaid, it would also be without any benefits. In fact, the employer’s witness testified that extending the leave of absence in order to still be considered an employee “wouldn’t really benefit her in any way.” Transcript at 26. Under the circumstances, risking her health to seek additional leaves of absence for the sake of maintaining an employment relationship from which claimant derived no benefit was not a reasonable alternative to leaving work.

For those reasons, regardless whether the employer discharged claimant or whether she quit work, her work separation was not disqualifying. Claimant therefore may not be disqualified from receiving unemployment insurance benefits because of her March 7th work separation from this employer.

Please note that this decision reverses an order that denied benefits, and that payment of benefits, if any are owed, may take approximately a week for the Department to complete. If claimant has been deemed ineligible for unemployment insurance benefits for other reasons, however, benefits might not be payable even though this particular decision is non-disqualifying.

DECISION: Order No. 19-UI-131420 is modified, as outlined above.

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

DATE of Service: July 29, 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 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.

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