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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-0749

Order No. 19-UI-133755 Reversed – No Disqualification
Order No. 19-UI-134691 Reversed – Benefits Payable

PROCEDURAL HISTORY: On June 6, 2019, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant quit work without good cause (decision # 153509). On June 28, 2018, the Department served notice of an administrative decision that concluded claimant was ineligible for unemployment insurance benefits during the period between two successive academic years (decision # 131734). Claimant filed timely requests for hearing on both decisions. On July 16, 2019, ALJ Murdock conducted a hearing regarding decision # 153509, and on July 22, 2019, issued Order No. 19-UI-133755, affirming decision # 153509.[1] On July 31, 2019, ALJ Frank conducted a hearing regarding decision # 131734, and on August 7, 2019, issued Order No. 19-UI-134691, affirming decision # 131734. On August 11, 2019, claimant filed applications for review of both hearing orders with the Employment Appeals Board (EAB).

Pursuant to OAR 471-041-0095 (October 29, 2006), EAB consolidated its review of Order Nos. 19-UI-133755 and 19-UI-134691. For case-tracking purposes, this decision is being issued in duplicate (EAB Decisions 2019-EAB-0749 and 2019-EAB-0748, respectively).

Claimant submitted written argument in support of claimant's applications for review. However, claimant did not declare that they provided a copy of their argument to the opposing party or parties as required by OAR 471-041-0080(2)(a) (May 13, 2019). The argument also contained information that was not part of the hearing record, and did not show that factors or circumstances beyond claimant's reasonable control prevented them from offering the information during the hearing as required by OAR 471-041-0090 (May 13, 2019). EAB considered only information received into evidence at the hearing when reaching this decision. *See* ORS 657.275(2).

[1] Although Order No. 19-UI-133755 stated that decision # 153509 was being affirmed, the effective date of the disqualification set forth in decision # 153509 was April 14, 2019, whereas the effective date of the disqualification set forth in Order No. 19-UI-133755 was April 21, 2019. *Cf.* decision # 153509 and Order No. 19-UI-133755 at 4. Accordingly, Order No. 19-UI-133755 should have stated that the administrative decision under review was being modified rather than affirmed.

FINDINGS OF FACT: (1) Harrisburg School District #7 (HSD) employed claimant as a groundskeeper and maintenance worker from January 12, 2018 to April 22, 2019.

(2) From approximately 2015 through the end of his employment, claimant was diagnosed and regularly treated for an anxiety disorder.

(3) Claimant had a young son that was diagnosed with autism. Claimant's son attended school at HSD and was on an Individual Education Plan (IEP). While at work, the employer frequently called claimant to his son's classroom to assist with his son when he had emotional outbursts, which caused claimant to miss work that he had to make up on weekends, which exhausted him. Although proximity to his son was one reason he had transferred his son to HSD, the frequency of the calls produced what he considered a "breach" of the lines between claimant as a parent and claimant as employee, which caused him increasing stress and anxiety and affected his relationships with coworkers. Transcript at 95-97.

(4) On February 11, 2019, claimant walked into his son's classroom and observed his son's teacher "jabbing…the four legs of a chair" at his son, striking him, which caused his son to scream and cry "hysterically." Transcript at 22; Exhibit 1. The employer contended that the teacher struck the child in self-defense, which is not what claimant had observed although he had walked in at the end of the incident. After witnessing the incident, claimant picked up his son, brought him to the back of the room and attempted to calm him until he fell asleep. Claimant then walked to his shared office and had "panic attack." Exhibit 1.

(5) In an IEP meeting on March 5, 2019, which claimant attended as a parent and not an employee, claimant requested a discussion of the incident to determine the offending teacher's perspective regarding what had occurred. After the IEP meeting, the school superintendent asked claimant to meet with him privately, during which the superintendent questioned claimant about the appropriateness of claimant's inquiry about the incident at the IEP meeting and his son's increased aggressiveness at school. He then warned claimant to watch "what you say" to coworkers. Exhibit 1.

(6) On April 4, 2019, another IEP meeting was held, and claimant attended it in his role as a parent. During the meeting, claimant requested an investigation of the incident by the employer because one had never been conducted after his special needs child had been struck by a teacher. However, a formal investigation of the incident was never conducted which substantially added to claimant's anxiety disorder because he concluded that the employer was not concerned about either him or his son.

(7) Claimant met with his treating psychiatrist more frequently after the February 11 incident. He eventually concluded that after witnessing an assault on his son and experiencing additional stressors related to the aftermath of that incident, claimant's anxiety disorder had "dramatically" worsened, resulting in increased anxiety, insomnia, and depression, and necessitating changes in claimant's medical treatment. Exhibit 1. Claimant eventually concluded, after taking two weeks off work in April and discussing with his family, fiancée, and doctors whether he should continue his employment, that he "had to quit." Transcript at 20.

(8) On April 22, 2019, claimant quit work due to the worsening of his anxiety disorder in order to protect his health. Transcript at 19-20.

(9) Claimant filed an initial claim for unemployment insurance benefits on April 30, 2019, effective the second quarter of 2019. An initial claim filed during that quarter has a base year that begins on January 1, 2018 and ends on December 31, 2018.

(10) Claimant's only base year employer was HSD, an educational institution. The Department determined claimant had a monetarily valid claim for benefits based on his total base year wages and that his weekly benefit amount was $421.

(11) The recess period between the 2018-2019 and 2019-2020 academic years for HSD began June 16, 2019 and ended August 31, 2019 (weeks 25-19 through 35-19). Claimant claimed benefits for the weeks including June 16 through July 20, 2019 (weeks 25-19 through 29-19), the weeks in issue.

(12) Claimant worked for HSD as a full-time groundskeeper during the 2018-2019 academic year. Claimant's position was a year-round, non-instructional position. Claimant earned more than $421 from HSD during at least one week of the 2018-2019 academic year.

CONCLUSIONS AND REASONS: Claimant voluntarily quit work with good cause. Benefits are payable to claimant during the period between two successive academic years.

Voluntary Leaving. 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). Claimant had an anxiety disorder from approximately 2015 through the end of his employment, a permanent or long-term "physical or mental impairment" as defined at 29 CFR §1630.2(h). A claimant with such 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 their employer for an additional period of time.

Order No. 19-UI-133755 concluded that although claimant quit work due to the aggravation of his anxiety disorder by "upsetting circumstances at work," he did so without good cause. Order No. 19-UI-133755 at 5-6. The order reasoned that because claimant's increased and continuing anxiety was caused by claimant's own lack of communication with the employer about an investigation of the February 11 incident, his choice to enroll his child within the school district for which he worked, his work conflicts which were "not grave," and his failure to pursue a reasonable alternative of applying for FMLA leave, he failed to establish good cause for leaving work when he did. *Id.* However, the record does not support the order's conclusions.

The record as a whole established that claimant's circumstances were grave when he quit. Claimant's treating psychiatrist stated that after witnessing the February 11 incident and experiencing related stressors, claimant's anxiety disorder had "dramatically" worsened resulting in changes in his medical treatment for his condition. Claimant experienced a "panic attack" on the date of the incident and continuing stress related to his unsuccessful inquiries concerning the incident and the employer's failure to conduct a formal investigation of the teacher's behavior. Claimant, in his capacity as an employee,

was warned by the employer's superintendent for bringing up the incident at an IEP meeting when he was acting in his capacity as a parent wanting to hear the teacher's explanation for her actions. When claimant concluded that there would be no formal investigation into the incident, claimant decided that he "couldn't work with people who weren't going to look out for my interests and my son's interests," and given his worsening anxiety disorder and the input he received from his family and medical providers, claimant decided to quit. Transcript at 102.

The possible alternative of pursuing FMLA leave under those circumstances likely would have been futile. If such leave had been granted, there is no indication in the record that it would have been paid. The Court of Appeals has held that a potentially protracted unpaid leave of absence is generally not a reasonable alternative to leaving work. *See Sothras v. Employment Division*, 48 Or App 69, 616 P2d 524 (1980) (an unpaid leave of four months was not a reasonable alternative to quitting work). Moreover, claimant had concluded that after what had transpired between the employer and him over the prior months, "he…didn't feel that he could go back," because "going forward there was really no repairing the relationship between the school and [claimant]. Transcript at 62-33.

Viewed objectively, no reasonable and prudent person with claimant's anxiety disorder in his circumstances would have continued to work for the employer for an additional period of time. Accordingly, claimant voluntarily left work with good cause and is not disqualified from receiving unemployment insurance benefits on the basis of his work separation.

Eligibility for Benefits During Recess Period. The Department determined claimant had a valid claim for benefits, i.e., was *monetarily* eligible, based on the total amount of his base year wages and that his weekly benefit amount was $421. However, when claims for benefits are based solely on base-year wages from an educational institution, both ORS 657.167 and ORS 657.221 require a reduction in those benefits under certain prescribed conditions. Claimant seeks benefits based on services performed for HSD as a full-time, year-round groundskeeper during the 2018-2019 academic year. HSD is an educational institution as defined in ORS 657.010(6). Therefore, ORS 657.221, which applies to services performed for educational institutions by individuals, such as claimant, in other than an instructional, research or principal administrative capacity, limits when those benefits may be paid, if prescribed conditions are satisfied.

ORS 657.221(1)(a) prohibits benefits based upon services for an educational institution performed by a non-educational employee from being paid "for any week of unemployment that commences during a period between two" terms "if the individual performs such services in the first academic term" and "there is a reasonable assurance that the individual will perform any such services in the second" term. That law applies when the individual claiming benefits "was not unemployed," as defined at ORS 657.100, during the academic term prior to the term break, regardless whether claimant's position observed between-term recess periods. In sum, the conditions that must be met for the between-terms school recess denial to apply to claimant are these: (1) the weeks claimed must commence during a period between two academic terms; (2) claimant must not have been "unemployed" during the term prior to the recess period at issue; and (3) there is reasonable assurance of work during the term following the recess period at issue.

Order No. 19-UI-134691 concluded that claimant sought benefits for a period between two academic years and was not unemployed during the term prior to the recess period, and the preponderance of the evidence in the hearing record supports those conclusions. Order No. 19-UI-134691 at 3-4. However, the order also concluded that claimant had reasonable assurance of continuing work in the 2019-2020 academic year, reasoning:

> At hearing, the parties agreed that if claimant had not quit work during the 2018-2019 school year, he would have been allowed to continue working for the employer as groundskeeper during the 2019-2020 school year. [OAR 471-030-0075(4)] specifies as follows: "Reasonable assurance cannot be ended or abated by any unilateral action of the individual. A decision to quit work, even for good cause, and even if the employer accepts the resignation, does not end or abate reasonable assurance.

Order No. 19-UI-134691 at 4. However, the order quoted a prior version of OAR 471-030-0075(4). The current version of the rule, which became effective on April 29, 2018, provides: "An individual who voluntarily leaves work for good cause, as defined under OAR 471-030-0038, does not have reasonable assurance with the employer from whom the person left work." OAR 471-030-0075 (4) (April 29, 2018). Having concluded in these consolidated cases that claimant voluntarily left work with good cause on April 22, 2019, it is further concluded, for that reason, that claimant does not have reasonable assurance of continuing work with the employer during the 2019-2020 academic year. Accordingly, the prescribed conditions of 657.221 have not been shown to have been satisfied with respect to benefits based on claimant's base-year wages for the weeks during the period between two successive academic years, and benefits are payable to claimant, provided claimant is otherwise eligible.

DECISION: Order Nos. 19-UI-133755 and 19-UI-134691 are set aside, as outlined above.[2]

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

DATE of Service: <u>September 16, 2019</u>

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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[2] These decisions reverse 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.

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 – 本判决会影响您的失业救济金。 如果您不明白本判决， 请立即联系就业上诉委员会。 如果您不同意此判决，您可以按照该判决结尾所写的说明，向俄勒冈州上诉法院提出司法复审申请。

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 Empleo. Si no está de acuerdo con esta decisión, puede presentar una Aplicación 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 فورا، 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 دستورالعمل موجود در پایان آن، از دادگاه تجدید نظر اورگان درخواست تجدید نظر کنید.

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