

EMPLOYMENT APPEALS BOARD DECISION
2019-EAB-0773

Reversed & Remanded

PROCEDURAL HISTORY: On May 13, 2019, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant but not for misconduct (decision # 114601). On June 3, 2019, decision # 114601 became final without the employer having filed a request for hearing. On July 17, 2019, the employer filed a late request for hearing. On July 24, 2019, the Office of Administrative Hearings (OAH) served notice of a hearing scheduled for August 2, 2019 on whether the employer's late request for hearing should be allowed and, if so, the merits of decision # 114601. On August 2, 2019, ALJ Janzen conducted a hearing, and on August 7, 2019 issued Order No. 19-UI-134625, allowing the employer's late request for hearing and affirming decision # 114601. On August 13, 2019, the employer filed an application for review with the Employment Appeals Board (EAB).

EAB considered the employer's written argument when reaching this decision.

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 the employer's late request for hearing is **adopted**.

FINDINGS OF FACT: (1) Mid Oregon Personnel Services Inc. employed claimant in payroll from July 7, 2009 until April 29, 2019

(2) Sometime before January 2019, claimant developed a blood clot in her left leg and a Baker's cyst behind her right knee from sitting long hours working at a desk.

(3) As of January 2019, the employer was transitioning to a new electronic payroll system. The transition was complicated. Claimant was the employee who was most familiar with payroll and performed essential functions during the transition.

(4) On January 16, 2019, claimant's physician recommended that she either take time off from work or leave work to allow her leg and knee to recover. Later that day, claimant notified the employer's president that she was resigning from work effective immediately due to health issues. The president responded that claimant's departure would leave the employer in a difficult position because the payroll

transition was not completed, and the employer needed claimant's expertise. The president asked if there was a way to modify claimant's job that would allow her to stay. Claimant agreed to stay on until the employer notified her that the payroll transition was complete if she was allowed to choose the hours she worked. The president agreed.

(5) After January 16, claimant generally worked nights when other employees were not in the workplace. At first, claimant was working nearly full time, but later her hours reduced as the payroll transition progressed.

(6) Around Friday, April 19, 2019, the employer sent claimant a note telling her not to prepare payroll the following week because the employer was testing the new payroll system. However, the employer asked claimant to standby for a week until the employer was certain that all payrolls could be done in the new system.

(7) On April 29, 2019, the employer notified claimant that all payrolls had been successfully completed in the new system, the transition was complete, and claimant's services were no longer needed. Claimant did not work after that day. On April 30, 2019, claimant turned in her workplace keys and picked up her final paycheck.

(8) As of April 29, the conditions in claimant's leg and knee had improved and she would have been able to continue working for the employer.

CONCLUSIONS AND REASONS: Claimant voluntarily left work on April 29, but additional evidence is needed to determine whether she left work for good cause.

The first issue in this case is the nature of the work separation. 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).

Order No. 19-UI-134625 concluded that the employer discharged claimant. The order found that claimant tendered a resignation on January 16, and that the employer and claimant subsequently agreed that claimant would continue working until the transition to a new payroll system was completed. Because the employer "controlled the determination of when the transition was complete," the order reasoned that the separation was discharge because when the employer made that determination it "established that it had no continuing work for claimant at that point." Order No. 19-UI-134625 at 4. However, the record establishes that the work separation was a voluntarily leaving, and not a discharge.

In *Westrope v. Employment Department*, 144 Or App 163, 167-168, 952 P2d 587 (1996), the Court of Appeals held that when a claimant initially tendered a resignation, then subsequently agreed to stay as long as the employer needed or until the employer found a replacement, the separation remained a voluntary leaving. The court reasoned that by his agreement, claimant had delegated to the employer the right to choose the date on which he would voluntarily leave work. *Id.* at 168. Here, the undisputed facts are analogous to those in *Westrope*. Claimant's work separation was a voluntary leaving on April 29, 2019.

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 blood clot and a Baker’s cyst, which may be permanent or long-term “physical or mental impairments” 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.

In order to determine if claimant had good cause for leaving work, additional information is required. At the outset, the record was not developed as to whether claimant’s health conditions were permanent or long-term impairments, and should be taken into account in evaluating whether claimant had good cause for leaving.

Additionally, when a claimant leaves work, the Court of Appeal has indicated that the appropriate time to assess whether claimant had good cause is when claimant actually left work and not when claimant gave notice of an intention to quit work. *Roadhouse v. Employment Department*, 283 Or App 859, 391 P3d 887 (2017) (the relevant period to analyze whether an individual left work with good cause is the date the individual left work, not when the individual gave notice or another prior date); *see accord Kay v. Employment Department*, 284 Or App 167, 391 P3d 989 (2017) (*Kay I*); *Gaines v. Employment Department*, 287 Or App 604, 403 P3d 423 (2017); *Kay v. Employment Department*, 292 Or App 700, 425 P3d 502 (2018) (*Kay II*). As of the time claimant left work on April 29, it appears that the health issues that caused claimant to give notice on January 16, the blood clot and the Baker’s cyst, had resolved and she was able to work, although she did not tell the employer and did not seek to continue to work. Transcript at 34, 35-36.

However, the record does not show if there were reason(s) that claimant did not try to withdraw her January 16 resignation when she later recovered sufficiently to allow her to return to work other than that she did not see the president “that often.” Transcript at 34. The record does not show if, as of April 29, claimant had reasonable concerns about a recurrence of the health conditions that led her to submit her resignation on January 16, or if other health conditions arose after January 16 that gave her good cause to leave work on April 29. The record does not show if claimant tendered her resignation on January 16 for additional reasons other than her health, and if those reasons continued to exist and were good cause for her to leave work on April 29. The record does not show whether other circumstances developed after January 16 that gave claimant good cause to leave work on April 29. The record also does not show if claimant had reasonable alternatives to leaving work for the reason(s) that she did.

ORS 657.270 requires the ALJ to give all parties a reasonable opportunity for a fair hearing. That obligation necessarily requires the ALJ to ensure that the record developed at the hearing shows a full and fair inquiry into the facts necessary for consideration of all issues properly before the ALJ in a case. ORS 657.270(3); *see accord Dennis v. Employment Division*, 302 Or 160, 728 P2d 12 (1986). Because the ALJ failed to develop the record necessary for a determination of whether claimant had good cause to leave work when she did, Order No. 19-UI-134625 is reversed, and this matter remanded for further development of the record.

DECISION: Order No. 19-UI-134625 is set aside, and this matter remanded for further proceedings consistent with this order.

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

DATE of Service: September 19, 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 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

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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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