

EMPLOYMENT APPEALS BOARD DECISION
2019-EAB-0869

Reversed
No Disqualification

PROCEDURAL HISTORY: On July 24, 2019, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant quit work without good cause (decision # 70251). Claimant filed a timely request for hearing. On August 14, 2019, ALJ Murdock conducted a hearing, at which the employer failed to appear, and on August 21, 2019, issued Order No. 19-UI-135392, affirming the Department's decision. On September 9, 2019, claimant filed a timely application for review of Order No. 19-IU-135392 with the Employment Appeals Board (EAB).

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).

FINDINGS OF FACT: (1) PJ Food Service Inc. employed claimant as a housekeeper from September 4, 2012 to June 24, 2019.

(2) In November 2016, claimant was diagnosed with osteoporosis. Exhibit 1 (Letter, Adventist Health). Claimant had a history of fragility fractures due to her condition. Claimant submitted the letter of diagnosis to her employer in November 2016.

(3) During the entire period of her employment, claimant performed work tasks that she and her original manager (AM) had agreed claimant would perform. Exhibit 1 at 6. However, in July 2018, shortly after a new manager (ES) began supervising claimant's work activities, he asked claimant to perform additional tasks in the food production and distribution departments that claimant could not perform due to her osteoporosis, or due to her lack of a food handler's permit or fork lift operator certificate. When claimant refused to perform those tasks, ES threatened to terminate claimant's employment, but did not ever do so.

(4) On December 30, 2018, claimant discovered that ES had cleaned out her office desk and “trashed” its contents, including personal items such as drawings her grandchildren had made for her office, a personal insurance policy, and work manuals. Exhibit 1 at 8. When claimant complained to him in tears, ES responded, “I’m the boss. If I want to do something, I’m going to do it. I don’t have to tell you anything. You’re just the housekeeper.” Exhibit 1 at 8. Later that day, claimant witnessed a coworker and personal friend of ES perform a major personal car repair in the employer’s maintenance department during work time. When she reported it to ES, he became visibly angry and responded, “[Y]ou had better start worrying about your job! Not what I allow . . . anyone else to do.” Exhibit 1 at 8. On December 31, 2018, claimant filed a complaint against ES with the employer’s human resources department about what had occurred on December 30, 2018. Her complaint produced no response.

(5) On May 17, 2019, claimant was summoned to human resources and presented with a written warning in which ES claimed claimant had taken one of his cigarettes. Claimant denied the allegation and refused to sign the warning. Claimant was then presented with a new list of duties which increased her work responsibilities and changed her position description from “housekeeper” to “custodian.” Exhibit 1 at 8. Claimant was told that if she refused to agree, she would be fired. When claimant refused to agree, “they” confiscated a key which hindered her ability to perform many of her work duties. Exhibit 1 at 8.

(6) On May 20, 2019, claimant again was summoned to the human resources office and presented with a warning for answering her cell phone while outside the distribution office in violation of an alleged policy prohibiting cell phone use in the facility. However, no such prohibition was contained in the employee handbook. The employer also cited her “for various things claiming insubordination.” Exhibit 1 at 8.

(7) On May 23, 2019, claimant filed a complaint with the human resources manager (SC) against both ES and SC. In her complaint, claimant asserted that ES and SC “have repeatedly tried to force me to perform illegal activity . . . [and have] [h]arrassed, [i]ntimidated and threatened me with firing and loss of job if I do not work in the Food Production Department.” Exhibit 1 at 4. Claimant added that she was so affected by what she described as the “hostile environment” they created that “I feel physically ill prior to coming in for my shift and throughout my scheduled work day.” Exhibit 1 at 4.

(8) On May 27, 2019, claimant filed a “formal complaint” with SC that described most of the incidents that had occurred between July 2018 and May 20, 2019, and that asserted the employer had discriminated against her based on sex, age and disability, had harassed and retaliated against her, and had created a hostile work environment. Exhibit 1 at 7-8. She also filed a formal complaint for alleged Oregon Family Leave Act (OFLA) violations that had occurred in August 2018 and April 2019.

(9) On May 29, 2019, claimant was interviewed “via webex” by another employee about her complaints. Exhibit 1 at 9. Thereafter, claimant perceived that she was being ostracized at work by both management and coworkers.

(10) On May 31, 2019, claimant filed another complaint for retaliation based on being ostracized. Later that day, the human resources manager, SC, told claimant over the phone that all of her complaints had been determined to be “unfounded.” Transcript at 55. Claimant did not receive written responses to her complaints.

(11) In early June 2019, claimant consulted with her physician about her work environment over the past year and the symptoms she had been experiencing just thinking about going into work, such as insomnia, nausea and vomiting. Her physician diagnosed her with work stress and anxiety, offered her medication and suggested that she seek other work.

(12) On June 23, 2019, claimant concluded that because she had become so distraught over her work environment that it was making her physically ill and affecting her family life, with no favorable resolution from the employer in sight, she “just couldn’t take anymore.” Transcript at 36. That day she submitted an email to the employer, which she described as her “Involuntary Resignation Letter,” resigning effective June 24, 2019. Exhibit 1 at 1. In her letter, claimant referred to her work environment as becoming “increasingly hostile,” which had “affected [her] health and emotional well-being very adversely,” and stated that her resignation was being submitted for “self-preservation.” Exhibit 1 at 1.

(13) On June 24, 2019, claimant resigned from her employment to protect her health.

CONCLUSIONS AND REASONS: Claimant voluntarily quit work with good cause.

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 been diagnosed with osteoporosis since 2016, 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.

Although Order No. 19-IU-135392 found that claimant’s work environment had caused her “to experience sleep difficulties and vomiting,” that “her doctor [had] recommended medication and suggested that claimant begin seeking other work,” the order concluded that claimant voluntarily quit work without good cause. Order No. 19-IU-135392 at 2. The order reasoned that the record failed to show that claimant faced a grave situation, and that claimant could have filed another complaint against her manager for “yelling at her” near the end of her employment and waited to determine how the human resources department resolved that complaint before determining if continuing to work was futile. Order No. 19-IU-135392 at 3. Finally, the order reasoned that claimant could have continued to work for the employer until she obtained other work. Order No. 19-IU-135392 at 3. The order’s conclusions and reasoning is not supported by the evidence or precedent and the order must be reversed.

The record shows that claimant’s circumstances at the time she quit were grave. It shows that claimant had been diagnosed with osteoporosis since 2016, that her condition had resulted in “fragility fractures” in the past, and that performing weight-bearing activities or working in the confined spaces ES apparently assigned to her after July 2018 were activities that claimant could not safely perform due to her condition. Transcript at 9. The record also shows that the employer told claimant that she would be discharged if she did not agree to perform all of those activities. The employer placing claimant in that

“catch-22” circumstance created a grave situation for claimant because it left her with no reasonable alternative. Claimant’s physical reaction to her work stress and anxiety by June 2019 also created a grave circumstance for claimant. The record shows that in early June 2019 claimant’s physical symptoms included insomnia, nausea and vomiting, sometimes several times in a morning as she prepared to go to work. Transcript at 37. Consequently, her physician diagnosed her with work stress and anxiety, offered her a course of medication and suggested that she seek other work. The record as a whole shows that claimant’s circumstances were grave.

Within that backdrop, filing another complaint against her manager for “yelling at her” and waiting indefinitely for the human resources department to resolve it before quitting was not a reasonable alternative for claimant at the time she quit. Claimant’s actions in filing numerous complaints against both her manager and the human resources manager without success or even a written decision, viewed objectively, demonstrated that filing another complaint was, more likely than not, futile.

Finally, it is well established by precedent that continuing to work for the employer until she found other work was not a reasonable alternative to quitting. *Hill v. Employment Dep’t.*, 238 Or App 330, 243 P3d 78 (2010) (continuing to work until claimant has found other work is not a reasonable alternative to quitting work); *see accord Warkentin v. Employment Dep’t.*, 245 Or App 128, 261 P3d 72 (2011); *Campbell v. Employment Dep’t.*, 245 Or App 573, 263 P3d 1122 (2011); *Strutz v. Employment Dep’t.*, 247 Or App 439, 270 P3d 357 (2011); *Campbell v. Employment Dep’t.*, 256 Or App 682, 303 P3d 957 (2013).

Viewed objectively, no reasonable and prudent person with claimant’s impairment in her 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 her work separation.

DECISION: Order No. 19-UI-135392 is set aside, as outlined above.¹

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

DATE of Service: October 17, 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.

¹ 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.

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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 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 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 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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