

EMPLOYMENT APPEALS BOARD DECISION
2019-EAB-0997

Affirmed
No Disqualification

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 allowed, 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).

On September 19, 2019, EAB issued Appeals Board Decision 2019-EAB-0773, adopting that portion of Order No. 19-UI-134625 allowing the employer's late request for hearing, reversing that portion of Order No. 19-UI-134625 concluding claimant was discharged by the employer, and concluding claimant voluntarily quit work. Appeals Board Decision 2019-EAB-0773 also remanded this case for further development of the record to determine whether claimant quit work when she did with or without good cause.

On October 9, 2019, ALJ Janzen conducted a hearing on remand, and on October 11, 2019, issued Order No. 19-UI-137970, concluding claimant voluntarily left work with good cause. On October 16, 2019, the employer filed an application for review of Order No. 19-UI-137970 with EAB and filed a written argument in support of its application for review. EAB considered the employer's written argument when reaching this decision.

FINDINGS OF FACT: (1) Mid Oregon Personnel Services Inc. employed claimant as a member of its payroll staff from July 7, 2009 until April 29, 2019.

(2) In early 2018, claimant began treatment for a persistent blood clot in her left leg and a Baker's cyst behind her right knee diagnosed as being caused by sitting long hours while working at a desk. The cyst

caused considerable swelling of claimant's leg, which at times prevented her from bending it. The conditions continued to worsen despite claimant's occasional use of a stand-up desk.

(3) In January 2019, the employer began transitioning to a new electronic payroll system. The transition was complicated. Claimant was the employee who was most familiar with the payroll systems in effect and was needed to perform essential functions during the transition.

(4) On January 16, 2019, claimant's physician recommended that she take time off of work or leave her job altogether to allow her to recover from her blood clot and cyst conditions. The employer did not have enough employees for claimant to be eligible for protected leave,¹ and claimant did not believe the employer had sufficient staffing to grant any other form of leave. Later that day, claimant notified the employer's president that she was resigning from work effective immediately to protect her health. 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 proposed a modification of claimant's job to entice her to stay. The president offered to pay claimant for forty hours per week regardless of when she worked and the number of hours she worked per week until the transition was complete. Claimant agreed to the president's proposal.

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

(6) On Friday, April 19, 2019, the employer sent claimant a note telling her not to prepare payroll for the following week because the transition was nearly complete, and the employer intended to test the new system. However, the employer asked claimant to standby for a week until the employer was certain that all payrolls could be completed 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. The next day, claimant turned in her workplace keys and picked up her final paycheck.

(8) As of April 29, 2019, the conditions in claimant's leg and knee had improved but they had not gone away. Claimant's treating medical provider remained concerned about the persistence of her leg pain because he had anticipated that it would be gone by then. He also advised her that the conditions could recur if she returned to excessive hours sitting or performing sedentary work. After April 29, 2019 the employer was not willing to continue to accommodate claimant's need for less than full-time work.

(9) On April 29, 2019, claimant resigned from her employment to protect her health.

¹ The record shows the employer employed 14 people within four in-state offices. Transcript (August 2, 2019) at 31-32. The federal Family and Medical Leave Act (FMLA) only applies to employers with 50 or more employees within a 75-mile radius of the employee's worksite. The Oregon Family Leave Act (OFLA) only applies to employers with 25 or more employees in Oregon in the current or previous year. *See*, https://www.oregon.gov/boli/TA/pages/t_faq_oregon_family_leave_act_01-2011.aspx

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

Work Separation. The first issue to be determined 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. Order No. 19-UI-134625 at 4. Because the employer “controlled the determination of when the transition was complete,” the order reasoned that the separation was a 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, Order No. 19-UI-137970, citing Appeals Board Decision 2019-EAB-0773 and *Westrope v. Employment Department*, 144 Or App 163 (1996), concluded the work separation was a voluntary leaving.

In *Westrope*, 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, the claimant in that case had delegated to the employer the right to choose the date on which he would voluntarily leave work. *Westrope v. Employment Department*, 144 Or App 163 at 168. Here, the undisputed facts are analogous to those in *Westrope* because, after claimant tendered her resignation in January, she agreed to stay until the payroll system transition was completed on April 29, 2019. Accordingly, claimant’s work separation was a voluntary leaving which occurred on April 29, 2019.

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 a blood clot condition and a Baker’s cyst, which, on this record may be permanent or long-term “physical or mental impairments” as defined at 29 CFR §1630.2(h). A claimant with such impairments who quits work must show that no reasonable and prudent person with the characteristics and qualities of an individual with such impairments would have continued to work for their employer for an additional period of time.

Here, the record shows that claimant had been diagnosed in 2018 as having a blood clot condition and Baker’s cyst that were likely caused by her generally sedentary work for the employer. It shows that her conditions had worsened to the extent that she had difficulty even bending her leg, and had become serious enough by January 2019 that her treating medical provider recommended that she take considerable time off work or quit her job to protect her health. When claimant notified the employer’s president that she was quitting for that reason, he convinced her to stay by not requiring her to work a set number of hours or at a set time during any week until their payroll system transition was complete.

Although during the three months between January 16 and April 22, 2019, claimant often worked only several hours per week, the pain from her conditions did not go away. This concerned claimant's treating medical provider because he had anticipated that it would be eliminated fairly quickly, but it was not. He also advised her that her conditions could worsen or recur if she returned to excessive hours sitting or performing sedentary work. The record as a whole shows that claimant's situation was grave.

Nor were there reasonable alternatives to quitting available to claimant on April 29, 2019. A protected leave of absence was not available to claimant given the number of workers employed by the employer, and a voluntary leave was not likely to have been granted given the employer's short staffing. In addition, at hearing, when asked whether the employer would have been willing to accommodate claimant's need for a position with fewer hours, the employer's president responded, "Well we accommodated her for three or four months for that very thing . . . [but] . . . I couldn't go on indefinitely." Transcript (October 9, 2019 hearing) at 19. From that statement, it may reasonably be inferred that after April 29, 2019, the employer was not willing to continue to accommodate claimant's need for less than full-time work. Accordingly, requesting to continue working reduced-hours was not a reasonable alternative to quitting available to claimant on April 29, 2019.

Viewed objectively, no reasonable and prudent person with claimant's impairment in her circumstances with no reasonable alternatives available 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-137970 is affirmed.

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

DATE of Service: November 21, 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 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 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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