

EMPLOYMENT APPEALS BOARD DECISION
2019-EAB-1025

Affirmed
Disqualification

PROCEDURAL HISTORY: On May 9, 2019, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant quit working for the employer without good cause (decision # 153825). On May 29, 2019, decision # 153825 became final without claimant having filed a request for hearing. On June 21, 2019, claimant filed a late request for hearing. On June 26, 2019, ALJ Kangas issued Order No. 19-UI-132336, dismissing claimant's request for hearing as late without a showing of good cause, subject to claimant's right to renew the request by responding to an appellant questionnaire by July 10, 2019. Claimant filed a timely response to the appellant questionnaire. On July 17, 2019, the Office of Administrative Hearings (OAH) cancelled Order No. 19-UI-132336, and on July 18, 2019 served notice of a hearing scheduled for July 29, 2019 on whether claimant's late request for hearing on decision # 153825 should be allowed and, if so, the merits of that decision.

On July 29, 2019, ALJ Scott conducted a hearing at which the employer failed to appear, and on August 1, 2019 issued Order No. 19-UI-134385, allowing claimant's late request for hearing and reversing decision # 153825 by concluding that claimant voluntarily left work with good cause. On August 7, 2019, the employer filed a timely application for review of Order No. 19-UI-134385 with the Employment Appeals Board (EAB), which, pursuant to OAR 471-040-0040(6) (February 10, 2012), was treated as a timely request to reopen the July 29, 2019 hearing. ALJ Kangas considered the employer's request to reopen, and on August 19, 2019 issued Order No. 19-UI-135244, denying the request. On August 23, 2019, the employer filed an application for review of Order No. 19-UI-135244 with EAB. EAB considered the entire hearing record and the parties' written arguments to the extent they were relevant to whether the employer's request to reopen the July 29, 2019 hearing should be allowed.

On September 17, 2019, EAB issued Appeals Board Decision 2019-EAB-0830, reversing Order No. 19-UI-135244 and granting the employer's request to reopen the July 29, 2019 hearing on decision # 153825. On October 10, 2019, ALJ Scott conducted a hearing on the merits of decision # 153825 and on October 17, 2019, issued Order No. 19-UI-138304, concluding that claimant voluntarily left work without good cause. On October 25, 2019, claimant filed a timely application for review of Order No. 19-UI-138304 with EAB.

CLAIMANT’S WRITTEN ARGUMENT: 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) C & M Homecare employed claimant from July 2017 until April 5, 2019, last as a caregiver.

(2) As a caregiver, the employer expected claimant to work one weekend shift per week. The employer published the caregivers’ work schedule for the following week each Thursday. Caregivers could avoid discipline for failing to work a shift by notifying the employer that they could not work a shift by 4:00 p.m. each Friday. The employer’s scheduling policy allowed caregivers to provide information about their preferred shifts, and the employer tried to accommodate those preferences. Claimant frequently provided the employer with information about her scheduling preferences.

(3) The employer had a “caregiver app” that caregivers could use to request shifts from the employer each week. Transcript at 70. The “app” usually had more than 300 hours available for caregivers to work.

(4) In July 2018, claimant contracted MRSA while working. She received treatment pursuant to a worker’s compensation claim. At the time, claimant became infected, she was acting as a caregiver for a client who had MRSA in their bloodstream, but did not have an active case of MRSA. The employer required all caregivers to follow universal precautions to avoid infections, including MRSA infections. Claimant believed there should be additional safety and health protocols established for the client so that others would not contract MRSA.

(5) Until February 2019, claimant was working as a caregiver for a client from 9:00 a.m. to 3:00 p.m. Claimant was often late to her work assignment. The client asked that claimant be removed from her as her caregiver.

(6) In February 2019, the employer changed claimant’s work assignment, and assigned claimant to be caregiver for the client claimant had been caring for when she contracted MRSA in July 2018. Claimant did not object to working with the client again because the client had MRSA. Claimant’s scheduled shifts with the client began at 8:00 a.m. The client required 15 to 20 hours of care per week. Claimant was dissatisfied with the new client assignment. She was concerned she would contract MRSA again. Claimant disliked the new schedule because her children started school at 9:00 a.m., and because she needed more income than she could earn working 20 hours per week.

(7) Claimant told the employer she preferred to work from 9:00 a.m. to 3:00 p.m., and asked the employer to assign her back to the client she worked with until February 2019. The employer would not assign claimant back to that client because the client refused to have claimant as her caregiver. In March 28, 2019, claimant told the employer she would update the employer about her scheduling preferences “on a day-to-day basis.” Transcript at 67.

(8) Claimant did not tell the employer that she did not want to be caregiver for the client because they had MRSA. Had claimant asked the employer to remove her from caring for the client with MRSA, the employer would have removed claimant from the client.

(9) Claimant did not work March 30 or 31, 2019. Claimant worked every day from April 1 through April 5, 2019. One of the shifts was an “extra shift” claimant voluntarily took with a client who was not her regular client. Transcript at 55.

(10) On April 5, 2019, claimant reviewed the work schedule for the next week, and saw that the employer had scheduled her to work on Sunday, April 7, 2019. Claimant was unwilling to work that day because her children had sports activities that day, and because she had already worked from April 1 to April 5 that week. Claimant sent the scheduler an email stating that claimant could not work on April 7. Exhibit 1 at 32. The scheduler responded immediately that claimant would need to work a weekend day, and that all caregivers were required to work a weekend day. Exhibit 1 at 32. The scheduler offered to change claimant’s hours to another time during the weekend. Exhibit 1 at 32.

(11) If claimant had told the scheduler that she could not work on April 6 or 7, 2019, the employer would not have disciplined claimant. The employer would only have disciplined claimant if she was a no call, no show for the assignment.

(12) Later on April 5, 2019, claimant sent the scheduler an email stating that she was quitting work effective immediately due to dissatisfaction with her schedule and work assignment. Exhibit 1 at 33.

CONCLUSIONS AND REASONS: Claimant voluntarily left work without 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). “[T]he reason must be of such gravity that the individual has no reasonable alternative but to leave work.” OAR 471-030-0038(4). The standard is objective. *McDowell v. Employment Department*, 348 Or 605, 612, 236 P3d 722 (2010). A claimant who quits work must show that no reasonable and prudent person would have continued to work for their employer for an additional period of time.

To the extent claimant left work because she was concerned she would develop a MRSA infection from the client she was assigned to care for in February 2019, claimant left work without good cause. The employer had all its caregivers follow specific safety procedures for such clients, and claimant did not show by a preponderance of the evidence that those safety precautions did not meet the standards acceptable for the industry. However, because claimant did develop a MRSA infection while caring for the client in July 2018, it is possible she contracted it from that client. Based on this record, claimant established that she faced a grave situation because she was at risk for contracting MRSA from a client. However, claimant failed to show that she had no reasonable alternative but to quit work rather than continue as a caregiver for that client. Claimant did not have to continue as a caregiver for that client. There is no dispute in the record that claimant did not ask to be removed from that client because of her concern about developing an infection, and that if she had done so, the employer would have removed

her from that assignment. Because claimant had the reasonable alternative of asking to be removed from the client due to her concerns about MRSA infection, and that alternative would not have been futile, claimant failed to show that she had no reasonable alternative but to quit when she did because of her MRSA concerns.

Claimant also left work because she was dissatisfied with her schedule because it began at 8:00 a.m. and her children were not at school until 9:00 a.m. The record does not show if claimant investigated childcare options so she could report to work by 8:00 a.m. Assuming that she did not have such options, claimant did, however, have reasonable alternatives to quitting. Although claimant had told the employer that she preferred to return to the 9:00 a.m. to 3:00 p.m. case she worked before February 2019, claimant did not tell the employer before she quit that she was unavailable to work a shift that began at 8:00 a.m. Had she done so, the employer's scheduler would not have scheduled claimant to work at that time. Claimant would have been able to obtain shifts that fit her schedule from the employer's "app." The record shows that there were many hours of work available from the "app." Claimant also could have obtained additional shifts from the "app" so that she worked her desired number of shifts per week. Claimant also had the reasonable alternative of informing the scheduler by Friday at 4:00 p.m. of days she was unable to report to work by 8:00 a.m. The record shows claimant would not face discipline for doing so unless she was a no call, no show.

The claimant did not meet her burden to show that she quit work with good cause, and is disqualified from receiving unemployment insurance benefits because of this work separation.

DECISION: Order No. 19-UI-138304 is affirmed.

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

DATE of Service: December 2, 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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