

EMPLOYMENT APPEALS BOARD DECISION
2019-EAB-1029

Reversed
No Disqualification

PROCEDURAL HISTORY: On September 13, 2019, the Oregon Employment Department (the Department) served notice of two administrative decisions, one concluding claimant quit work without good cause from 7-Eleven # 22089E (decision # 80807) and the other concluding claimant quit work without good cause from 7-Eleven # 2353-15399F (decision # 92301). Claimant filed a timely request for hearing on both decisions. On October 3, 2019, ALJ S. Lee conducted a consolidated hearing on both decisions, and on October 11, 2019, issued Order Nos. 19-UI-137990, affirming decision # 80807, and 19-UI-137994, affirming decision # 92301. On October 29, 2019, claimant filed applications for review of both orders with the Employment Appeals Board (EAB).

Pursuant to OAR 471-041-0095 (May 13, 2019), EAB consolidated its review of Orders No. 19-UI-137990 and 19-UI-137994. For case-tracking purposes, this decision is being issued in duplicate (EAB Decisions 2019-EAB-1028 and 2019-EAB-1029).

FINDINGS OF FACT: (1) 7-Eleven # 22089E and 7-Eleven # 2353-15399F employed claimant from December 2018 until July 27, 2019 as an associate. The same franchisee owned both stores.

(2) Both stores where claimant worked were open 24 hours every day. At hire, the owner told claimant he would move claimant to day shifts, but that claimant would initially work nights. Claimant worked three nights per week in each store during the graveyard shift from 10:00 p.m. until 6:00 a.m.

(3) The owner had some new employees watch training videos at hire, including videos about “how to keep themselves safe.” Transcript at 27. Claimant did not receive such training. The employer instructed employees to remain calm with aggressive customers and to call the police if they could not resolve problems with customers. The stores had alarms and video surveillance cameras.

(4) Claimant often experienced threats and attempted physical violence from customers while working. The problem “got worse and worse” during 2019. Transcript at 6. Claimant had to call the police in response to such incidents “more times than [he] would like to count” during 2019. Transcript at 7.

Customers sometimes “swung at” claimant. Transcript at 7. Claimant attributed the increase in threats and attempted violence toward him to an increase in customers after midnight because another large store on the same road changed its closing time to midnight.

(5) Claimant and other night shift employees had complained to the owner about the increase in aggressive customer behavior. Claimant complained to three different morning managers and the owner about the problem.

(6) When claimant called the police in response to customer aggression, the police response was inconsistent. Sometimes the police arrived, but “not immediately.” Transcript at 7. Sometimes the police did not respond.

(7) One other employee alternated working at both the employer’s stores during claimant’s shifts, but he was not physically able to assist in another employee’s defense. The night manager worked until claimant reported to work, then left. One additional employee sometimes worked with claimant until 1:00 a.m.

(8) In late June 2019, claimant asked the owner about moving him to day shifts. The owner told claimant he would move claimant to day shifts.

(9) At approximately 2:00 a.m. on July 21, 2019, an angry customer “beat [claimant] up behind the counter.” Transcript at 6. The other employee was not able to assist claimant during the assault. Claimant had a black eye from the assault. Claimant called the police after the assault, and on this occasion, the police arrived quickly. The customer had left before the police arrived. Claimant filed a police report. The police asked claimant to provide video footage from the store. Claimant requested the video footage of the incident from one of the managers. The manager did not provide claimant with the video footage before claimant’s employment ended.

(10) Later on July 21, 2019, claimant talked to the owner about the incident and the owner told claimant that the employees’ safety was a “number one concern.” Transcript at 10. One of claimant’s managers questioned claimant as to why claimant did not “fight back” on July 21. Transcript at 34. Claimant told the owner that he quit due to the unsafe working conditions at night. The owner told claimant he would change claimant to a day shift. Based on that promise, claimant agreed to continue working for the employer.

(11) After July 21, 2019, claimant worked one day shift before the owner moved him back to graveyard shifts. The owner and managers did not tell claimant why they moved him back to the graveyard shift. Claimant understood that the employer might have been dissatisfied with his work performance during the day shift.

(12) The employer made no changes after the July 21, 2019 incident to address employee safety at the stores.

(13) After the employer moved claimant back to the graveyard shift, the employer hired another employee who it planned to have work the graveyard shift after he was trained. The employer did not tell claimant that it was training the new employee to work the graveyard shift.

(14) The owner told claimant to report to work at 10:00 p.m. on July 27, 2019. Claimant reported for work at 11:00 p.m. The owner called claimant and reprimanded claimant for reporting to work late because the owner wanted claimant to train the new employee during that shift. During the telephone conversation, claimant asked the owner why the owner had not switched claimant to day shifts. The owner told claimant that he “needed time to get his night crew ready.” Transcript at 11. The owner did not tell claimant when he would switch claimant to day shifts, or offer claimant options other than continuing to work at night until he switched him to day shifts. Claimant also complained about having to complete the day crew’s duty of removing old food from the racks, which the day crew had not completed. The owner told claimant he was “complaining too much.” Transcript at 15. Claimant told the owner that he quit.

(15) On July 27, 2019, claimant voluntarily left work because he felt unsafe working the graveyard shift for the employer. Another employee was “attacked” physically at work the week after claimant quit. Transcript at 28.

CONCLUSIONS AND REASONS: Claimant voluntarily left 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). “[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.

Order Nos. 19-UI-137990 and 19-UI-137994 concluded that claimant faced a grave situation at work due to the risk to his physical safety from customers, but also concluded that rather than quitting when he did, claimant had the reasonable alternative of waiting for the employer to switch him to day shifts.¹ The record shows claimant faced a grave situation at work, but does not support the conclusion that claimant had a reasonable alternative to leaving work on July 27, 2019.

Claimant testified that he left work on July 27, 2019 because he was “scared” and the employer had taken “no action” to address his safety concerns. Transcript at 32. Based on the late-night customers’ regular threatening and violent behavior, claimant faced a grave situation at work and his fear for his safety was reasonable. Claimant and other night shift employees complained to the employer about their working conditions, and based on the July 21 incident alone, the owner knew or should have known that additional safety measures were necessary at the store where claimant was attacked. However, the record shows the employer believed additional safety measures were not necessary. When asked if the employer was planning to make any changes to improve safety at the stores after claimant was assaulted, the owner replied, “We have all the preventative . . . we needed. We have everything . . . we needed.” Transcript at 23. The owner testified that he did not need to take additional safety measures because he

¹ Order Nos. 19-UI-137990 and 19-UI-137994 at 3.

did not have “those kind of incidents that often.” Transcript at 24. However, a similar incident occurred one week after claimant quit. The owner testified that he did not assign another employee to work with claimant after 1:00 a.m. because “it was pretty quiet” that late in the store. Transcript at 39. However, claimant was assaulted at 2:00 a.m. The owner asserted that all employees received training regarding keeping themselves safe. However, claimant did not receive such training. The record shows there was a lack of uniform training because although the owner testified that employees were trained not to argue with aggressive customers, after the July 21 incident, one of the managers questioned claimant as to why claimant did not “fight back” on July 21. The owner stated that the stores had an alarm system and video surveillance, and that employees were instructed to remain calm with customers and call the police if an incident occurred. Transcript at 23-24. However, as claimant testified, “[C]alling 911 after you get beat up is not a safety precaution.” Transcript at 32. Continuing to work graveyard shift under the same conditions as before he was assaulted was not a reasonable alternative for claimant. Nor did the employer provide claimant an alternative to working the graveyard shift before the employer was able to move him to a day shift.

Claimant did not know if or when the employer would move him to a day shift. Although the employer alleged that he was training a new hire to work at night, thereby allowing him to move claimant to day shifts, the owner and managers did not give claimant a date that he would begin working day shifts permanently. Transcript at 40-41. To the contrary, the owner had discussed day shifts with claimant since hire, and had said he would move claimant to day shifts weeks before the July 21 incident, without providing claimant day shifts. Although the owner had claimant work one day shift after the assault, the owner immediately moved claimant back to graveyard without explanation or assurance that the employer would move him permanently to a day shift. Claimant understood that the employer might have been dissatisfied with his work performance during the day shift. The owner did not tell claimant the new hire would take over claimant’s night shifts, and it was reasonable that claimant had lost confidence that the employer would move him to day shifts. In claimant’s conversation with the owner on July 27, rather than responding to claimant’s questions about working day shift, the owner told claimant he was “complaining too much.” Transcript at 12.

The preponderance of the evidence shows that claimant faced a situation of such gravity at work that he did not have a reasonable alternative to quitting work when he did. Claimant therefore had good cause to quit on July 27, 2019.

DECISION: Order Nos. 19-UI-137990 and 19-UI-137994 are set aside, as outlined above.

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

DATE of Service: December 4, 2019

NOTE: 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.

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

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.

Employment Appeals Board - 875 Union Street NE | Salem, OR 97311
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