

EMPLOYMENT APPEALS BOARD DECISION
2019-EAB-1145

Request to Reopen Granted
Reversed
No Disqualification

PROCEDURAL HISTORY: On August 24, 2019, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant quit work without good cause (decision # 90613). Claimant filed a timely request for hearing. On September 5, 2019, the Office of Administrative Hearings (OAH) served notice of a hearing scheduled for September 18, 2019. On September 18, 2019, ALJ F. Scott conducted a hearing at which the employer failed to appear, and on September 23, 2019, issued Order No. 19-UI-136947, concluding claimant voluntarily quit work with good cause. On October 9, 2019, the employer filed a timely request to reopen the hearing. On October 29, 2019 and November 13, 2019, ALJ Seideman conducted a hearing at which both claimant and the employer appeared, and on November 14, 2019 issued Order No. 19-UI-139763, granting the employer's request to reopen and concluding claimant voluntarily quit work without good cause. On December 4, 2019, claimant filed a timely application for review of Order No. 19-UI-139763 and written argument with the Employment Appeals Board (EAB).

Claimant submitted written argument but did not certify that she provided a copy of her argument to the other parties as required by OAR 471-041-0080(2)(a) (October 29, 2006). Therefore, EAB did not consider claimant's written argument when reaching this decision.

EVIDENTIARY MATTER: The ALJ admitted Exhibit 6 into evidence, but failed to mark it as such, and instead marked it as Exhibit 5 although a separate document had already been marked as Exhibit 5. As a clerical matter, we have identified Exhibit 6 based on the ALJ's description of it, and marked it as Exhibit 6. Audio Record (November 13, 2019 hearing) at 4:50 to 5:10.

Based on a *de novo* review of the entire record in this case, and pursuant to ORS 657.275(2), Order No. 19-UI-139763's findings and analysis with respect to allowing the employer's request to reopen are **adopted**.

FINDINGS OF FACT: (1) Silver Lake Café and Bar employed claimant as a waitress, dishwasher, cashier, and cook from June 23, 2017 to July 31, 2019. ML was the employer's owner and claimant's direct supervisor.

(2) Over time, claimant noticed that ML had been speaking to her frequently in a demeaning manner. In early March 2019, while processing a credit card transaction, claimant attempted to replace the machine's paper, which had run out. While doing so, the machine became inoperable and caused ML to ask the customer to go to a local store to obtain cash and then return to pay for his meal. After the customer left, ML criticized claimant about replacing the paper, stating, "Only an idiot couldn't figure it out." Transcript (November 13, 2019 hearing) at 17. Around that same time, ML also called claimant "stupid girl" when addressing claimant about another mistake she had made. Transcript (November 13, 2019 hearing) at 17. Around March 5, 2019, claimant asked ML to stop "talking down" to her when discussing her work activities, to which ML responded, "I can't be walking on eggshells around you." Transcript (November 13, 2019 hearing) at 6, 17; Exhibit 12.

(3) On April 20, 2019, ML spilled butter on a grill and blamed claimant for moving the butter from its usual location. In anger, ML slammed a metal cookie sheet against the grill and tossed it toward the sink where claimant was standing, causing claimant to duck to avoid it. Exhibit 2. Claimant again spoke to ML about the effect ML's behavior toward her was having on her. Claimant decided to document ML's comments to her on her calendar.

(4) On April 27, 2019, ML criticized claimant for ruining some biscuits by cutting them too soon and then threw the empty plastic biscuit bin toward claimant, striking her and leaving a small cut on claimant's arm. Exhibit 2. The next day, claimant described the incident to her sister, who was aware of ML's past demeaning statements to claimant, and she suggested that claimant quit, which claimant was not willing to do because she was the primary support for her and her disabled husband. Exhibit 11.

(5) On June 4, 2019, ML told claimant that she was "too slow and sloppy," and that she needed to dress better and not let her hair grow gray. Exhibit 12.

(6) On July 6, 2019, in a meeting with coworkers, ML accused claimant of "trying to sabotage [ML's] business" by her frequent mistakes. Transcript (November 13, 2019 hearing) at 31; Exhibit 12. ML's statement embarrassed claimant.

(7) On July 7, 2019, the employer had a large crowd for a women's World Cup match. While claimant was waiting on a customer, ML yelled, "Order up!" several times, which claimant did not hear, and loudly stated within earshot of customers, "Where is that stupid girl?" which again embarrassed claimant. Transcript (November 13, 2019 hearing) at 17-20. ML then criticized claimant for not filling a cooler with ice as previously instructed, stating, "What part of that didn't you understand?" Transcript (November 13, 2019 hearing) at 17-20. When claimant tried to explain that there was not enough ice, ML told her she did not want to hear claimant's excuses. Claimant went outside to empty the cooler, began crying and returned minutes later with the cooler. When a customer told ML that it appeared claimant had been crying, ML criticized claimant for doing so in front of customers, which she had not done. Transcript (November 13, 2019 hearing) at 17-20.

(8) ML's continual demeaning behavior toward claimant eventually caused claimant to begin "shaking" whenever ML came into the employer's establishment while claimant worked. Transcript (November 13, 2019 hearing) at 5.

(9) On July 31, 2019, which was claimant's day off, ML sent claimant two critical text messages. "Hey do you need your glasses fixed? You opened another jar of pickles which there was one open." Exhibit 6. "No more slicing anything. U keep doing it wrong no matter how many times I tell you...I do not understand why or what is going on with you...U are costing me so much money." Exhibit 7.

(10) Later that day, claimant concluded that ML's demeaning behavior toward her had persisted to the point where their relationship had broken down and she "couldn't function anymore" at work. Transcript (November 13, 2019 hearing) at 6. Claimant responded to claimant's previous text messages that day by sending ML a text stating that she "quit" because of ML's demeaning comments. Exhibit 9. On July 31, 2019, claimant turned in her key and quit work.

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). 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.

As a preliminary matter, claimant and the employer's witnesses disagreed regarding what had transpired regarding most of the facts and incidents at issue. The employer's witnesses expressed their belief that many of the incidents claimant described had not even occurred, even though those witnesses, with the exception of the owner, usually were not present. Transcript (November 13, 2019 hearing) at 21-40; Exhibits 15-17. However, because claimant's testimony was more detailed and often supported by contemporaneous calendar entries she had made and text messages from the owner she had kept, viewing the record as a whole, claimant's testimony had more probative value than that of the employer's witnesses, including the owner. Accordingly, where the parties' evidence conflicted, findings of facts were based on claimant's evidence.

Order No. 19-UI-139763, with little analysis, found facts in accordance with the employer's evidence and concluded claimant quit work without good cause, reasoning as follows:

The remaining issue is whether claimant had good cause to quit. She was upset with things and blamed everyone else. However, the testimony was very clear that there was much lack of harmony and others were also upset with claimant's attitude. If this case was a discharge case, I would have to determine which side was right. However, that doesn't have to be done, because claimant was the one who quit and she had no good cause to quit. She had not looked for any other work before quitting.

Order No. 19-UI-139763 at 3. However, the order is not supported by the record, and the stated alternative of seeking other work before quitting was not a reasonable one based on Oregon appellate decisions.

Claimant quit work because ML's demeaning behavior toward her had caused their employment relationship to break down to the extent that claimant's body began "shaking" when ML walked into the establishment, and claimant "couldn't function anymore at work." The evidence was persuasive that ML subjected claimant to embarrassing verbal ridicule and insults on a regular basis, often within earshot of customers, and did not stop after claimant told her at least twice that her comments had a damaging effect on her, and that she needed them to stop. On one occasion when claimant tried to communicate to ML the impact her words had on her, ML's response was that she was not willing to "walk on eggshells" around claimant, and ML's behavior did not change. ML's final insults toward claimant occurred on July 31, 2019, when ML sent text messages to claimant, on her day off, questioning her eyesight in an insulting manner and telling her that when slicing meat, "U keep doing it wrong no matter how many times I tell you."

ML's persistent demeaning comments and behavior toward claimant, which included tossing a cookie sheet and plastic bin in claimant's direction when ML was angry, and sending her text messages on her day off, created a grave situation for claimant. It served no legitimate purpose of the employer and was entirely within ML's control to correct. Claimant pursued the reasonable alternative of asking ML to discontinue her comments and behavior at least twice before July 31, 2019, without success. Under those circumstances, claimant demonstrated that a reasonable and prudent person of normal sensitivity, exercising ordinary common sense, would leave work.

Order No. 19-UI-139763's reasoning that claimant quit work without good cause because she failed to pursue the reasonable alternative of seeking other work before quitting is contrary to Oregon appellate decisions. *See, 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).

Claimant established that no reasonable and prudent person would have continued to work for her employer for an additional period of time. She therefore quit work with good cause, and is not disqualified from receiving benefits based on her work separation from the employer.

DECISION: Order No. 19-UI-139763 is set aside, as outlined above.¹

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

DATE of Service: January 10, 2020

¹ This decision reverses an order that denied benefits. Please note that payment of benefits, if any are owed, and 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 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

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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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