EO: 200
BYE: 202048

State of Oregon
Employment Appeals Board
875 Union St. N.E.
Salem, OR 97311

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VQ 005.00

EMPLOYMENT APPEALS BOARD DECISION
2020-EAB-0226

Reversed
No Disqualification

PROCEDURAL HISTORY: On January 31, 2020, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant voluntarily left work without good cause and was disqualified from benefits effective December 1, 2019 (decision # 152341). Claimant filed a timely request for hearing. On March 5, 2020, ALJ R. Frank conducted a hearing, and on March 6, 2020 issued Order No. 20-UI-145758, affirming the Department's decision. On March 13, 2020, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant's argument 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. Under ORS 657.275(2) and OAR 471-041-0090 (May 13, 2019), EAB considered only information received into evidence at the hearing when reaching this decision.

FINDINGS OF FACT: (1) The Veterans Administration employed claimant as a social worker from September 2014 to December 3, 2019.

(2) In approximately May 2013, claimant began to develop a complex pain syndrome. She was diagnosed with interstitial cystitis, Hunner's ulcers, neuralgia, endometriosis, and myofascial pelvic pain disorder.

(3) Claimant and her then-supervisor worked to develop informal accommodations for claimant that helped her perform her job despite her diagnoses. At some point in time, claimant got a new supervisor. The new supervisor removed claimant's informal accommodations and increased her productivity expectations. Claimant began working with the employer to formalize some reasonable accommodations, none of which were established during times relevant to this decision.

(4) Beginning October 7, 2019, claimant began a leave of absence. She did not initially submit timely paperwork to have the leave protected under the Family Medical Leave Act (FMLA). She was depressed, in pain, was having a hard time getting things done, and had encountered a lot of obstacles.

Ultimately, she submitted the appropriate FMLA paperwork and the employer retroactively approved her leave of absence for the period of October 7, 2019 to January 6, 2020.

(5) On October 17, 2019, claimant underwent surgery to temporarily place wires in her spine. She was scheduled to have the wires removed a week later. She made the employer aware of the procedures. During that period, however, claimant's supervisor notified claimant that she was required to report to the work site on October 22, 2019. The director supported the supervisor's decision to require claimant's presence at the work site. The stress claimant experienced as a result exacerbated her condition.

(6) In late-November 2019, the employer notified claimant that her supervisor had recommended the director terminate her employment for excessive absenteeism. The notification instructed claimant that she must either submit a written statement or meet with the director on December 3, 2019, and that there would be a meeting on December 3, 2019 at which the director would decide whether or not to approve the supervisor's recommendation that the employer terminate claimant's employment. The notification gave claimant the option to have union representation.

(7) Claimant sought union representation. Her representative was the vice president of the Portland VA Medical Center Union. The representative confirmed that the employer could discharge her, and said she had consulted with the union's attorney and received verification that the employer could legally discharge claimant despite the fact that claimant was on FMLA leave. The representative strongly encouraged claimant to quit her job, and told her that if she did not quit her job she would be fired.

(8) Claimant twice asked her union representative if she "saw any possibility for me to keep my job." Exhibit 1. The representative twice responded that she did not. Additionally, the representative told claimant that the employer can fire people while they are on FMLA, that the director had "agreed with every supervisor's proposal to remove an employee from their post since becoming director," and that "no matter what you do, he (the director) is going to fire you anyway." Exhibit 1.

(9) Effective December 3, 2019, as strongly recommended by her union representative, claimant notified the employer that she 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). "[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). Claimant had a complex pain syndrome and at least five separate pain condition diagnoses since 2013, which may be considered a permanent or long-term "physical or mental impairment" as defined at 29 CFR §1630.2(h). A claimant with such an impairment who quits work must show that no reasonable and prudent person with the characteristics and qualities of an individual with such an impairment would have continued to work for their employer for an additional period of time.

As a preliminary matter, the order under review contained significant factual errors. The ALJ referred to claimant's clear and specific testimony about having a complex pain syndrome and listing each of her five diagnoses as merely "a wide array of medical conditions manifesting in various symptoms" "that are numerous, varied and difficult to catalog." *Compare* Audio record at 11:40-13:05; Order No. 20-UI-145758 at 1, 2. The ALJ referred to applying the standard of "a reasonable and prudent person, treated and medicated for such conditions," although there is no evidence in this record that claimant was medicated for her conditions, or how she was medicated. Order No. 20-UI-145758 at 2. The ALJ made conjectures, that he mislabeled as "findings of fact," that "[a]pproval of claimant's leave requests may have been stalled due to delays in claimant's medical appointments and receipt of paperwork," although no evidence in the record supported the premise that claimant's late submission of FMLA paperwork to the employer was connected to either of those things, and she had in fact testified that the late submission of FMLA paperwork was related to her being depressed, in pain, having a hard time getting things done, and having to overcome obstacles in order to complete it. Order No. 20-UI-145758 at 1.

The ALJ additionally mislabeled as a finding of fact that, on December 3, 2019 claimant's "leave of absence was approved until January 6, 2020, was no longer approved, was 'retroactively' approved, or was not 'fully' approved due to delayed paperwork." The ALJ then referred to claimant's testimony about whether her leave of absence was approved as of December 3rd as "an array of testimony that was inconsistent and utterly confusing, variously suggesting that her leave of absence was approved until January 6, 2020, had lapsed, was 'retroactively' approved and was not 'fully' approved". There was, however, clear and consistent testimony throughout the record that, regardless of claimant's delay submitting FMLA paperwork initially, as of December 3rd claimant's leave of absence under FMLA had been retroactively approved for the whole period of October 7, 2019 to January 6, 2020. *Compare* Audio record at 11:30, 14:35; Order No. 20-UI-145758 at 1, 3.

The ALJ found as fact that claimant "conferred with a union representative on" December 3, 2019, despite there being a significant amount of evidence throughout the record logically suggesting that claimant's consultations with the union representative had occurred within the two-week period prior to December 3rd, and not on that date. Order No. 20-UI-145758 at 1. The ALJ further found as fact that claimant "may have been worried" that the employer would discharge her while she was on FMLA, when the unrefuted evidence in the record is that claimant quit work precisely to avoid being discharged by the employer while on FMLA, and that her decision to quit when she did was based upon her union representative's and union attorney's advice that the employer could and would discharge her if she did not quit before the December 3rd meeting. *Compare* Audio record at 15:10-16:00; Order No. 20-UI-145758 at 2. Finally, the ALJ found as fact that claimant "does not know whether the meeting would have been investigative or a prescribed due process step pursuant to her union contract." Order No. 20-UI-145758 at 2. Although that is strictly true, claimant succinctly described that the purpose of the December 3rd meeting was to speak with the employer's director, who would decide at that time whether or not to approve the supervisor's recommendation to fire her. *See* Audio record at 16:15-16:30.

Having established the factual errors underlying the ALJ's conclusion that claimant voluntarily left her job without good cause, there is, likewise, an inadequate basis for concluding that claimant's situation was not grave or that she had reasonable alternatives to quitting work. For example, the ALJ suggested that claimant's leave of absence had lapsed and she could have taken steps to reinstate it. Order No. 20-UI-145758 at 3. There is no evidence in this record suggesting that claimant's leave of absence had lapsed, much less that there was anything she should or could have done to reinstate it; claimant

repeatedly established through her testimony that as of December 3rd she was on an approved FMLA leave of absence. The ALJ suggested claimant could have remained on leave until the following month; however, the unrefuted evidence in this record is that the director was going to fire her on December 3rd if she did not quit. The ALJ also suggested that claimant had the reasonable alternative "of availing herself of all due process afforded her by union contract in order to prevent any proposed discharge." Order No. 20-UI-145758 at 3. The record does not include any evidence that – notwithstanding the ALJ's own allusions to the existence of a union contract and the existence of possible due process rights under such a contract – there were any pre-dismissal processes available to claimant at the time she quit work. The fact that claimant's union representative, on advice from the union lawyer, told claimant that she would be fired if she attended the December 3rd meeting, told claimant she could legally be fired despite being on FMLA, and twice represented to her that there was nothing she could do to avoid being discharged, strongly suggests that there were no union contract mandated processes that might have allowed her to avoid discharge.

Claimant quit work to avoid being discharged, not for misconduct. At the time she quit work, the employer had twice requested or required her to report to the work site while she was on FMLA and known to be in recovery from medical procedures. Her supervisor had removed all the informal accommodations claimant's prior supervisor had put in place for claimant and increased her productivity expectation, leaving claimant unable to perform her job satisfactorily. She had also been unable to have any new accommodations formalized in time for them to make a difference. Claimant was advised by her union's vice president, on advice of the union's lawyer, that if she did not quit her job by December 3rd the employer would fire her, and the only thing she could do to avoid being fired was to quit her job. No reasonable and prudent person with the characteristics and qualities of someone with a complex pain syndrome on medical leave to obtain treatment to alleviate those conditions would consider remaining employed and inevitably being fired a reasonable alternative to quitting work. Regardless what claimant did on December 3rd her employment was going to end; claimant's decision to quit work was consistent with how any reasonable and prudent person would react under the same circumstance.

Claimant voluntarily left work without good cause. Claimant is not disqualified from receiving unemployment insurance benefits because of this work separation.

DECISION: Order No. 20-UI-145758 is set aside, as outlined above.

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

DATE of Service: <u>April 15, 2020</u>

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.

Please help us improve our service by completing an online customer service survey. To complete the survey, please go to https://www.surveymonkey.com/s/5WQXNJH. If you are unable to complete the survey online and wish to have a paper copy of the survey, please contact our office.

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 – 本判决会影响您的失业救济金。 如果您不明白本判决， 请立即联系就业上诉委员会。 如果您不同意此判决，您可以按照该判决结尾所写的说明，向俄勒冈州上诉法院提出司法复审申请。

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 فورا، 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 دستورالعمل موجود در پایان آن، از دادگاه تجدید نظر اورگان درخواست تجدید نظر کنید.

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