

EMPLOYMENT APPEALS BOARD DECISION
2020-EAB-0384

Reversed
No Disqualification

PROCEDURAL HISTORY: On March 13, 2020, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant left work without good cause and was disqualified from receiving benefits effective January 12, 2020 (decision # 83021). Claimant filed a timely request for hearing. On April 24, 2020, ALJ Lee conducted a hearing, and on May 1, 2020, issued Order No. 20-UI-149155 affirming the Department's decision. On May 14, 2020, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Caesars Nails and Day Spa employed claimant as a nail technician from May 25, 2019 through January 18, 2020. At all relevant times, claimant's co-workers included the owner, TN; a manager, AN; a receptionist/supervisor, SS; and a co-worker, JL. At all relevant times, JL was a convicted felon based on a prior firearm-related offense and TN was aware of JL's criminal history.

(2) On July 10, 2019, JL screamed at claimant because he believed that claimant had failed to put away nail polish and because claimant's area was messy. The screaming lasted a lengthy period of time and occurred in front of one of claimant's clients. Claimant met with TN that day to discuss the incident and "was still physically upset" about what JL had done. Transcript at 9. TN told claimant she would speak to JL. TN spoke to JL and told him he was "not allowed to talk to [claimant] or show [claimant] how to do his job or how to clean up." Transcript at 29. JL apologized to TN and told TN that he would leave claimant alone. TN then told claimant that JL would "not talk to [claimant] that way anymore" and that she "will not let anybody bully anyone." Transcript at 31, 34.

(3) From July 11, 2019 until January 4, 2020, JL continued to harass claimant "more subtly, but more frequently." Transcript at 10. JL's harassment was "strategic" in that he would do it when TN tended not to be around. Transcript at 25. JL's treatment of claimant in the workplace during this time period included cursing and screaming at claimant to the point that JL was "spitting in [claimant's] face," public humiliation and intimidation, pacing around in a manner where claimant thought JL was going to strike claimant, and aggressively staring at claimant. Transcript at 8. JL would speak loudly to his clients in claimant's presence, telling them that he carried a concealed gun and that he was trained in martial

arts, which claimant “perceived as a threat.” Transcript at 17. On five separate days, claimant found “soggy wads of toilet paper” on his chair, which he believed JL had deposited based on his observing JL coming out of the bathroom and then dropping “something white” in the area where his chair was located. Transcript at 13. On one occasion, “[JL] caught [claimant] off guard ... in the prep room and told me that he was going to fucking kill me ... under his breath.” Transcript at 15.

(4) Claimant informed TN and AN “on several occasions” about JL’s continuing aggressive behavior, although he was not sure if he told TN about JL’s actions with the soggy toilet paper wads or his threat to kill claimant. Transcript at 13. TN’s response to claimant was that she could not do anything about it because she did not witness it. Claimant did his best to avoid JL “and especially in private areas.” Transcript at 14. TN did not recall claimant telling her about any additional issues with JL after July 10, 2019; however, claimant did “kind of mention about [JL], uh with his attitude” and that “he became very nervous and - and sad all the time or different.” Transcript at 33.

(5) On or about January 2, 2020, claimant and other workers congregated toward the front of the salon and began preparing for the salon’s opening at 10:00 a.m. Claimant was preparing his tools and noticed that the only chair available was JL’s chair. Because JL was in the back break room and “[claimant] didn’t think that he would know,” claimant decided to briefly sit in JL’s chair. Transcript at 11. JL approached claimant and told him “to get the fuck out of his chair.” Transcript at 11-12. Claimant got up from the chair and started walking backwards while JL continued to approach him. JL told claimant “he was going to rip [claimant’s] fucking head off of [his] shoulders,” then slammed his chest into claimant’s chest. Transcript at 12. Claimant screamed at AN and SS to call the police; however, neither individual called the police. Although SS heard claimant ask for the police to be called, SS did not hear JL make any threat toward claimant and “didn’t feel like it needed to be reported because they figured it out.” Transcript at 63. Claimant left the salon and travelled to the police station where he filled out a police report.

(6) From on or about January 2, 2020 until January 17, 2020, claimant continued reporting to work “hoping that the management would work out this problem and do the right thing.” Transcript at 21. Claimant “was desperate to keep the job.” Transcript at 22.

(7) On January 17, 2020, claimant told TN that JL had a knife in his pocket and showed her a picture he took from behind JL. Claimant felt unsafe and left work. TN had AN search JL for a knife, but AN discovered no knife in JL’s possession.

(8) On January 18, 2020, TN spoke with claimant and told him that no knife was found on JL the day before. Claimant expressed to TN, “in a serious way”, that he “was very disappointed with the way that this was failing to be handled.” Transcript at 81. Claimant did not believe he was raising his voice at TN during the conversation; however, TN perceived claimant to be “yelling” at her and to be doing so in front of a client. Transcript at 45.

(9) Later that day, TN gave claimant two written warnings. The first written warning was based on claimant raising his voice at TN. The second written warning instructed claimant that he was “not to encroach or intimidate employees” (the encroachment warning). Transcript at 80. After receiving this written warning “that implied [claimant] was responsible for being attacked by [JL],” claimant decided

to quit because he did not believe the employer could “make the work environment safe and acceptable....” Transcript at 21-22.

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. In a voluntary leaving case, claimant has the burden of proving good cause by a preponderance of the evidence. *Young v. Employment Department*, 170 Or App 752, 13 P3d 1027 (2000).

The Order under review concluded that although claimant “was faced with a serious situation,” his decision to voluntarily leave work was not supported by good cause. Order No. 20-UI-149155 at 4. The Order reached this conclusion based on claimant’s decision to remain at work for two additional weeks after the incident occurring on or about January 2, 2020 between claimant and JL. The Order reasoned that the actual basis for claimant’s decision to leave work was the encroachment warning he received and, in particular, the language within that warning which blamed claimant for “causing the altercation” with JL. Order No. 20-UI-149155 at 4. According to the Order, rather than quitting when he did, claimant had the reasonable alternatives “of objecting to the wording of the warning and asking to work hours when the owner was present if the owner was unwilling to take further action against [JL].” Order No. 20-UI-149155 at 4. In addition, the Order concluded that claimant was not physically at risk when he quit because “[t]he chest bump was the only physical action taken by [JL]... and he had not acted aggressively toward claimant since the altercation.” Order No. 20-UI-149155 at 4. Based on this reasoning, the Order concluded that claimant did not quit work without good cause. While the record supports the Order’s conclusion that claimant “was faced with a serious situation” with respect to his co-worker JL, the record fails to support the Order’s conclusion that claimant left work without good cause.

The record supports the Order’s conclusion that JL’s behavior toward claimant reflected a serious situation. In fact, the preponderance of the evidence demonstrates that claimant was faced with a grave situation. For nearly six months claimant was the victim of an escalating pattern of harassing behavior from JL. JL’s abusive behavior toward claimant began as screaming and over time graduated to threats of physical violence and then, ultimately, an act of physical violence in the form of the unwanted chest bump that occurred on or about January 2, 2020. Under such circumstances, any reasonable and prudent person of normal sensitivity, exercising ordinary common sense, would view claimant’s work situation as grave where claimant was faced with an escalating level of harassment culminating in physical violence.

However, the record fails to support the order’s conclusion that claimant left work without good cause. To the contrary, the record evidence establishes that claimant repeatedly went to the owner and another manager over the course of nearly six months with his concerns about the grave situation he faced with

respect to JL. Despite receiving initial assurances from the owner that JL would be leaving claimant alone, the preponderance of the evidence demonstrates that JL's behavior towards claimant grew progressively worse, and culminated with JL committing physical violence toward claimant. While claimant continually attempted to bring JL's harassing, humiliating, and intimidating behavior to the attention of the owner so that some form of corrective action could take place, the owner instead told claimant that she could not do anything about the behavior because she did not witness it. In light of these circumstances, including JL's escalating pattern of abusive behavior towards the claimant over the course of nearly six months culminating in an assault, and the employer's failure to take any form of corrective action during this time, no reasonable and prudent person would have continued to work for their employer for an additional period of time.

Likewise, the fact that claimant remained at work for another two weeks after the assault he suffered at the hands of JL does not change the conclusion that claimant left work with good cause. Here, the record establishes that claimant was desperate to keep his job, and that he was hopeful during the two weeks that transpired between the assault and his decision to quit that management would find a solution to the problems that existed between claimant and JL. Instead, claimant learned on his last day of work that the employer perceived claimant to be the individual who was "intimidating" other employees and gave him a written warning to this effect. Under these circumstances, where claimant was hopeful that the employer would take remedial action so that he could keep a job he desperately needed, only to discover that the employer perceived him to be the problem and thus no remedial action was likely to occur, no reasonable and prudent person of normal sensitivity, exercising ordinary common sense, would have concluded that they had any other reasonable alternative but to leave work.

The preponderance of the evidence demonstrates that claimant left work with good cause. As a result, claimant is not disqualified from receiving unemployment insurance benefits.

DECISION: Order No. 20-UI-149155 is set aside, as outlined above.

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

DATE of Service: June 11, 2020

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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You can access the survey using a computer, tablet, or smartphone. If you are unable to complete the survey online and need 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.

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