

EMPLOYMENT APPEALS BOARD DECISION
2020-EAB-0431

Modified
No Disqualification

PROCEDURAL HISTORY: On April 22, 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 receiving unemployment insurance benefits effective March 15, 2020 (decision # 172357). Claimant filed a timely request for hearing. On May 19, 2020, ALJ Schmidt conducted a hearing at which the employer failed to appear, and on May 20, 2020, issued Order No. 20-UI-150031, modifying the Department's decision by concluding the employer discharged claimant, not for misconduct, within fifteen days of a planned quit without good cause, and that claimant was eligible for benefits for weeks 12-20 and 13-20, but disqualified effective March 29, 2020 (week 14-20). On May 29, 2020, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Float North employed claimant as a part-time massage therapist from March 2018 to March 15, 2020. Claimant worked for the employer from one to four hours on Sundays, depending on the number of appointments scheduled for that day.

(2) While working for the employer, claimant also maintained a full-time job as a massage therapist with another employer, working for that employer on weekdays and Saturdays.

(3) Claimant experienced soreness, low energy, and general exhaustion from working two jobs. She underwent chiropractic treatment for her symptoms and eventually concluded that she was not getting the rest necessary for her occupation, which made it more likely for her to oversleep in the morning. Claimant decided to quit her part-time job with the employer.

(4) On February 23, 2020, claimant gave the employer notice of her resignation, effective March 29, 2020.

(5) On March 8, 2020, Governor Brown issued Executive Order No. 20-03 declaring a statewide emergency due to the infectious novel coronavirus. Executive Order 20-03 (effective March 8, 2020).

(6) On March 15, 2020, the employer laid claimant off from her employment due to the health and safety concerns created by the proliferation of COVID-19.

CONCLUSIONS AND REASONS: The employer discharged claimant, but not for misconduct.

ORS 657.176(2)(a) requires a disqualification from unemployment insurance benefits if the employer discharged claimant for misconduct connected with work. ORS 657.176(2)(c) requires a disqualification from unemployment insurance benefits if a claimant leaves work voluntarily unless they prove, by a preponderance of the evidence, that they had good cause for leaving work when they did. However, ORS 657.176(8) states, “For purposes of applying subsection (2) of this section, when an individual has notified an employer that the individual will leave work on a specific date and it is determined that: (a) The voluntary leaving would be for reasons that do not constitute good cause; (b) The employer discharged the individual, but not for misconduct connected with work, prior to the date of the planned voluntary leaving; and (c) The actual discharge occurred no more than 15 days prior to the planned voluntary leaving, then the separation from work shall be adjudicated as if the discharge had not occurred and the planned voluntary leaving had occurred. However, the individual shall be eligible for benefits for the period including the week in which the actual discharge occurred through the week prior to the week of the planned voluntary leaving date.”

Under ORS 657.176(8), the first issue to be analyzed is whether claimant quit work with or without good cause. Under ORS 657.176(2)(c), “[g]ood 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 had 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 No. 20-UI-150031 concluded that claimant quit work without good cause because she did not establish that she faced a situation of such gravity that no reasonable person in her circumstances would have continued to work for the employer for an additional period of time.¹ The order reasoned that claimant failed to show that “serious or grave circumstances [arose] from her work with the employer.”² However, the order’s conclusion that claimant quit work without good cause was not supported by the record.

It was undisputed that claimant experienced considerable soreness, low energy, and general exhaustion as a result of working two jobs to the extent that she underwent chiropractic treatment for her symptoms and eventually concluded that she was not getting the rest necessary for her occupation. She asserted that her level of exhaustion from working both jobs made it more likely for her to oversleep in the morning and rendered her unable to accomplish necessary tasks in her personal life.³ On this record, claimant’s exhaustion level from both jobs put her full-time employment at risk and she eventually

¹ Order No. 20-UI-150031 at 3.

² Order No. 20-UI-150031 at 3.

³ Audio Record at 11:00 to 13:00.

decided to quit her part-time job with the employer to give her a necessary day off from work. Although the record may fail to show that serious or grave circumstances [arose] from her work with claimant's part-time employer only, viewed objectively, a reasonable and prudent person of normal sensitivity, exercising ordinary common sense in claimant's circumstances of working two jobs without adequate rest, would have concluded she had no reasonable alternative but to quit her part-time job. Accordingly, claimant's planned quit was with good cause.

Because claimant's planned quit was with good cause, ORS 657.176(8) does not apply and the remaining issue to be determined is whether the employer discharged claimant for misconduct under ORS 657.176(2)(a). ORS 657.176(2)(a) requires a disqualification from unemployment insurance benefits if the employer discharged claimant for misconduct connected with work. "As used in ORS 657.176(2)(a) . . . a willful or wantonly negligent violation of the standards of behavior which an employer has the right to expect of an employee is misconduct. An act or series of actions that amount to a willful or wantonly negligent disregard of an employer's interest is misconduct." OAR 471-030-0038(3)(a) (December 23, 2018). "[W]antonly negligent' means indifference to the consequences of an act or series of actions, or a failure to act or a series of failures to act, where the individual acting or failing to act is conscious of his or her conduct and knew or should have known that his or her conduct would probably result in a violation of the standards of behavior which an employer has the right to expect of an employee." OAR 471-030-0038(1)(c). In a discharge case, the employer has the burden to establish misconduct by a preponderance of evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

However, Oregon temporary rules set out unemployment insurance provisions applicable to the unique situations arising due to COVID-19 and the actions to slow its spread. OAR 471-030-0070(2)(a) (effective March 8, 2020 through September 12, 2020) provides that an individual who is discharged from work because of a COVID-19 related situation is not disqualified from receiving unemployment insurance benefits. Under OAR 471-030-0070(1), a COVID-19 related situation includes the following:

(d) A person is unable to work because their employer has ceased or curtailed operations due to the novel coronavirus, including closures or curtailments based on the direction or advice of the Governor or of public health officials;

On February 23, 2020, claimant notified the employer she was quitting work effective March 29, 2020. On March 8, 2020, Governor Brown issued Executive Order No. 20-03 declaring a statewide emergency due to the infectious novel coronavirus. Claimant last worked for the employer on March 15, 2020. When asked why she did not work through her notice period until March 29, 2020 or seek a leave of absence while she recovered from her exhaustion, claimant responded "when COVID -19 stay home save lives happened, I wasn't able to go any further." From that testimony, it reasonably may be inferred that claimant was laid off because the employer ceased its operations due to the novel coronavirus following the direction or advice of the Governor. More likely than not, that the employer laid claimant off claimant on March 15, 2020 due to the health and safety concerns created by the proliferation of

COVID-19 rather than due to any willful or wantonly negligent conduct attributable to claimant as misconduct.

Accordingly, the employer discharged claimant, not for misconduct, and claimant is not disqualified from receiving unemployment insurance benefits based on her work separation.

DECISION: Order No. 20-UI-150031 is modified, as outlined above.

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

DATE of Service: July 6, 2020

NOTE: This decision modifies 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 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 دستور العمل موجود در پایان آن، از دادگاه تجدید نظر اورگان درخواست تجدید نظر کنید.

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