

EMPLOYMENT APPEALS BOARD DECISION
2020-EAB-0692

Reversed & Remanded

PROCEDURAL HISTORY: On September 3, 2020, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant quit work without good cause and was disqualified from receiving unemployment insurance benefits effective March 1, 2020 (decision # 154518). Claimant filed a timely request for hearing. On October 7, 2020, ALJ Schmidt conducted a hearing, and on October 13, 2020 issued Order No. 20-UI-155128, affirming the Department's decision. On October 30, 2020, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) McCormick & Schmick employed claimant as a cook from July 10, 2018 until March 6, 2020.

(2) The employer's sous chef was claimant's supervisor. Throughout her employment, claimant did not approve of how the employer's sous chef treated claimant's coworkers in the kitchen. Claimant observed the sous chef yelling at them, "demeaning" them, and "rolling her eyes" at them. Transcript at 10. Claimant told the sous chef that she did not approve of how she treated the coworkers. The sous chef responded that she treated them the way she did to "get respect." Transcript at 10. Claimant asked the sous chef to "stop being so mean." Transcript at 9. Until January 2020, claimant did not feel that the sous chef mistreated claimant. However, in January 2020, claimant felt like "something shifted," and the sous chef began to treat claimant in a demeaning manner with her "body language," but did not yell at claimant. Transcript at 35. Claimant observed that the sous chef would "look at [her] . . . roll her eyes and . . . make a joke." Transcript at 35.

(3) Claimant observed that when her coworkers had complained to the employer's human resources department about the sous chef's conduct, the sous chef learned about the complaints, and treated those coworkers "more . . . harshly" after they complained. Transcript at 15.

(4) In January 2020, claimant complained to the head chef about the sous chef's conduct. The head chef responded, "[T]hat's just who she is," about the sous chef. Transcript at 14. Claimant found his response to be "unacceptable." Transcript at 14.

(5) At least three times during her employment, claimant complained to the general manager about the sous chef's conduct. When claimant complained to the general manager, he met with claimant and the sous chef to try to "work through the situation so there was an understanding between [claimant and the sous chef]." Transcript at 22.

(6) During February and March 2020, claimant was also working at Shari's, another restaurant.

(7) Late at night at the end of her shift on approximately February 10, 2020, the sous chef told claimant to count the steaks. Counting steaks was not one of claimant's regular duties. Claimant told the sous chef that she did not have time to count the steaks before her transit train left. Claimant was scheduled to work at Shari's after her shift with the employer. The sous chef did not give claimant permission to leave work before counting the steaks. Claimant counted the steaks and the delay caused claimant to miss her train. Claimant had to pay \$25 for a Lyft to avoid being late to her job at Shari's.

(8) On approximately February 12, 2020, claimant was preparing a dish and cut green onions straight instead of diagonally, "on the bias," as was the norm for the dish claimant had prepared. Transcript at 6. The sous chef pushed the plate back at claimant, approached claimant and stated, "Well, let me show you how to do it," in front of claimant's coworkers. Transcript at 7. Claimant told the sous chef that she knew how to slice green onions diagonally, and had just failed to do it. The sous chef continued to demonstrate how to cut the green onions. Claimant was "upset" about the sous chef's actions because the sous chef knew claimant had attended culinary school and knew how to cut green onions. Claimant felt "humiliated . . . in front of [her] co-workers." Transcript at 6.

(9) After February 12, 2020, claimant complained to the sous chef about the incidents when claimant missed her train and when the sous chef showed her how to cut green onions. Claimant told the sous chef that she thought the sous chef was unnecessarily critical, and the sous chef told claimant that she should "get over it." Transcript at 13. Claimant felt that the sous chef responded as if she was not "sorry" and "didn't even care." Transcript at 10.

(10) Claimant had an anxiety disorder that was diagnosed in 2015. The sous chef's conduct at work caused claimant to experience anxiety, difficulty sleeping, and "dread" about going to work. Transcript at 16.

(11) On February 21, 2020, claimant told the employer she planned to quit work on March 6, 2020.

(12) On March 6, 2020, claimant left work with the employer and began working at Deschutes Brewery.

(13) At the time claimant left work with the employer, the employer paid claimant \$15.00 per hour and claimant was working 22 to 25 hours per week for the employer.

CONCLUSIONS AND REASONS: Order No. 20-UI-155128 is reversed and remanded to the Office of Administrative Hearings for further development of the record.

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) (September 22, 2020). “[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 an anxiety condition, a permanent or long-term “physical or mental impairment” as defined at 29 CFR §1630.2(h). A claimant with 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.

A claimant who leaves work to accept an offer of other work “has left work with good cause only if the offer is definite and the work is to begin in the shortest length of time as can be deemed reasonable under the individual circumstances. Furthermore, the offered work must reasonably be expected to continue, and must pay [either] an amount equal to or in excess of the weekly benefit amount; or an amount greater than the work left.” OAR 471-030-0038(5)(a).

Order No. 20-UI-155128 concluded that claimant quit work due to the “condescending” treatment from the sous chef, and that she quit work without good cause because claimant did not experience a grave situation at work.¹ The order reasoned that claimant’s working conditions were not grave because the feedback claimant received from the sous chef was a normal part of work, and that “there was no evidence that the sous chef treated claimant in a patently abusive manner, such as by yelling, name-calling, or the use of profanities or threats.”² In reaching this conclusion, the order used the general standard for a reasonable and prudent person of normal sensitivity.³ The order reasoned that although claimant had a long-term anxiety condition, the modified standard for a reasonable and prudent person with a permanent or long-term “physical or mental impairment” was not applicable to claimant’s work separation because claimant’s testimony did not establish a connection between her anxiety condition and her decision to quit.⁴ The record does not contain sufficient information to determine that the modified standard should not be applied to claimant’s quit, and the record should be developed in this regard on remand.

The record shows that claimant’s health condition may have contributed to her decision to quit. When describing if anxiety contributed to her decision to quit work, claimant testified, “Yeah . . . it was just too much. I couldn’t take it anymore. Like I just couldn’t. I was at . . . the end and . . . it wasn’t worth the \$15.50 that I made an hour to . . . feel that way every day.” Transcript at 17. The record does not show sufficient information to determine if and how claimant’s working conditions exacerbated her anxiety condition. On remand, the record must be developed to show whether a person with the characteristics and qualities of an individual with claimant’s impairment would have continued to work for their employer.

¹ Order No. 20-UI-155128 at 3.

² Order No. 20-UI-155128 at 3.

³ Order No. 20-UI-155128 at 3.

⁴ Order No. 20-UI-155128 at 2.

The record also shows that claimant may have left work in part to accept an offer of other work at Deschutes Brewery, but the record does not contain sufficient information to determine if claimant had good cause to leave work for that reason. The record does not show if claimant had a definite offer of work at Deschutes Brewery before she gave notice to the employer that she planned to quit work on March 6, 2020. The record does not show if the work at Deschutes Brewery was a permanent position that was expected to continue. Nor does the record show what wage and number of hours per week Deschutes Brewery offered claimant, and when claimant knew those terms of employment. The record also does not contain claimant's weekly benefit amount.

Claimant also worked for the employer, Shari's. The record does not contain sufficient information about that employment to determine whether claimant had good cause to leave work with McCormick & Schmick when she did. The record does not show if claimant continued to work for Shari's after she left McCormick & Schmick. If she did continue to work at Shari's, the record does not show what her wage was there, how many hours she worked, and if that work was expected to continue.

ORS 657.270 requires the ALJ to give all parties a reasonable opportunity for a fair hearing. That obligation necessarily requires the ALJ to ensure that the record developed at the hearing shows a full and fair inquiry into the facts necessary for consideration of all issues properly before the ALJ in a case. ORS 657.270(3); *see accord Dennis v. Employment Division*, 302 Or 160, 728 P2d 12 (1986). Because further development of the record is necessary for a determination of whether claimant quit work with good cause, Order No. 20-UI-155128 is reversed, and this matter is remanded.

DECISION: Order No. 20-UI-155128 is set aside, and this matter remanded for further proceedings consistent with this order.

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

DATE of Service: December 7, 2020

NOTE: The failure of any party to appear at the hearing on remand will not reinstate Order No. 20-UI-155128 or return this matter to EAB. Only a timely application for review of the subsequent order will cause this matter to return to EAB.

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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 ໂດຍປະຕິບັດຕາມຄໍາແນະນໍາທີ່ບອກໄວ້ຢູ່ຕອນຫ້າຍຂອງຄໍາຕັດສິນນີ້.

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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