EO: 200
BYE: 202113

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

053
VQ 005.00

EMPLOYMENT APPEALS BOARD DECISION
2020-EAB-0699

Affirmed
Disqualification

PROCEDURAL HISTORY: On June 22, 2020, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant quit work without good cause and was disqualified from receiving unemployment insurance benefits effective February 23, 2020 (decision # 60743). Claimant filed a timely request for hearing. On October 13, 2020, ALJ Murdock conducted a hearing, and on October 16, 2020 issued Order No. Order No. 20-UI-155369, affirming the Department's decision. On November 5, 2020, claimant filed an application for review with the Employment Appeals Board (EAB).

EAB considered the entire hearing record and claimant's written argument in reaching this decision.

FINDINGS OF FACT: (1) Cascade Centers Inc. employed claimant as a counselor and trainer from November 25, 2018 until February 28, 2020.

(2) In June 2019, the employer's vice president (who was one of the company's owners) scheduled a technician to repair the phone system at the Salem office where claimant worked. Claimant was scheduled to be in the office at that time, but when the technician arrived, no one was there to let him in. The technician called the vice president, who made several attempts to contact claimant about her whereabouts. When the vice president and claimant finally spoke on the phone, claimant explained that she had left to get coffee and was stuck in a construction zone in traffic. Ultimately, the technician had to wait two hours to gain access to the office and begin the work. The vice president spoke to claimant about that issue and told her that she was expected to be in the office during her scheduled work hours.

(3) In September 2019, the employer's managing owners approved claimant's request to bring her young dog to work with her, as claimant was training the dog to become a service animal. Later in

September 2019, the vice president directed claimant to remove the dog from a staff meeting because the dog had become agitated and had disrupted speakers in the meeting. Shortly after that incident, the vice president also informed claimant that one of claimant's clients had complained that the dog had been disruptive. Thereafter, claimant no longer brought the dog to meetings, and felt as though the employer disapproved of her bringing the dog to work.

(4) Also in September 2019, the vice president noticed that claimant had been scheduling charting time inappropriately, and subsequently reorganized claimant's schedule to bring her charting hours in line with the employer's expectations. The vice president had also heard from other employees that claimant had not been in the office during her charting hours, contrary to the employer's policy. The vice president discussed the scheduling issue with claimant and reminded her that she needed to be in the office during charting hours.

(5) When the vice president discussed the scheduling issue with claimant, claimant expressed that she thought she was being treated "differently" than other employees. Transcript at 19. The vice president assured claimant that the expectations were the same for all employees. Claimant also told the vice president that she felt as if the vice president's management style had changed since the request to bring her dog to work with her was approved. The vice president told claimant that she supported claimant in bringing the dog to work with her.

(6) On January 29, 2020, another owner attempted to contact claimant by instant message and then by email about a schedule change, but claimant did not respond. He copied the vice president on the email and when claimant did not respond to the email, the vice president called the office and asked another counselor to see if claimant was in her office. The counselor did not find claimant in her office. The vice president then sent claimant a text message, telling her she was trying to get ahold of her and asking whether she was running late. Claimant responded 30 minutes later, stating that she had been at the office the whole time, and that she had been in the bathroom. The vice president was not satisfied that claimant's explanation accounted for the length of time that she was unreachable, but she only expressed to claimant that they needed to know where she was because they needed to assign her to handle phone calls.

(7) Later that day, when claimant used the restroom, she sent an email to the vice president, informing her that she was going to the restroom. The vice president replied that she needed to let her know when she would be unavailable for a significant period of time, but not when she would be gone for a short time to use the restroom.

(8) After January 29, 2020, claimant started to experience physical symptoms of stress related to work, including troubled sleep, gastrointestinal problems, and increased blood pressure. Later that week, claimant consulted a doctor about her work-related stress and health issues. The doctor recommended that claimant "look for another position and leave this position, because of the impact it was starting to have on my health in general." Transcript at 27.

(9) On February 11, 2020, due to the effects that the work-related stress was starting to have on her health, claimant gave the employer notice that she would resign, effective February 28, 2020. Claimant gave this much notice because she understood her ethical obligations as a counselor to require it.

CONCLUSIONS AND REASONS: Claimant quit work without 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) (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). 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.

The order under review concluded that claimant ". . . voluntarily left work because she felt that the work environment had become hostile and discriminatory"; that "claimant did not demonstrate that she was harassed, discriminated against, retaliated against or treated in an unfair or unreasonable manner by the employer"; and that, while claimant's doctor "may have recommended that she seek other work, [claimant] did not face a grave situation." Order No. 20-UI-155369 at 3. While the record supports these conclusions, the issues they address merit further discussion, particularly in light of claimant's written argument.

Briefly, claimant asserted in her written argument that she requested and was ultimately granted a workplace accommodation for a service animal in order to support her own disability. Claimant also asserted that, after the accommodation was granted, the employer discriminated against her and retaliated against her by way of subjecting her work schedule to undue scrutiny, and that the stress of these occurrences caused various medical concerns for claimant, which ultimately led her to quit at her physician's advice. Such assertions are not supported by the evidence in the record.

For instance, while claimant argued that "the ALJ omit[ted] Claimant's testimony that she had requested to bring a dog to work as a service animal and as a reasonable accommodation for her own condition (TR 6:8–10)," the portion of the transcript to which claimant cites makes no mention of the dog as a reasonable accommodation *for her own condition*. Claimant's Written Argument at 5. Indeed, claimant offered no clear evidence to support the claim that she had requested, or needed, the dog for her own condition or disability, or even that she suffered from a condition or disability at the time she made the request[1]. Rather, the employer's uncontroverted testimony established that claimant had requested—and was granted—leave to bring to work the puppy she had recently adopted in order to train the dog as a service animal, but not for claimant's own needs. Transcript at 35, 36.

Similarly, the record does not support claimant's assertions that the employer retaliated or discriminated against her, or otherwise harassed her based on the "reasonable disability accommodation"[2] she had

[1] For purposes of the Americans with Disabilities Act of 1990 (42 U.S. Code §12101 *et. seq.*), "disability" means "a physical or mental impairment that substantially limits one or more major life activities of such individual; a record of such an impairment; or being regarded as having such an impairment." 42 U.S. Code §12102.

[2] For purposes of Title I the Americans with Disabilities Act of 1990 (42 U.S. Code §12111 - 12117), which addresses disabilities in the context of employment, "reasonable accommodation" is defined to include "making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and job restructuring, part-time or modified

requested. The record shows that claimant subjectively felt that the employer unreasonably scrutinized her schedule, for example testifying that she ". . . felt like [she] was being treated differently, based on the service animal, and . . . no action was taken, nothing changed." Transcript at 18 to 19. However, the record fails to show that the employer used foul or disrespectful language toward her, treated her differently than other employees, denied her rights or opportunities that would otherwise have been afforded to her, or acted in any other manner that would support her assertion that the employer had retaliated against her for bringing her dog to work. While the record does show that the employer was concerned with claimant's schedule or whereabouts on several occasions, and that in those instances the employer spoke to claimant or otherwise moved items on claimant's calendar so that they conformed to office policy, the order under review correctly concluded that "the employer had a reasonable right to enforce its expectations and to correct perceived performance deficiencies." Order No. 20-UI-155369 at 3. The evidence in the record does not show that the employer exceeded its right to do so.

Claimant also asserted in her written argument that the order under review applied the wrong legal standard in determining that she quit work without good cause, arguing that "Claimant is an individual with a mental impairment; therefore, the ALJ should have considered whether a reasonable and prudent person *with Claimant's characteristics and qualities* would have left work under the circumstances." Claimant's Written Argument at 3 (emphasis in original). She further noted that, per OAR 471-030-0038(4), "For an individual with a permanent or long-term "physical or mental impairment" (as defined at 29 CFR §1630.2(h)) good cause for voluntarily leaving work is such that a reasonable and prudent person with the characteristics and qualities of such individual, would leave work." However, while the medical conditions that claimant attributed to the stress of the job may meet the definition of "physical or mental impairment" per 29 CFR §1630.2(h)(2),[3] the evidence in the record does not show that those conditions were "permanent or long term." Rather, the record only indicates that claimant first sought medical treatment for those conditions on or around January 31, 2020, and that the conditions appeared sometime around January 29, 2020. Transcript at 22, 27 to 28. Because the record does not show that claimant's conditions were permanent or long-term, the order under review applied the correct standard in determining whether claimant had good cause to quit.

Absent a showing of a "permanent or long-term" impairment under OAR 471-030-0038(4), claimant must show that no reasonable person of normal sensitivity, exercising ordinary common sense, would have continued to work for the employer for an additional period of time, and not quit when claimant did due the physical symptoms of work-related stress that she had only recently started to experience. Claimant's doctor's recommendation that she "look for another position and leave this position" because of the impact it was "starting" to have on her health shows only that it may not have been unreasonable for claimant to quit work when she did. It does not show that claimant's health issues were so severe that

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work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities." 42 U.S. Code §12111. Notably, the definition here requires that actions taken as accommodations be *for individuals with disabilities*.

[3] Any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more body systems, such as neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genitourinary, immune, circulatory, hemic, lymphatic, skin, and endocrine; or (2) Any mental or psychological disorder, such as an intellectual disability (formerly termed "mental retardation"), organic brain syndrome, emotional or mental illness, and specific learning disabilities. 29 CFR §1630.2(h)(2)

no reasonable person of normal sensitivity, exercising ordinary common sense, would have continued to work for their employer for an additional period of time.

As discussed above, the record does not support claimant's assertions that the employer retaliated or discriminated against her, or otherwise harassed her. The employer had a reasonable right to enforce its expectations and to correct perceived performance deficiencies, and the evidence in the record does not show that the employer exceeded its right to do so. Rather than quitting, claimant had the reasonable alternative of attempting to comply with the employer's expectations to the best of her ability and requesting clarifications when necessary. Claimant therefore quit without good cause and is disqualified from receiving unemployment insurance benefits effective February 28, 2020.

DECISION: Order No. 20-UI-155369 is affirmed.

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

DATE of Service: December 11, 2020

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.

NOTE: This decision denies payment of your Unemployment Insurance (UI) benefits.

However, you may be eligible for Pandemic Unemployment Assistance (PUA) benefits for the period you are not eligible for other benefits as long as you are unable to work, unavailable for work, or unemployed due to the COVID-19 public health emergency. PUA is a new unemployment benefits program available through the Oregon Employment Department in response to the COVID-19 pandemic.

Visit https://unemployment.oregon.gov for more information, to apply for PUA, or to contact the Oregon Employment Department using the "Contact Us" form. You can also apply for PUA by calling 1-833-410-1004, but please be aware that the PUA staff cannot answer questions about this decision that denies payment of regular Unemployment Insurance (UI) benefits.

Please help us improve our service by completing an online customer service survey. To complete the survey, please go to https://www.surveygizmo.com/s3/5552642/EAB-Customer-Service-Survey. 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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