

EMPLOYMENT APPEALS BOARD DECISION
2021-EAB-0174

Affirmed
Disqualification

PROCEDURAL HISTORY: On December 29, 2020, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant quit working for the employer with good cause and was not disqualified from receiving unemployment insurance benefits based on that work separation (decision # 104459). The employer filed a timely request for hearing. On February 16, 2021, ALJ Amesbury conducted a hearing, and on February 18, 2021 issued Order No. 21-UI-161226, reversing decision # 104459 by concluding that claimant quit without good cause and was disqualified from receiving benefits effective May 17, 2020. On March 10, 2021, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) The employer employed claimant at its deli shop from November 2019 until May 22, 2020.

(2) On March 16, 2020, following the onset of the COVID-19 pandemic, the employer temporarily closed due to government restrictions. The employer temporarily laid off many of their employees, including claimant. Prior to the layoff, the employer had given claimant a final written warning for violating workplace expectations.

(3) In early May 2020, the employer began preparing to reopen. On May 9, 2020, the employer sent a group text to their employees advising of the employer's intent to reopen. Claimant responded to the group text stating that she had not been feeling well and "to be honest, I'm not ready to come back yet . . . [c]an I please stay on unemployment as long as possible? I will come back if needed though." Transcript at 59-60. On May 16, 2020, the employer held a meeting with their employees, including claimant, to discuss upcoming work schedules and the health status of the employees. At the meeting, the employer's owner asked "if anybody had been sick or had COVID," and "nobody objected or said . . . I'm not feeling well." Transcript at 44-45.

(4) On May 17, 2020, claimant sent the employer a text message indicating that claimant was not feeling well and did not know when she could work again. The employer texted claimant back requesting that claimant provide a doctor's note to verify her illness was not a COVID-19 infection.

Claimant sent a response text stating that she could not obtain a doctor's note because she did not have health insurance and was too ill to drive to a doctor's office.

(5) On May 17, 2020, the employer responded by text stating, “[Y]ou should have health insurance. It’s free through OHP, so no good logic to have to pay out of pocket. Your poor choice of not having medical coverage should not be an excuse for you not going to be evaluated by a doctor. These are scary times and as an extremely concerned employer, we want to make sure all our staff is healthy and able to do their job. If you are so sick as to not be able to even drive, that is serious, and you should seek medical help immediately. White Bird clinic is a very low cost option My understanding is that you are with your mom, so if you’re not able to drive, she should take you to White Bird clinic today. Please let us know the outcome, as we are very concerned about you. . . . [Y]ou are our employee and with this history of sickness, we strongly suggest you get tested, especially because you’re sick now.” Transcript at 28-29.

(6) On May 17, 2020, following this text exchange, claimant consulted with a doctor online. The doctor diagnosed claimant as having an illness that was not related to COVID-19, prescribed claimant medication, and authorized claimant to stay home for three days based on the symptoms. Claimant texted her diagnosis and the doctor's authorization that claimant stay home for three days to the employer. Based on the information claimant provided, the employer scheduled claimant to return to work on May 24, 2020.

(7) On May 21, 2020, claimant texted the employer that she did not know if she would be well enough to work her upcoming shift because she had been delayed from picking up her medication. On May 22, 2020, the employer sent a response text stating, “[Y]ou’re presuming on Thursday that you will not be better enough to work on Sunday is an unfair assumption. The fact that you were prescribed meds by the doctor . . . and by you not picking them up and starting them that day is an indication that you are not following the doctor’s protocol to get better and return to work. Your defiant attitude and actions from the beginning of this restart of your job on Sunday, May 17th does not bear well for you. Keep in mind that you have been given a final written warning due to several issues of misconduct on the job. The Employment Department will be informed of the situation, not only to report your returning back to your position offered, but that you are not cooperating with doctor’s recommendations in order to return to your job. I would strongly rethink your actions and hope you come to the right resolution. We will await to hear from you.” Transcript at 67-68.

(8) On May 22, 2020, claimant sent a response text to the employer requesting that the employer not contact her again because she thought the employer's text messages were “harassing” her and she “just had had enough.” Transcript at 21. Claimant did not return to work or have any further contact with the employer.

(9) If claimant had been too ill to report to work on May 24, 2020, the employer would have allowed her to stay home until claimant felt well enough to work.

CONCLUSIONS AND REASONS: Claimant voluntarily quit work without good cause.

Nature of the Work Separation. If the employee could have continued to work for the same employer for an additional period of time, the work separation is a voluntary leaving. OAR 471-030-0038(2)(a)

(September 22, 2020). If the employee is willing to continue to work for the same employer for an additional period of time but is not allowed to do so by the employer, the separation is a discharge. OAR 471-030-0038(2)(b).

The record shows that claimant's work separation was a voluntary leaving. Although claimant had received a final written warning prior to her work separation, continuing work was available to claimant because the employer scheduled claimant to return to work on May 24, 2020, and if claimant was too ill to report to work that day, the employer would have allowed her to stay home until she felt well enough to work. The record therefore shows that claimant could have continued to work for the employer for an additional period of time. Claimant's May 22, 2020 request that the employer cease further contact with her and no further contact with the employer demonstrates that she was unwilling to do so. Claimant's work separation therefore was a voluntary leaving.

Voluntary Leaving. 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). "[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.

Claimant quit work without good cause. Claimant did not establish that her situation was grave at the time she voluntarily left work on May 22, 2020. Claimant quit on that date because she believed the employer was harassing her by sending text messages that, in claimant's view, contained "false accusations of what [claimant] should be doing." Transcript at 24. However, the record does not support that the employer's text messages placed claimant in a grave situation. While portions of the employer's May 17, 2020 text message, such as where the employer opined that claimant made a "poor choice," were critical, much of that communication related to expressing concern for claimant's well-being and providing suggestions as to how claimant might be able to obtain free or low cost medical care. The employer's May 22, 2020 text message took a sterner tone, but that communication did not subject claimant to abuse, oppression, name-calling, foul language, or threats of physical harm such to render claimant's situation grave. *Compare McPherson v. Employment Division*, 285 Or 541, 591 P2d 1381 (1979) (claimants need not "sacrifice all other than economic objectives and, for instance, endure racial, ethnic, or sexual slurs or personal abuse, for fear that abandoning an oppressive situation will disqualify the work from unemployment benefits[.]"). Viewed objectively, the employer's text messages did not present claimant with a situation of such gravity that she had no reasonable alternative but to leave work instead of returning to work on May 24, 2020 or until she felt well enough to return.

Claimant quit work without good cause and is disqualified from receiving benefits effective May 17, 2020.

DECISION: Order No. 21-UI-161226 is affirmed.

S. Alba and D. P. Hettle.

DATE of Service: April 15, 2021

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 ໄດ້ໂດຍປະຕິບັດຕາມຄໍາແນະນໍາທີ່ບອກໄວ້ຢູ່ຕອນທ້າຍຂອງຄໍາຕັດສິນນີ້.

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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