

EMPLOYMENT APPEALS BOARD DECISION
2021-EAB-0344

Reversed
No Disqualification

PROCEDURAL HISTORY: On February 23, 2021, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant voluntarily quit work without good cause and was disqualified from receiving unemployment insurance benefits effective July 12, 2020 (decision # 134542). Claimant filed a timely request for hearing. On April 12, 2021, ALJ Amesbury conducted a hearing, and on April 16, 2021 issued Order No. 21-UI-165033, affirming decision # 134542. On May 1, 2021, claimant filed an application for review with the Employment Appeals Board (EAB).

WRITTEN ARGUMENT: EAB considered claimant's written argument when reaching this decision.

FINDINGS OF FACT: (1) Town Club employed claimant from 2002 until July 15, 2020, most recently as head waitress at the private club the employer operated.

(2) For several years prior to her separation from work, claimant regularly experienced a number of negative working conditions, including sexual harassment (both towards herself and, later, towards other female employees, both minor and adult), pay disparity, sexism, and what she considered to be a "toxic work environment." Transcript at 12. These working conditions stemmed from decisions made, or actions taken, by the general manager of the club. As a result of these working conditions, claimant suffered from stress and depression, at times causing her to feel sick at work. Claimant sought treatment from a mental health provider for these health conditions.

(3) In November 2019, one of claimant's coworkers sent a letter to the employer's board of governors, outlining concerns about the negative working conditions. A week later, claimant sent information to the board which identified similar concerns. In response to these letters, the board began an investigation into the allegations. The investigation concluded in February 2020, and substantiated some of the allegations raised, including inappropriate sexual innuendo made by the kitchen staff, a "lack of communication and clear direction from management to waitstaff," a need for sexual harassment training for staff and management, insufficient human resources oversight, and concerns about how the staff was paid. Transcript at 45. The employer eventually implemented changes based on the problems

identified by the investigation, although staff did not receive sexual harassment training until after claimant separated from work.

(4) Around March 2020, the club temporarily closed due to the COVID-19 pandemic. While the club was closed, the employer continued to pay their employees a reduced number of hours per week, based on the individual employees' average hours worked. Where most of claimant's coworkers saw a cut of three to five hours per week, claimant had typically worked 40 hours per week and was cut to 28 hours per week. Some time later, the employer told claimant that she would be receiving a pay raise, retroactive to March 15, 2020.

(5) Claimant spoke to the employer about receiving her wage increase, and what she felt was an unfair cut in her hours relative to her length of tenure, on several occasions through June 2020. Although the employer reassured claimant repeatedly that the pay increase would appear on the next paycheck, the employer continually failed to pay it to claimant until after she separated from work in July 2020. Claimant believed that the employer's failure to remedy the wage problem was management's retaliation against her due to the complaints she lodged in November 2019. In May or June 2020, claimant filed a complaint with the Bureau of Labor and Industries (BOLI), but did not receive a response prior to her separation from work.

(6) On June 20, 2020, claimant sent the board president an e-mail, stating that she was resigning because of the pay disparity and other working conditions. On June 21, 2020, the president responded to claimant, declining to accept claimant's resignation and asking claimant to continue working for the employer while they addressed the problems claimant had identified.

(7) On June 25, 2020, the club reopened, and claimant returned to work. When she returned to work, claimant was concerned about safety practices relating to COVID-19, because the employer did not ensure that surfaces were properly sanitized, and "there was no way to work in that place and abide by the 6 ft. rule." Exhibit 1 at 1. Claimant also continued to experience the negative working conditions that she had previously complained about, which "left [her] going home in tears every night." Exhibit 1 at 1. The employer promised claimant that the wage increase would appear on her July 15, 2020 paycheck. However, the wage increase did not appear in the check.

(8) On July 15, 2020, due to the ongoing negative working conditions, the unresolved wage issues, and the stress and depression that claimant experienced as a result of these concerns, claimant informed the employer that she could no longer work for them. On July 17, 2020, the board president sent claimant a separation agreement which included an offer of severance pay in exchange for claimant's agreement to a non-disparagement clause. Claimant refused to agree to the employer's terms of separation, but did not return to work.

CONCLUSIONS AND REASONS: Claimant voluntarily quit work with 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).

At hearing, claimant testified that she “didn’t feel like [she] quit [her] job,” but instead felt that she was “forced out” and that ultimately it “became a mutual separation.” Transcript at 19. However, claimant also testified that on July 15, 2020, she told the employer that she “could no longer work for this employer and for this management.” Transcript at 19. The employer’s witness likewise testified that she believed the employer would have permitted claimant to continue working for them had claimant chosen to do so, although the issues claimant identified may not have been resolved as soon as claimant hoped. Transcript at 39. Therefore, whether or not claimant felt that she had any choice but to leave, the record is clear that the employer would have continued to permit claimant to work if she had so chosen to continue working, and that it was claimant’s choice to end the employment relationship.

Likewise, while claimant suggested that the separation was “mutual” due, apparently, to the separation agreement that the employer sent to her on July 17, 2020, the record shows that claimant had already decided to leave as of July 15, 2020, and that the separation agreement was merely a formal memorialization of claimant’s decision to leave. Therefore, claimant voluntarily quit work.

Voluntary quit. 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.

Claimant voluntarily quit work due to a constellation of ongoing negative working conditions, the effects that those working conditions had on her mental health, and the disparity between the number of hours and pay she received compared to the hours and pay received by less senior employees, which she believed to be the result of discrimination and/or retaliation. The order under review concluded that, while “a workplace marked by sexually inappropriate comments and gesticulations, discrimination, or ‘misogyny’ could result in a grave situation,” the fact that “the activities claimant complained about at hearing continued without any objection or complaint by claimant over a number of years . . . indicated that while she may have found the behaviors to be annoying, she did not consider them so grave as to cause a reasonable and prudent person to quit.” Order No. 21-UI-165033 at 5. The record does not support this conclusion. At hearing, claimant testified that she did not report the problems to the board earlier because she “wanted things to be better” and “wanted to stay there to protect these women who were being preyed upon,” and was “scared” to report the problem prior to 2019. Transcript at 29. Neither the fact that claimant was afraid of reporting abusive behavior for several years before finally being able to do so, nor the fact that she delayed reporting the working conditions because she felt responsible for the safety of her coworkers who were being harassed, undermines the gravity of the situation.

The record also shows that these issues persisted even after the board investigated and began to implement changes, and that the ongoing problems with the work environment caused claimant to leave in tears every night once she returned to work in June 2020. To the extent that claimant voluntarily quit

due to these working conditions and the effects they had on her mental health, claimant met her burden to show that she quit for a reason of such gravity that she had no reasonable alternative but to quit.

To the extent that claimant quit as a result of the protracted issues of her pay disparity and delayed raise, claimant also showed that she quit for a reason of such gravity that she had no reasonable alternative but to quit. The order under review found that “although [the] employer intended to pay claimant at the higher rate [they had agreed to pay her], due to errors in its payroll system, claimant’s checks failed to reflect the \$1.50 per hour raise in paychecks before she left her employment.” Order No. 21-UI-165033 at 3. The record does not support this finding, nor does it make clear why claimant’s wage issues went unresolved for so long after the board had directed management to resolve them. Even assuming that the order’s finding is correct, however, the record does not show that claimant knew or had any reason to know why the wage issues went unresolved. Given that the problems about which claimant complained in November 2019 were either caused or overlooked by the club’s general manager, a person in claimant’s situation could reasonably conclude that management’s continued failure to resolve the wage problems were retaliation for having lodged that complaint. Claimant’s reasonable belief that she faced retaliation in the form of promised but withheld pay was a grave reason for quitting work. Because the record shows that claimant sought reasonable alternatives such as attempting to address the issues with the board and filing a complaint with BOLI, the record shows this was also a reason of such gravity that claimant had no reasonable alternative but to quit. Under the circumstances, waiting for BOLI to handle her complaint was not a reasonable alternative.¹

For the above reasons, claimant voluntarily quit work with good cause and is not disqualified from receiving unemployment insurance benefits based on the work separation.

DECISION: Order No. 21-UI-165033 is set aside, as outlined above.

D. Hettle and A. Steger-Bentz;
S. Alba, not participating.

DATE of Service: June 8, 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 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.

¹ *See J. Clancy Bedspreads and Draperies v. Wheeler*, 152 Or App 646, 954 P2d 1265 (1998) (where unfair labor practices are ongoing or there is a substantial risk of recurrence, it is not reasonable to expect claimant to continue to work for an indefinite period of time while the unfair practices are handled by BOLI); *compare Marian Estates v. Employment Department*, 158 Or App 630, 976 P2d 71 (1999) (where unfair labor practices have ceased and the only remaining dispute between claimant and the employer is the resolution of the past issues, it was reasonable for claimant to continue working for the employer while litigating the claim).

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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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