

EMPLOYMENT APPEALS BOARD DECISION
2021-EAB-0454

Order No. 21-UI-167367 Reversed ~ No Disqualification
Order No. 21-UI-167370 Affirmed ~ Ineligible Weeks 39-20 through 18-21

PROCEDURAL HISTORY: On January 6, 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 September 13, 2020 (decision # 135424). Also on January 6, 2021, the Department served notice of an administrative decision concluding that claimant was unable to work for the weeks including September 20, 2020 through January 2, 2021 (weeks 39-20 through 53-20) and therefore ineligible for benefits for that period of time and until the reason for the denial had ended (decision # 140210). Claimant filed timely requests for hearing on decisions # 135424 and # 140210. On May 11, 2021, ALJ S. Lee conducted a consolidated hearing on decisions # 135424 and # 140210. On May 24, 2021, ALJ S. Lee issued Order No. 21-UI-167367, affirming decision # 135424, and Order No. 21-UI-167370, modifying decision # 140210 by concluding that claimant was unavailable for work, and therefore ineligible for benefits, for the weeks including September 20, 2020 through May 8, 2021 (weeks 39-20 through 18-21). On June 7, 2021, claimant filed applications for review of Orders No. 21-UI-167367 and 21-UI-167370 with the Employment Appeals Board (EAB).

Pursuant to OAR 471-041-0095 (October 29, 2006), EAB consolidated its review of Orders No. 21-UI-167367 and 21-UI-167370. For case-tracking purposes, this decision is being issued in duplicate (EAB Decisions 2021-EAB-0453 and 2021-EAB-0454).

Based on a *de novo* review of the entire consolidated record in these cases, and pursuant to ORS 657.275(2), Order No. 21-UI-167370, concluding that claimant was not available for work, and therefore ineligible for benefits, for the weeks including September 20, 2020 through May 8, 2020 (weeks 39-20 through 18-21) is **adopted**. The remainder of these consolidated decisions addresses whether, as concluded in Order No. 21-UI-167367, claimant voluntarily quit work without good cause.

FINDINGS OF FACT: (1) Newport Avenue Market & Alpine Foods employed claimant, most recently as a meat cutter, from September 2015 until September 15, 2020.

(2) In early April 2020, the employer notified their employees that due to the COVID-19 pandemic and guidance issued by the Oregon Health Authority (OHA), all employees would be required to wear masks or other appropriate face coverings at work as of April 6, 2020.

(3) Claimant was aware of the employer's mask policy and initially complied with it. Over time, claimant became increasingly uncomfortable with wearing a mask, experiencing symptoms such as anxiety, dizziness, increased heart rate, and flashbacks. These symptoms eventually caused claimant to be unable to wear a mask that complied with the employer's policy.

(4) During the week of August 30, 2020, claimant reported for a shift while wearing a mask that did not comply with the employer's policy. The employer explained to claimant that her mask did not comply with OHA guidelines and that she could not wear it at work. Claimant changed to a mask which complied with the policy, and resumed working her shift.

(5) On September 11, 2020, claimant reported for her shift wearing the same non-compliant face mask that she had worn the previous week. As a result of the policy violation, the employer gave claimant a written warning and suspended her for one day.

(6) On September 14, 2020, claimant reported for work and told the employer that it was "too dangerous to work with a mask or face shield on." Exhibit 1 at 7. The employer advised claimant that if she did not wear a compliant mask while working her shift, it would be considered an unexcused absence. Claimant left work and did not complete the rest of her shift.

(7) On September 15, 2020, claimant arrived at the employer's store about 30 minutes before her shift. Claimant was "dressed for work and ready to go to work," but found that she was unable to put on a mask or report for her shift. Transcript at 29. Claimant called the store manager on the phone and explained this to her. The manager advised claimant that if she did not report for work that day with a mask on, it would be considered her second consecutive unexcused absence, which the employer would consider job abandonment and lead to termination. Claimant declined to work her shift and wear a mask, and never returned to work.

(8) After claimant stopped working for the employer, she sought diagnosis and treatment from her primary care physician. Claimant's physician determined that claimant had been suffering from post-traumatic stress disorder (PTSD), and that claimant's PTSD had been the cause of her inability to wear a mask. Claimant had not previously considered that her inability to wear a mask was the result of a medical condition, and therefore did not seek accommodations or a medical leave of absence from the employer.

CONCLUSIONS AND REASONS: Claimant voluntarily quit 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).

The order under review concluded that claimant “voluntarily quit her job by refusing to work as scheduled.” Order No. 21-UI-167367 at 3. At hearing, claimant expressed uncertainty as to whether she was discharged or voluntarily quit. Transcript at 25. The record does not show that claimant explicitly resigned her position, and evidence offered by the employer suggested that claimant might have been terminated for failing to comply with their policies. However, the record also shows that on September 15, 2020, the employer advised claimant that they would consider her to have abandoned her job if she failed to report to work and wear a mask. Therefore, claimant had a choice to continue the employment relationship. Because claimant declined to continue working for the employer while continuing work was available, the order under review correctly determined that claimant voluntarily quit.

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). Claimant had post-traumatic stress disorder, 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.

Claimant voluntarily quit work because, as a result of her then-undiagnosed PTSD, she was unable to continue wearing a face mask as the employer required her to do. The order under review concluded that while “claimant’s situation was serious because the required uniform was causing her distress,” claimant quit work without good cause because she “took no steps to determine the actual cause of her distress by seeing a doctor or asking the employer for an accommodation prior to quitting.” Order No. 21-UI-167367 at 3. The record does not support this conclusion.

The record shows that by September 2020, claimant’s aversion to wearing a mask—which was caused by her PTSD—had advanced to the point where she was unable to wear a mask without suffering from symptoms such as anxiety and dizziness. Particularly in light of the fact that claimant was, presumably, required to work with knives or other cutting implements in order to perform her work as a meat cutter, experiencing such symptoms while working would prove to be dangerous, and therefore a grave situation. Claimant did not seek medical treatment or any sort of accommodations from the employer in order to address this issue.

However, at the time claimant quit, such alternatives were not available. The record shows that claimant came to work on September 15, 2020 with the intention of working, and found immediately beforehand that she could not force herself to wear a mask and work her shift. The employer subsequently gave her an ultimatum: that she either wear a mask and work her shift, or leave. The record does not show that any other options were available to claimant in that moment. Faced with such a choice, a reasonable and prudent person suffering from PTSD would not have continued working for the employer when the result would be to further experience distressing and potentially dangerous symptoms. Claimant therefore had no reasonable alternative but to quit.

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

DECISION: Order No. 21-UI-167367 is set aside, as outlined above. Order No. 21-UI-167370 is affirmed.

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

DATE of Service: July 14, 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 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 الاستئناف 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.

Employment Appeals Board - 875 Union Street NE | Salem, OR 97311
 Phone: (503) 378-2077 | 1-800-734-6949 | Fax: (503) 378-2129 | TDD: 711
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