

EMPLOYMENT APPEALS BOARD DECISION
2021-EAB-0527

Reversed
No Disqualification

PROCEDURAL HISTORY: On November 6, 2020, 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 February 23, 2020 (decision # 133105). Claimant filed a timely request for hearing. On June 4, 2021, ALJ L. Lee conducted a hearing at which the employer failed to appear, and on June 9, 2021 issued Order No. 21-UI-168428, affirming decision # 133105. On June 22, 2021, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) The Home Depot employed claimant as a merchandiser from November 4, 2019 until March 11, 2020.

(2) In 2016, claimant was involved in a motor vehicle accident in which she sustained serious injuries, including a traumatic brain injury (TBI) which affected her memory and cognitive abilities. Claimant also sustained injuries to her back and neck, including herniated discs, in the accident.

(3) Prior to working for the employer, claimant had experience working as a merchandiser for a grocery store, which she was physically able to perform. When claimant interviewed for the position with the employer, the employer led her to believe that the position would not require lifting over 25 pounds.

(4) When claimant began working for the employer, she was initially able to perform the required duties of the job. In February 2020, new merchandising decisions for the spring required that claimant perform more physically-demanding tasks such as climbing ladders, performing overhead movements, and lifting boxes and bags that weighed between 50 and 80 pounds. Claimant attempted to perform these tasks, but doing so caused her to suffer from muscle weakness, migraines, and reduced range of motion in her neck. The issues grew progressively worse to the point that claimant would become dizzy and would drop boxes while she was on a ladder.

(5) When claimant realized that she could not perform the tasks required of her without injuring herself, she told her supervisor that “it was a safety issue because I was no longer having the grip strength that I had prior, and I was dropping boxes off the ladder, and part of my disability is vertigo and balance issues.” Transcript at 21. Claimant’s supervisor advised her that claimant would “build up strength, and there are people to help.” Transcript at 18. The supervisor did not suggest to claimant that workplace accommodations might be available, request that claimant provide medical documentation of her conditions, or otherwise offer any other solutions to the problem. Claimant did not explicitly request accommodations from the supervisor or the employer’s human resources department because she believed that verbally notifying the supervisor about the problem was sufficient, and because she had observed another employee who was “a very sick gentleman with very severe medical conditions, and there were no modifications made for him.” Transcript at 23.

(6) On February 27, 2020, due to her physical inability to perform the job duties, claimant notified the employer that she would be resigning effective March 11, 2020. Claimant had intended to continue working for the employer through March 11, 2020. However, claimant fell ill on February 28, 2020 and notified the employer that she could not work due to illness. On March 2, 2020, claimant notified the employer that she was still sick and was still unable to work due to illness. Thereafter, claimant continued to be absent from work, and never returned to work after February 27, 2020.

CONCLUSIONS AND REASONS: Claimant voluntarily quit work with good cause.

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). “Work” means “the continuing relationship between an employer and an employee.” OAR 471-030-0038(1)(a) (September 22, 2020).

The order under review concluded that claimant had intended to quit on March 11, 2020, but actually quit on February 27, 2020 because she “did not work through her notice period” due to illness. Order No. 21-UI-168428 at 2. The record does not support this conclusion. Although claimant was ill as of February 28, 2020, and did not work through her notice period as a result, the record does not show that either claimant or the employer severed the employment relationship prior to March 11, 2020. At hearing, claimant testified that she “absolutely intended to” work through the notice period, but then fell ill. Transcript at 9. Claimant also testified that she notified the employer via email on March 2, 2020 that she was still sick, would not be able to work as a result, and would let the employer know if the situation changed. Exhibit 1 at 2. Claimant did not return to work for any portion of her notice period solely because of her illness, not because of an unwillingness to continue working. The evidence on the record therefore shows that claimant made efforts to maintain the employment relationship through March 11, 2020, and that she voluntarily quit work on that date.

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) (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 physical and neurological deficits resulting from a motor vehicle accident, which are permanent or long-term “physical or mental impairments” 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 on March 11, 2020 because her long-term medical conditions, resulting primarily from a 2016 motor vehicle accident, made the job impossible to perform safely. Continuing to work under the conditions she described could have exacerbated claimant’s medical conditions, or might have caused additional injuries to claimant such as falling from a ladder after becoming dizzy. Claimant therefore quit for a grave reason. The order under review concluded that, while claimant’s reason for quitting was likely grave, such a reason for quitting would not have been for good cause¹ because claimant did not seek reasonable alternatives such as requesting a modification of duties in order to accommodate her disabilities, or requesting a medical leave of absence to “give her a body a break.” Order No. 21-UI-168428 at 4. The record does not support this conclusion.

Given the long-term nature of claimant’s medical conditions, it is not clear from the record that a medical leave of absence would have meaningfully addressed claimant’s inherent inability to perform the tasks that the job required. However, even if it would have, the record does not show that a medical leave of absence was available to claimant. *See, e.g., Fisher v. Employment Dept.*, 139 Or App 320, 911 P2d 975 (1996) (Before finding that claimant failed to consider reasonable alternatives to leaving work, it must be found that such alternatives existed); *Gonzales v. Employment Dep’t.*, 200 Or. App. 547, 115 P.3d 976 (2005) (claimant was disqualified for refusing continuing production work, but the Court reversed based on a lack of evidence that the employer actually checked and had production work, and lack of evidence that claimant was qualified, capable or interested in performing such work). The record fails to show that claimant had worked for the employer long enough to qualify for either Family Medical Leave Act (FMLA) or Oregon Family Leave Act (OFLA) leave, as claimant had only worked for the employer for about four months, and medical leave under both Acts require longer periods of employment before an employee becomes eligible.² The record also fails to show that the employer offered any other type of long-term leave for which claimant may have been eligible. Accordingly, requesting a medical leave of absence likely would have been futile.

Similarly, while it is conceivable that claimant may have been able to continue working for the employer without risking her health if the employer had made accommodations for her medical conditions, the record does not show that such accommodations were available to claimant. The only evidence on the record regarding such accommodations—claimant’s unrefuted testimony that the supervisor offered unhelpful responses to claimant’s complaints, and that one of her coworkers with

¹ Order No. 21-UI-168428 concluded that claimant quit work on February 27, 2020, earlier than her original planned date of March 11, 2020. However, the order under review analyzed, pursuant to ORS 176.176(6), both claimant’s original reason for quitting and the “accelerated” reason for quitting on February 27, 2020. Order No. 21-UI-168428 at 2–4.

² *See* 29 U.S.C. § 2611(2)(A), requiring at least twelve months of employment and 1,250 hours of service before eligibility under FMLA accrues; and ORS 65A.156(1)(a), requiring at least 180 days of employment before eligibility under OFLA accrues.

“very severe medical conditions” was not given accommodations—fails to support a conclusion that accommodations were available.

Because the evidence in the record does not show that possible alternatives to quitting were available to claimant, claimant voluntarily quit work for a reason of such gravity that she had no reasonable alternative but to quit. Claimant therefore quit work with good cause, and is not disqualified from receiving unemployment insurance benefits based on this work separation.

DECISION: Order No. 21-UI-168428 is set aside, as outlined above.

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

DATE of Service: July 29, 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.

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
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