

EMPLOYMENT APPEALS BOARD DECISION
2021-EAB-0567

Reversed
Disqualification

PROCEDURAL HISTORY: On December 7, 2020, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant voluntarily quit work with good cause and was not disqualified from receiving unemployment insurance benefits based on the work separation (decision # 122547). The employer filed a timely request for hearing. On June 28, 2021, ALJ Mott conducted a hearing, and on June 29, 2021 issued Order No. 21-UI-169536, affirming decision # 122547, but concluding that claimant was discharged, not for misconduct, and was not disqualified from receiving benefits based on the work separation.¹ On July 14, 2021, the employer filed an application for review with the Employment Appeals Board (EAB).

WRITTEN ARGUMENT: The employer did not declare that they provided a copy of their argument to the opposing party or parties as required by OAR 471-041-0080(2)(a) (May 13, 2019). The argument also contained information that was not part of the hearing record, and did not show that factors or circumstances beyond the employer's reasonable control prevented them from offering the information during the hearing as required by OAR 471-041-0090 (May 13, 2019). EAB considered only information received into evidence at the hearing when reaching this decision. *See* ORS 657.275(2).

FINDINGS OF FACT: (1) Prems Gas & Mini Mart, Inc. employed claimant from August 2019 to January 9, 2020, last as a manager. At the time of hire, claimant informed the employer that she required elective surgery and that the process required her to quit smoking for three weeks prior to the surgery and to complete a four to six-week recovery period after the surgery.

(2) In November 2019, claimant attempted to schedule the surgery, but the surgical provider would not schedule claimant at that time because she had not quit smoking. Claimant scheduled the procedure for January 20, 2020 and informed the employer of the surgery date.

¹ Because the effect of Order No. 21-UI-169536 was to change the reason for decision # 122547, but not the result of decision # 122547, EAB assumes that Order No. 21-UI-169536's characterization of the order as a "modification" of decision # 122547 was a typographical error and that Order No. 21-UI-169536 meant to state that it affirmed decision # 122547. Order No. 21-UI-169536 at 3.

(3) On January 6, 2020, claimant had a closed-door meeting with the owner and a new employee. The owner had recently hired the new employee to replace claimant as manager for a limited time while claimant was addressing her surgical needs. The owner directed claimant to train the new employee. The owner told claimant that she would not lose any hours or pay based on the temporary hiring of the new employee.

(4) On January 7, 2020, claimant called in sick to work because she felt “overwhelmed” from the closed-door discussion on January 6, 2020. Transcript at 8. Claimant attempted to text the owner, but the owner responded that claimant should not text him anymore because they had already talked in the office. Later that day, the new employee texted claimant to confirm his understanding that claimant was going to help train him, and that claimant had her “surgery scheduled for coming week and you might be out for 4-6 weeks,” and to reassure claimant that she would not lose any pay or hours based on the temporary management change. Exhibit 1. Claimant responded, “Yes, but then I heard that it was said [I was] demoted and there is no room on schedule . . . just alot of gossip n drama going on (sic).” Exhibit 1. The new employee responded that claimant should not “worry about the gossip and drama,” but should listen to what the owner had told her. Exhibit 1.

(5) On January 8, 2020, claimant returned to work. The new employee told claimant to give him her keys because the employee was replacing her as manager. The new employee told claimant “there was no room on the schedule for [her], and [the new employee] had no idea where he would put [her].” Transcript at 10. Claimant worked the rest of her shift that day, but believed the employer had discharged her based on the new employee’s decision to take her keys and not place her on the schedule.

(6) On January 9, 2020, claimant worked a two-hour shift. Claimant left work that day with the intent of spending the next three weeks quitting smoking. Before claimant left, she told the new employee to call her when she was needed and told him she would be happy to help with any questions he had. The employer considered claimant to be on a leave of absence after January 9, 2020 so that she could undergo her surgical procedure and recovery. Claimant planned to have the surgical procedure and then return to work based on “[her] understanding . . . that [she] could come back after surgery” because she had been told as much “all the way through” by both the owner and the new employee. Transcript at 15, 19, 37. Claimant did not undergo the surgical procedure on January 20, 2020.

(7) From January 9 to mid-February 2020, claimant did not pursue the surgical procedure. She did contact the Department’s ethics committee to find out if there was anything she could do to keep her job.

(8) In mid-February 2020, claimant went to her medical provider and received patches to help her quit smoking.

(9) On March 9, 2020, claimant called the surgical provider to schedule her surgery, but was informed that the provider was no longer doing elective surgeries due to COVID-19. Claimant decided to “wait it out” and take care of her kids. Transcript at 19. Claimant made no further attempt to contact the employer.

CONCLUSIONS AND REASONS: Claimant voluntarily left 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) (December 23, 2018). 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 the employer discharged claimant based on the employer's decision to hire the new employee to replace claimant, and the new employee's later direction to claimant to turn in her keys, and statement to claimant that there was no room on the schedule for her. Order No. 21-UI-169536 at 2. The record does not support the conclusion that the employer discharged claimant.

The record shows that the employer placed claimant on a leave of absence as of January 9, 2020 so she could pursue her elective surgical procedure that was scheduled to occur on January 20, 2020, and complete the subsequent four to six-week recovery period. The employer hired a new employee to assume claimant's manager responsibilities during her absence. This hiring decision, coupled with the new employee's later instruction to claimant to hand over her keys and his statement that there was no room for her on the schedule, were the bases for claimant's concern that the employer had discharged her. However, the preponderance of the evidence shows that this hiring of the new employee was temporary in nature and that both the employer and the new employee had tried to reassure claimant that the temporary hire would not have an adverse impact on claimant's pay or hours. To the extent the new employee requested claimant's keys, it is more likely than not the new employee requested the keys so that he could carry out his temporary duties. Furthermore, the record shows that the employer never told claimant she had been discharged, that claimant's intent was to return to work after her recovery, and that the employer and claimant understood that the employer would have continuing work available for claimant when she returned. Because the record shows that the employer had continuing work available for claimant after her medical leave of absence and claimant did not return to work, claimant quit work on January 9, 2020.

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 left work without good cause. The record shows that claimant did not return to work and, hence, left her employment because she incorrectly believed that the employer had discharged her before she left work to quit smoking, and undergo surgery. However, claimant's belief was unreasonable and did not establish good cause to quit in light of the record evidence showing that the employer provided claimant a medical leave of absence effective January 9, 2020, understanding that claimant's procedure would commence on January 20, 2020. The employer planned for claimant's absence by temporarily hiring a new employee to replace her during this window, and made efforts to reassure

claimant that this temporary hiring decision would not affect her hours and pay. Likewise, the employer told the claimant “all the way through” that her job would be waiting for her after her recovery and claimant testified that it was her intent to return to work after her surgery. Transcript at 15. While claimant believed the new employee’s January 8, 2020 request for her keys showed the employer discharged her, the record evidence suggests that it was more likely than not that the new employee made this request in order to carry out his temporary duties in claimant’s absence. Likewise, claimant’s subsequent actions after turning over the keys in completing her January 8, 2020 and January 9, 2020 shifts further show that it was unreasonable for to believe that the employer had discharged her prior to her leave of absence. In light of the totality of the evidence, and the evidence establishing that both claimant and the employer recognized that claimant would be welcomed back to her job upon her full recovery and that claimant intended to return, no reasonable and prudent person of normal sensitivity, exercising ordinary common sense would have left their job believing they had been discharged without seeking clarification first with the employer, nor was claimant’s unreasonable belief that she had been discharged a reason of such gravity that claimant had no alternative but to leave work. Claimant therefore quit work without good cause and is disqualified from receiving benefits based on this work separation.

DECISION: Order No. 21-UI-169536 is set aside, as outlined above.

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

DATE of Service: August 20, 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 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.

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

The Oregon Employment Department is an equal opportunity employer/program. Auxiliary aids and services are available upon request to individuals with disabilities. Language assistance is available to persons with limited English proficiency at no cost.

El Departamento de Empleo de Oregon es un programa que respeta la igualdad de oportunidades. Disponemos de servicios o ayudas auxiliares, formatos alternos y asistencia de idiomas para personas con discapacidades o conocimiento limitado del inglés, a pedido y sin costo.