

EMPLOYMENT APPEALS BOARD DECISION
2021-EAB-0568

Reversed
No Disqualification

PROCEDURAL HISTORY: On April 30, 2021, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant quit working for Winco Foods, Inc. without good cause and was disqualified from receiving unemployment insurance benefits effective January 31, 2021 (decision # 104152). Claimant filed a timely request for hearing. On June 23, 2021, ALJ Amesbury conducted a hearing, and on June 24, 2021 issued Order No. 21-UI-169360, affirming decision # 104152. On July 9, 2021, claimant filed an application for review with the Employment Appeals Board (EAB).

WRITTEN ARGUMENT: Claimant's argument contained information that was not part of the hearing record, and did not show that factors or circumstances beyond claimant's reasonable control prevented her from offering the information during the hearing. Under ORS 657.275(2) and OAR 471-041-0090 (May 13, 2019), EAB considered only information received into evidence at the hearing when reaching this decision. EAB considered claimant's argument to the extent it was based on the record.

FINDINGS OF FACT: (1) Winco Foods, Inc. employed claimant as a deli clerk from July 8, 2018 to February 6, 2021. Claimant mostly worked in the back of the deli preparing food, but at times would have to approach customers at the deli counter or when stocking food on the shelves.

(2) In early 2020, the COVID-19 pandemic spread throughout the country leading the Centers for Disease Control (CDC) to issue health and safety guidelines for businesses to follow to contain the spread of the virus. This CDC guidance included the wearing of masks by customers in businesses to help fight virus transmission. The employer required customers to wear masks from March 2020 until claimant's last day of work. The employer asked customers to wear masks. However, for safety reasons, the employer did not take further action when a customer expressly refused to wear a mask in the store.

(3) After March 2020, claimant became concerned about the threat of COVID-19 to her health due to the number of customers she observed in the store who did not wear masks. A coworker had also told claimant that an upset customer had spit on them after the coworker had asked the customer to wear a

mask. Claimant expressed her health-related concerns to the deli manager and they discussed whether she could limit her exposure to customers by working only in the back of the deli where there was little contact with customers. The deli manager told claimant there was nothing the employer could do to help claimant because there were not sufficient employees in the deli to ensure that claimant could work only in the back of the deli. The deli manager did not bring claimant's concerns to the store manager's attention. Although claimant had often approached the store manager to discuss other issues, she did not bring her health-related concerns directly to the store manager because he had stated at a meeting that he would not enforce the store's mask requirement on non-complying customers.

(4) In August 2020, claimant began to experience physical and mental illness symptoms due to her interactions with unmasked customers, including stomach sickness and feeling that she was going to have a "nervous breakdown." Transcript at 11. Claimant did not quit at the time because she felt "trapped" in her job situation due to the lack of other job opportunities in the area and her need to meet her financial obligations. Transcript at 7.

(5) In September 2020, claimant began seeing a therapist about her health-related concerns. After several months of therapy, claimant gradually developed a mindset that, coupled with the improving job market in the area, made her more comfortable with the idea of quitting.

(6) On or about January 20, 2021, claimant gave the employer two weeks' notice of her intent to quit due to her health-related concerns over unmasked customers in her work area.

(7) On February 6, 2021, claimant quit her job after the two-week notice period she provided to the employer had expired. Although claimant had received an offer of new employment during the two-week notice period, her decision to quit work rested solely on her health-related concerns.

CONCLUSIONS AND REASONS: Claimant voluntarily quit working for the employer with good cause.

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.

Order No. 21-UI-169360 concluded that claimant voluntarily quit work "because she intended to work for another employer" and had failed to establish good cause for her decision. Order No. 21-UI-169360 at 3. However, the record fails to support that conclusion. Claimant quit her job with the employer due to her health-related concerns caused by the persistent presence of unmasked customers in her work environment, the transmissibility of the COVID-19 virus, and the physical and mental illness she suffered as a result. Although claimant did receive a job offer for new employment during her two-week notice period, the record establishes by a preponderance of the evidence that claimant would have quit

work with the employer “even if [she] didn’t have any job prospects at all” because of the significant nature of her health concerns. Transcript at 29.

The record establishes that from March 2020 until the time she quit, claimant became increasingly concerned about unmasked customers in her work area and the potential health-related consequences she might suffer if she were exposed to COVID-19 when customers did not comply with the employer’s mask policy. Although the employer’s policy required customers to wear masks, and the employer would ask noncompliant customers to do so, the employer would not eject customers who still refused to wear a mask after being asked. Claimant ultimately sought mental health treatment after suffering mental and physical illness, exacerbated by her knowledge that a customer had spit in a coworker’s face after being asked to wear a mask. Claimant’s illness, coupled with her knowledge about the in-store spitting incident, was of such gravity that a reasonable and prudent person of normal sensitivity, exercising ordinary common sense, would leave work if there was no reasonable alternative.

Claimant did approach the deli manager about her health-related concerns, and they did discuss the possible alternative of claimant working exclusively in the back of the deli to limit her exposure to unmasked customers. However, the deli manager rejected that alternative for lack of sufficient employees to support the accommodation, and did not otherwise address claimant’s concerns with the store manager. Based on the deli manager’s response, it was reasonable for claimant to conclude that further pursuing that accommodation with employer would be futile.

While claimant could have approached the store manager directly to pursue other potential alternatives, the record shows that any such effort likely would have been futile because the store manager had expressly stated that unmasked patrons would not be required to leave the store. Thus, no reasonable alternative appeared to exist that could remove claimant from the root of her health-related concerns - unmasked customers in the store and the risk they posed of transmitting COVID-19 to claimant. As such, the record shows that claimant had no reasonable alternative but to quit her job because any reasonable alternative likely would have been futile, or had already been rejected by the employer.

Claimant voluntarily quit her employment with good cause and she is not disqualified from receiving unemployment insurance benefits based on her work separation from Winco Foods, Inc.

DECISION: Order No. 21-UI-169360 is set aside, as outlined above.

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

DATE of Service: August 13, 2021

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.

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.

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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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