

EMPLOYMENT APPEALS BOARD DECISION
2021-EAB-0712

Reversed
No Disqualification

PROCEDURAL HISTORY: On January 12, 2021, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant quit work without good cause and was disqualified from receiving unemployment insurance benefits effective May 24, 2020 based on the work separation (decision # 80451). Claimant filed a timely request for hearing. On August 12, 2021, ALJ Mott conducted a hearing, and on August 13, 2021 issued Order No. 21-UI-172501, affirming decision # 80451. On August 31, 2021, claimant filed an application for review with the Employment Appeals Board (EAB).

WRITTEN ARGUMENT: Claimant did not declare that she provided a copy of her 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 claimant's reasonable control prevented her 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) Perfect Look Hair Fashions employed claimant as a hair stylist from July 2019 to May 24, 2020.

(2) In March 2020, claimant's boyfriend, who had cancer, underwent a bone marrow transplant. Claimant's boyfriend remained in the hospital for an additional period of time due to complications from the procedure. Claimant was her boyfriend's main caretaker and had been advised by his doctors that because of his compromised immune system, it was "super important that everybody was . . . healthy around him . . . [a]nd if they were sick, to just stay away." Transcript at 9.

(3) From March 22, 2020 to May 22, 2020, the employer closed the workplace due to COVID-19. Prior to the May 22, 2020 reopening, claimant spoke with her manager to address her concerns over the health and safety protocols the employer planned to use to mitigate any COVID-19 risk in light of her boyfriend's compromised immune system. The manager told claimant that, among other requirements,

the employer would require employees and customers to wear masks, would provide gloves, and would emphasize handwashing and the use of hand sanitizer.

(4) Between May 22, 2020 and May 29, 2020, claimant worked three total shifts over three days. During each shift, claimant observed “maybe . . . five times” people removing their masks, or not wearing them, and employees not washing their hands properly. Transcript at 11. Claimant became “stressed out, and concerned about [her] safety” due to the protocol violations she observed, and addressed her concerns with her manager. Transcript at 11. Claimant’s manager told claimant that she knew “exactly who [claimant] was talking about, who’s doing those things,” but claimant believed that the manager “offered real no (sic) solution.” Transcript at 12. The manager told claimant she did not know what else the employer could do to make claimant feel safe because the employer was “going strictly by protocol.” Transcript at 24.

(5) On May 29, 2020, claimant provided a letter to the employer that explained that she “was not quitting, that [she] was going back on unemployment because of the unsafe working conditions.” Transcript at 14. The employer had continuing work available for claimant at the time of her work separation.

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

Nature of the work separation. The first issue is the nature of the work separation. “Work” means “the continuing relationship between an employer and an employee.” OAR 471-030-0038(1)(a) (September 22, 2020). “[T]he date an individual is separated from work is the date the employer-employee relationship is severed.” OAR 471-030-0038(1)(a). 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). 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).

Claimant’s work separation was a voluntary leaving because the record shows that claimant could have continued working for the employer for an additional period of time but chose not to do so. The employer testified that continuing work was available at the time of claimant’s work separation. Transcript at 31. Likewise, claimant testified that continuing work was available “if it was safe.” Transcript at 14. However, although whether claimant’s workplace was “safe” is relevant to determine whether claimant had good cause to quit, for purposes of the work separation analysis, the record shows that the employer had continuing work available for claimant and would have allowed claimant to continue working on and after May 29, 2020, but that claimant was not willing to do so. Claimant quit work on May 29, 2020 when she severed the employer-employee relationship by stating that she was not willing to continue working due to the “unsafe working conditions.”

Although claimant told the employer on May 29, 2020 that she “was not quitting” before she ultimately left the employer to apply for unemployment insurance benefits, claimant’s characterization of the work separation does not change the fact that the work separation was a quit pursuant to OAR 471-030-0038. Claimant’s statement that she “was not quitting” shows that she may not have wanted to quit, but that she felt she had to do so because of the “unsafe working conditions.” For the purpose of OAR 471-030-0038, claimant’s feelings in this regard do not change the fact that at the time she left the employer on

May 29, 2020, the employer had continuing work available and was not preventing claimant from performing that work, but claimant was unwilling to continue working for the employer. As such, the preponderance of the evidence shows that claimant quit work despite the availability of continued 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.

The order under review concluded that claimant faced a grave situation at work due to the COVID-19 protocol violations she had observed, combined with the potential impact of those violations on her boyfriend’s compromised health status, and the employer’s inability to offer any solutions for the problem. Order No. 21-UI-172501 at 3-4. However, the order under review concluded that despite her grave situation, claimant quit work without good cause because she failed to pursue reasonable alternatives to leaving work. Order No. 21-UI-172501 at 4. The order under review identified working at one of the employer’s other locations and taking her concerns “to anyone other than her immediate supervisor” as reasonable alternatives available to claimant before she quit. Order No. 21-UI-172501 at 4. The record does not support these conclusions.

The preponderance of the evidence shows that that despite the employer’s efforts to implement safety protocols to mitigate the risk in the workplace posed by COVID-19, claimant observed people violating the protocols while she worked. Because claimant was her boyfriend’s primary caretaker, and in light of his compromised immune system and claimant’s knowledge of the risk he faced if she was exposed to COVID-19, the protocol violations that claimant observed created a circumstance of such gravity that claimant acted as any reasonable and prudent person of normal sensitivity would by taking her concerns to her manager, and when her manager could offer no solutions in response, leaving work.

The record also demonstrates that claimant had no reasonable alternatives but to leave work when she did. Claimant testified that she went to her immediate manager to address her concerns, as opposed to a higher-level supervisor, because “[she] just thought [she] was supposed to . . . tell [her] concerns to [her] manager, because [her manager] was in the shop, dealing with everything.” Transcript at 38. Claimant’s decision to report her concerns to only her immediate manager was reasonable under the circumstances. In doing so, claimant gave the employer sufficient notice of her concerns because the manager could have addressed claimant’s complaints herself, or if necessary, escalated them to a higher level of management. Likewise, transferring to another employer location was not a reasonable alternative for claimant. The record shows that, more likely than not, claimant would have faced the same grave situation at any of claimant’s other locations, for the same reasons. As such, claimant voluntarily quit work with good cause and is therefore not disqualified from receiving unemployment insurance benefits.

DECISION: Order No. 21-UI-172501 is set aside, as outlined above.

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

DATE of Service: October 6, 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 desisyong.

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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