

EO: 200
BYE: 202117

State of Oregon
Employment Appeals Board
875 Union St. N.E.
Salem, OR 97311

386
VQ 005.00

EMPLOYMENT APPEALS BOARD DECISION
2021-EAB-0967

*Affirmed
Disqualification*

PROCEDURAL HISTORY: On September 20, 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 January 24, 2021 (decision # 151229). Claimant filed a timely request for hearing. On November 3, 2021, ALJ Kaneshiro conducted a hearing, and on November 4, 2021 issued Order No. 21-UI-179010, affirming decision # 151229. On November 17, 2021, claimant filed an application for review of Order No. 21-UI-179010 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) Miss Diana's employed claimant as an artistic director in their ballet school from May 2010 until January 27, 2021.

(2) On November 18, 2020, the employer temporarily closed its ballet school to in-person classes in response the Oregon Governor's executive order mandating closure of certain businesses to slow the spread of COVID-19. From November 18, 2020 through December 2020, claimant continued to work full time remotely for the employer. In late December 2020, the employer's owner and claimant agreed that beginning January 1, 2021, claimant would work 20 hours per week for a 50% reduction in claimant's salary.

(3) In late December 2020, the owner asked claimant if she would assist with rehearsals in person in the ballet school for an upcoming performance. The rehearsals were scheduled to be from January 11, 2021 through January 18, 2021. Claimant initially agreed to work at the rehearsals, but felt "severe anxiety" about the prospect of that in-person work. Exhibit 1 at 7. Claimant felt anxiety because as a person with an autoimmune disorder, she was concerned about her health and the risk of contracting COVID-19, and

because she felt the in-person rehearsals did not comply with the Governor's executive order regarding closures due to COVID-19.

(4) On January 4, 2021, claimant told the owner that she was not willing to work at the rehearsals in person due to her health concerns. Claimant's decision not to return to work in person gave her a "sense of relief from [her] anxiety and stress." Exhibit 1 at 6. Claimant told the owner she would continue working remotely part time.

(5) On January 6, 2021, the owner sent claimant an email stating that claimant should apply for unemployment insurance benefits starting that week, and asking claimant to provide the owner with claimant's "tentative class lists for February." Exhibit 1 at 9. The owner and claimant understood that claimant was laid off temporarily and expecting to return to work when the employer was permitted by state government to resume conducting in-person classes.

(6) In mid-January 2021, claimant's medical provider told claimant that her autoimmune disorder had worsened.

(7) On January 27, 2021, the employer's owner sent claimant an email stating that the ballet school was opening to in-person classes at a limited capacity in February 2021, and asked claimant if they could schedule a time to discuss claimant's "plans." Exhibit 1 at 10.

(8) Later on January 27, 2021, claimant sent the owner an email discussing her dissatisfaction with her limited role at the ballet school, despite having obtained a master's in business administration (MBA). Claimant also stated that she "would be happy to discuss you contracting me out to teach classes in the limited capacity. But I do not want to be a full-time employee again as of yet. . . I am an unemployed ballet teacher right now, so if you have classes you need to hire an instructor for, I'd be happy to chat." Exhibit 2 at 3-4. Claimant also stated that unless the owner was willing to "grow, expand, diversify, take risks," then claimant would "need to try to accomplish those goals for myself" Exhibit 2 at 3-4.

(9) On January 28, 2021, the owner sent claimant a reply email stating, in relevant part, "I appreciate the offer of contracting for me but at this point I do not think that would be a good idea." Exhibit 2 at 5. The owner asked claimant to turn in her keys to the school.

(10) In February 2021, the employer resumed in-person classes. The employer limited class sizes, required students and teachers to wear masks, and conducted cleaning procedures to prevent the spread of COVID-19.

CONCLUSIONS AND REASONS: Claimant voluntarily quit 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) (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).

Claimant asserted at hearing in and her written argument that the work separation occurred when she was laid off work on January 6, 2021. However, the parties' mutual understanding was that claimant was laid off temporarily until the employer was permitted by state government to conduct in-person classes again. As such, the continuing relationship between the employer and claimant was not severed on January 6, 2021.

Claimant's work separation was a voluntary quit on January 27, 2021. On January 27, 2021, the owner sent claimant an email stating that the school would reopen for in-person classes in February 2021. The record therefore shows that claimant could have continued to work for the employer for an additional period of time. The preponderance of the evidence shows that claimant's response, that she was not willing to be a full-time employee, but was willing to discuss "contracting me out to teach," was a counter-offer from claimant to continue working not as an employee, but as an independent contractor. Thus, claimant rejected the employer's offer of continuing work as an employee. Claimant, not the employer, ended the employer and employee relationship, and claimant's work separation was a voluntary quit on January 27, 2021.

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). Claimant had an autoimmune 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.

However, during a state of emergency declared by the Governor under ORS 401.165, the Department may waive, otherwise limit, or modify the requirements of OAR 471-030-0038. OAR 471-030-0071 (September 13, 2020). Paragraph (2)(b) of Oregon Employment Department Temporary Rule for Unemployment Insurance Flexibility (March 8, 2020), <http://records.sos.state.or.us/ORSOSWebDrawer/Recordpdf/7604239> [hereinafter OED Temporary COVID-19 Rule], provides that a person who quits work because of a COVID-19 related situation is not disqualified from receiving unemployment insurance benefits. Under OED Temporary COVID-19 Rule (1), a COVID-19 related situation includes the following, in relevant part:

* * *

(c) A person is unable to work because they have been advised by their health care provider or by advice issued by public health officials to self-quarantine due to possible risk of exposure to, or spread of, the novel coronavirus;

(d) A person is unable to work because their employer has ceased or curtailed operations due to the novel coronavirus, including closures or curtailments based on the direction or advice of the Governor or of public health officials;

* * *

(g) A person is being asked to work when it would require them to act in violation of a mandatory quarantine or Governor's directive regarding the limitation of activities to limit the spread of the novel coronavirus.

Claimant had concerns about returning to work in person for the employer because she was a person with an autoimmune disorder and had concerns about exposure to COVID-19 at work. Claimant did not show that she quit work on January 27, 2021 due to a COVID-19 related situation as defined by OED Temporary COVID-19 Rule. Although claimant's health condition had worsened during 2020, the record does not show that her health care provider or public health officials advised that she self-quarantine due to possible risk of exposure to, or spread of, the novel coronavirus. Nor does the record show that the employer would be closed due to COVID-19 or that claimant was being asked to work in violation of the Governor's directive during February 2021.

Claimant also failed to establish good cause to quit work under OAR 471-030-0038(4). Claimant left work, in part, because she was concerned about being exposed to COVID-19 at the ballet school. Claimant did not show that this reason for quitting presented her with a situation so grave that she had no reasonable alternative but to leave work. The preponderance of the evidence supports that the employer had COVID-19 safety precautions in place, which included face covering requirements, cleaning practices, and limited class sizes. Moreover, claimant's willingness to work on a contract basis at the school undermines the gravity of claimant's concern about the risk of contracting COVID-19.

Finally, to any extent claimant quit working for the employer in order to work on an independent contractor basis as a self-employed ballet instructor, claimant quit work without good cause because, under OAR 471-030-0038(5)(b)(G), “[l]eaving work for self employment” constitutes leaving work without good cause.

Claimant quit work without good cause and is disqualified from receiving unemployment insurance benefits effective January 24, 2021.

DECISION: Order No. 21-UI-179010 is affirmed.

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

DATE of Service: December 27, 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.

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 – 本判决会影响您的失业救济金。如果您不明白本判决，请立即联系就业上诉委员会。如果您不同意此判决，您可以按照该判决结尾所写的说明，向俄勒冈州上诉法院提出司法复审申请。

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 Tự 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 – សេចក្តីសម្រាប់នាមដូលប៉ះពាល់ដល់អត្ថប្រយោជន៍ត្រានការងារធ្វើរបស់លោកអ្នក។ ប្រសិនបើលោកអ្នកមិនយល់អំពីសេចក្តីសម្រាប់នាមទាំងគណៈកម្មការខ្លួនណាការងារភ្លាមៗ។ ប្រសិនបើលោកអ្នកមិនយល់ស្របចំពោះសេចក្តីសម្រាប់នាមទេ លោកអ្នកអារ៉ាកាត់ពាក្យប្រើដែលសំឡែងនាមការពិនិត្យផ្លូវក្រីឡើងវិញជាមួយគុណខ្លួនណារដ្ឋ Oregon ដោយអនុវត្តតាមសេចក្តីណែនាំដែលសរសេរនៅខាងចុងបញ្ហាប់នៃសេចក្តីសម្រាប់។

Laotian

ເອົາໃຈໄສ – ຄໍາຕັດສິນນີ້ມີຜົນກະທົບຕໍ່ກັບເງິນຊ່ວຍເຫຼືອການຫວ່າງງານຂອງທ່ານ. ຖ້າທ່ານບໍ່ເຂົ້າໃຈຄໍາຕັດສິນນີ້, ກະລຸນາຕິດຕໍ່ຫາຄະນະກຳມະການອຸທອນການຈ້າງງານໃນທັນທີ. ຖ້າທ່ານບໍ່ເຫັນດີນໍາຄໍາຕັດສິນນີ້, ທ່ານສາມາດຢືນຄໍາຮ້ອງຂໍການທີບຫວນຄໍາຕັດສິນນຳສານອຸທອນລັດ Oregon ດັດໄປຢັບຕະຫຼາດຕາມຄໍາແຮງໃໝ່ທີ່ໂກກໄວ້ຢ່າງຍິນຍຶດຂອງຄໍາຕັດສິນນີ້.

Arabic

هذا القرار قد يؤثر على منحة البطالة الخاصة بك، إذا لم تفهم هذا القرار، إتصل بمجلس منازعات العمل فوراً، وإذا كنت لا توافق على هذا القرار، يمكنك رفع شكوى للمرجعة القانونية بمحكمة الاستئناف بأورينغون وذلك باتباع الإرشادات المدرجة أسفل القرار.

Farsi

توجه - این حکم بر مزایای بیکاری شما تاثیر می‌گذارد. اگر با این تصمیم موافق نیستید، بلا فاصله 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.