

EMPLOYMENT APPEALS BOARD DECISION
2022-EAB-0188

Reversed
No Disqualification

PROCEDURAL HISTORY: On June 24, 2021, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant quit working for the employer without good cause and was disqualified from receiving unemployment insurance benefits effective January 10, 2021 (decision # 104941). Claimant filed a timely request for hearing. On January 10, 2022, ALJ Logan conducted a hearing at which the employer failed to appear, and on January 13, 2022 issued Order No. 22-UI-183998, affirming decision # 104941. On January 31, 2022, claimant filed an application for review with the Employment Appeals Board (EAB).

WRITTEN ARGUMENT: Claimant's arguments filed February 15, 2022 and February 22, 2022 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 arguments to the extent they were based on the record.

FINDINGS OF FACT: (1) Phoenix Gus Enterprise LLC employed claimant as a "sandwich artist" from January 2020 until January 16, 2021. Transcript at 4. The employer operated a Subway restaurant franchise.

(2) Following the onset of the COVID-19 pandemic in March 2020, the employer did not stringently follow COVID-19 safety protocols. For instance, the store's cleaning and sanitizing schedule was not followed, and employees frequently failed to wear masks or maintain social distancing in the store. Claimant was concerned about her coworkers' lack of adherence to safety protocols. Claimant "frequently" raised these concerns with her manager, but the manager did not discipline the offending employees or otherwise take steps to address claimant's concerns. Transcript at 7. Instead, the manager told claimant that she would "just . . . have to put up with it" because the store needed employees. Transcript at 7.

(3) In August 2020, claimant was diagnosed with white-cell anemia, which her physician advised could “effectively compromise her immune system.” Exhibit 1 at 2. Claimant’s physician did not order her to quarantine, but did tell her that she was “at risk” because of the diagnosis. Transcript at 9.

(4) During 2020, a number of employees quit. The new employees hired to replace them were even less adherent to COVID-19 safety protocols, causing the safety of claimant’s working conditions to get “worse and worse.” Transcript at 5.

(5) On January 16, 2021, claimant voluntarily quit work due to her concerns about contracting COVID-19 at work. No specific event immediately precipitated claimant’s decision to quit on that day. Instead, claimant’s concerns were “. . . just [a] feeling that [she] had that day rather than the day before.” Transcript at 9. Claimant had considered quitting work at an earlier date for the same reason, but delayed doing so out of a sense of obligation to her manager.

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

ORS 657.176(2)(c) requires a disqualification from unemployment insurance benefits if a claimant voluntarily leaves (quits) work without good cause. *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 white-cell anemia, 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:

- (a) A person is unable to work because they are ill with the novel coronavirus;
- (b) A person is unable to work because they have been potentially exposed to the novel coronavirus and have been subjected to a mandatory quarantine period;
- (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;
- (e) A person is unable to work because they have to stay home to care for a family member, or other person with whom they live or for whom they provide care, who is suffering from the novel coronavirus or subject to a mandatory quarantine;
- (f) A person is unable to work because they have to stay home to care for a child due to the closure of schools, child care providers, or similar facilities due to the novel coronavirus; and
- (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 voluntarily quit work due to her concerns that she would contract COVID-19 at work as a result of her coworkers' noncompliance with safety protocols. The order under review concluded that this did not constitute good cause for voluntarily quitting because "nothing changed between the prior day and January 16, 2021," "the risk posed by a possibly-weakened immune system had been present for several months, but that risk had not been sufficient to cause claimant to quit her job," and "'feeling different' about a job than on the day before does not establish a grave situation . . . [but is] more akin to a whim than a grave situation without alternatives." Order No. 22-UI-183998 at 3. The order under review also concluded that claimant had the reasonable alternative of "continuing to work." Order No. 22-UI-183998 at 3. The record does not support those conclusions.

As a preliminary matter, while claimant's concerns that led her to quit were related to COVID-19, claimant did not quit for a "COVID-19 related situation" under the OED Temporary COVID-19 Rule that was in effect when she quit. While claimant's medical diagnosis suggested that she was at a heightened risk of complications were she to contract COVID-19, the record specifically shows that claimant was not advised to self-quarantine. Nor does the record show that any of the other scenarios contemplated under paragraph (1) of the OED Temporary COVID-19 Rule were applicable to claimant. Therefore, the question of whether claimant voluntarily quit with good cause must be considered under the standard analysis found in OAR 471-030-0038(4).

Contrary to the conclusions drawn by the order under review, the fact that claimant felt different on January 16, 2021, and thus decided to quit that day rather than on a prior date, does not show that claimant's decision to quit was the result of a "whim." Rather, the record shows that claimant's ongoing safety concerns grew over time, and were in particular exacerbated by the new coworkers hired during 2020 who were even less compliant with COVID-19 safety protocols. It is reasonable to infer from the record that on January 16, 2021, claimant's concerns became severe enough that she felt that she no longer had a reasonable alternative but to quit work.

Claimant's circumstances constituted a grave reason for quitting. At the time that she quit, claimant's coworkers were not following standard COVID-19 safety protocols such as wearing

masks and properly sanitizing, which likely increased her chance of contracting COVID-19 at work. The circumstances were exacerbated by claimant's white-cell anemia, which compromised her immune system and therefore likely increased claimant's susceptibility to complications were she to contract COVID-19. A reasonable and prudent person with white-cell anemia would not have continued to work for the employer for an additional period of time while such conditions persisted.

Further, claimant had no reasonable alternative but to quit. Claimant "frequently" discussed her safety concerns with her manager, but her manager neither took any action to remedy the concerns nor gave any indication that she would do so. The record does not show that other methods available to claimant would have mitigated the risk posed to her by continuing to work with coworkers who did not follow safety protocols. Additionally, although the order under review concluded that continuing to work was a reasonable alternative to quitting, the Court of Appeals has explicitly held otherwise. *See Hill v. Employment Dep't.*, 238 Or App 330, 243 P3d 78 (2010) (continuing to work until claimant has found other work is not a reasonable alternative to quitting work); *see accord Warkentin v. Employment Dep't.*, 245 Or App 128, 261 P3d 72 (2011); *Campbell v. Employment Dep't.*, 245 Or App 573, 263 P3d 1122 (2011); *Strutz v. Employment Dep't.*, 247 Or App 439, 270 P3d 357 (2011); *Campbell v. Employment Dep't.*, 256 Or App 682, 303 P3d 957 (2013).

Because claimant had no reasonable alternative but to quit work when she did, she quit work with good cause, and is not disqualified from receiving unemployment insurance benefits based on the work separation.

DECISION: Order No. 22-UI-183998 is set aside, as outlined above.

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

DATE of Service: April 4, 2022

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.

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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 ໂດຍປະຕິບັດຕາມຄໍາແນະນໍາທີ່ບອກໄວ້ຢູ່ຕອນຫ້າຍຂອງຄໍາຕັດສິນນີ້.

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.

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