

EMPLOYMENT APPEALS BOARD DECISION
2022-EAB-0588

Reversed
No Disqualification

PROCEDURAL HISTORY: On November 24, 2020, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant quit working for the employer without good cause and therefore was disqualified from receiving unemployment insurance benefits effective March 22, 2020 (decision # 91402). Claimant filed a timely request for hearing. On May 4, 2022, ALJ Vincent conducted a hearing at which the employer failed to appear, and on May 6, 2022 issued Order No. 22-UI-193150, affirming¹ decision # 91402. On May 20, 2022, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) New Horizons Adult Care employed claimant as an in-home caregiver until March 26, 2020. Claimant was assigned to perform caregiving services for one of the employer's clients, who lived in an assisted living facility.

(2) In addition to her work for the employer, claimant provided caregiving services to her great-grandmother, who was in hospice care.

(3) Around March 2020, when the COVID-19 pandemic started, claimant became concerned that continuing to provide caregiving services for the employer's client posed a risk of transmitting COVID-19 to her great-grandmother. At that time, claimant's great-grandmother's doctors advised claimant that they did not believe her great-grandmother would survive a COVID-19 infection. Additionally, claimant had heard news stories about frequent COVID-19 outbreaks at residential care facilities. Although claimant only provided caregiving services for her client at the assisted living facility, she was concerned that employees of the facility itself would be in and out of her client's room, potentially exposing her or her client to COVID-19. At the time, the employer's COVID-19 safety protocols

¹ The order under review concluded that claimant was disqualified from receiving benefits effective March 20, 2022, rather than March 22, 2020, as decision # 91402 had concluded. Order No. 22-UI-193150 at 3. As the findings of fact in the order under review support a finding that the work separation occurred in March 2020, the discrepancy is presumed to be scrivener's error.

included employee use of masks and hand sanitizer, and required employees to self-isolate for two weeks if they tested positive.

(4) On March 26, 2020, claimant brought her concerns about COVID-19 to a “staffing person” who worked for the employer, and asked them if she could be reassigned. Audio Record at 6:50. At that time, the staff person told claimant that she should “call back when [she and her family] felt it was safe.” Audio Record at 7:08. The staff person did not try to assign claimant to work for a different client. Claimant did not contact the employer after March 26, 2020 about returning to work.

CONCLUSIONS AND REASONS: Claimant voluntarily quit with 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. *Former* 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). “Work” means “the continuing relationship between an employer and an employee.” OAR 471-030-0038(1)(a). The date an individual is separated from work is the date the employer-employee relationship is severed. OAR 471-030-0038(1)(a).

At hearing, claimant testified that she “didn’t think [she] quit,” but that she was told by one of the employer’s staff on March 26, 2020 that she should contact them again when she felt it was safe to return to work. Audio Record at 6:55. However, claimant did not contact the employer after March 26, 2020 about returning to work. Although claimant may have been willing to continue working for the employer for an additional period of time after March 26, 2020, it was her failure to contact the employer about returning to work that prevented her from doing so, and not the employer. Because claimant could have continued to work for the employer for an additional period of time after March 26, 2020, the work separation was a voluntary leaving on that date.

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 quit work due to her concern that she could contract COVID-19 at the facility where her client lived, and subsequently pass the infection to her great-grandmother who was in hospice and unlikely to survive an infection. The order under review concluded that while this constituted a grave reason for quitting, claimant nevertheless quit without good cause because she did not seek reasonable alternatives prior to quitting, such as “using more protective equipment, transferring positions, or taking a leave of absence before leaving.” Order No. 22-UI-193150 at 2. However, the record fails to show that those were reasonable alternatives to quitting.

First, the record does not show either that “more protective equipment” was available to claimant, or that any such additional equipment would have further mitigated the risk of claimant becoming infected and passing the virus on to her great-grandmother. Next, the record shows that while claimant attempted to speak to the employer about her safety concerns, the employer made no mention of the possibility of a transfer to a different client (or a different position altogether) that might have posed a lower risk of transmission to claimant. As the record does not show that either of these options were actually available to claimant, they were not reasonable alternatives to quitting. *See Fisher v. Employment Dept.*, 139 Or App 320, 911 P2d 975 (1996) (before finding that claimant failed to consider reasonable alternatives to leaving work, it must be found that such alternatives existed).

Finally, the fails to show that the employer would have considered granting claimant a leave of absence had she sought one, and in fact no inquiry was conducted at hearing regarding either the availability of a leave of absence. As noted above, the record must contain some indication that an alternative actually existed in order for it to be considered a reasonable alternative. However, even assuming that the employer would have permitted claimant to take a leave of absence, the record fails to show that taking leave would have been a reasonable alternative to quitting.

Given that claimant had no reasonable way of knowing when the pandemic would end, or how much longer she would need to care for her great-grandmother, any leave of absence she took would have been open-ended and likely protracted, and the record fails to show that it would have been paid. The Court of Appeals has held that a protracted, unpaid leave of absence is not a reasonable alternative to quitting. *See Sothras v. Employment Division*, 48 Or App 69, 616 P2d 524 (1980) (despite being on an unpaid leave of absence for more than a month claimant remained unable to return to work; the court held that “a protracted, unpaid leave of absence is not a ‘reasonable alternative’ to leaving work and being unemployed; indeed it is not an alternative at all”); *Taylor v. Employment Division*, 66 Or App 313, 674 P2d 64 (1984) (claimant had good cause to leave work after being suspended without pay for over a month, and there was no end in sight to the suspension). The record therefore fails to show that taking a leave of absence was a reasonable alternative to quitting.

For the above reasons, claimant quit work for a reason of such gravity that she had no reasonable alternative but to do so. Claimant therefore voluntarily quit work with good cause, and is not disqualified from receiving unemployment insurance benefits based on the work separation.

DECISION: Order No. 22-UI-193150 is set aside, as outlined above.

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

DATE of Service: August 11, 2022

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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