EO: 200
BYE: 202230

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

149
VQ 005.00

EMPLOYMENT APPEALS BOARD DECISION
2022-EAB-1196

Affirmed
Disqualification

PROCEDURAL HISTORY: On June 28, 2022, 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 benefits effective June 13, 2021 (decision # 144442). Claimant filed a timely request for hearing. On November 7, 2022, ALJ D. Lee conducted a hearing, and on November 15, 2022 issued Order No. 22-UI-207422, affirming decision # 144442. On December 1, 2022, claimant filed an application for review with the Employment Appeals Board (EAB).

WRITTEN ARGUMENT: EAB considered claimant's written argument when reaching this decision.

FINDINGS OF FACTS: (1) Harvard Partner's Health employed claimant as a nurse recruiter from March 24, 2021 until June 13, 2021.

(2) Prior to and during her employment for the employer, claimant had endometriosis and hemiplegic migraines. These conditions caused claimant pain and, at times, negatively affected her vision and her ability to type.

(3) Prior to the employer hiring claimant, another recruiter of the employer, K.W., became acquainted with claimant by interviewing her for a different position. K.W. referred claimant to the employer's co-owner for the recruiter position. The co-owner and other owners interviewed claimant multiple times and hired her. After the employer hired claimant, they assigned K.W. to train claimant and supervise her work.

(4) The employer allowed their recruiters to select their own schedule. Claimant chose a fully remote work schedule, working from home from 9:00 a.m. to 5:00 p.m. Monday through Friday. Claimant checked in weekly with K.W. and the employer's H.R. officer. Claimant's medical conditions caused her to have difficulty meeting work goals and to call out from work frequently. The employer excused claimant's absences.

(5) The employer did not require claimant to work after hours. However, over the course of claimant's employment, K.W. sometimes called claimant at night and on weekends, both for work related matters and to chat as friends. During these calls, K.W. made comments about claimant's productivity or health issues that claimant viewed as "microaggression remarks." Transcript at 14. Claimant viewed K.W.'s calls made after hours as overstepping professional boundaries, but felt obligated to take the calls. Claimant was not required to take these calls and her employment would not have been in jeopardy if she had ignored them.

(6) On June 13, 2021, K.W. called claimant. During the telephone call, K.W. told claimant that she was not performing well, was inadequate for the job, and should consider other employment options. After the call with K.W., claimant "understood that [she] was not a good fit there," and felt she had no other choice but to send a resignation text to the employer. Transcript at 27. That evening, claimant sent the employer's co-owner a text stating, "I'm sorry but with my current circumstances/families death, my chronic illness I think it's best for me to walk away from this job." Exhibit 1 at 2.

(7) At the time K.W. called claimant on June 13, 2021, claimant was not at risk of being discharged. K.W. did not have the authority to discharge claimant, and the employer intended to continue employing claimant.

(8) Claimant never raised any concerns regarding K.W.'s treatment of her with the co-owner. Claimant decided to send the resignation text without first raising concerns about K.W. with the co-owner because claimant believed that the employer's H.R. officer was also dismissive of claimant's health issues and unwilling to limit K.W.'s after hour calls. This caused claimant to think the co-owner was also "part of the problem." Transcript at 60. However, the co-owner knew claimant had health issues (but was unware specifically of the endometriosis and hemiplegic migraines), and had not made comments dismissive of claimant's health. If claimant had raised concerns about K.W.'s treatment of claimant with the co-owner, the employer would have investigated and imposed a plan of correction on K.W. with frequent communication with claimant to see if things were improving.

CONCLUSIONS AND REASONS: Claimant 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).

The record shows that on July 13, 2021 at 7:12 p.m., claimant sent the employer's co-owner a text stating, "I'm sorry but with my current circumstances/families death, my chronic illness I think it's best for me to walk away from this job." Exhibit 1 at 2. At hearing, claimant characterized the work

separation as a discharge because claimant perceived K.W.'s comments, that claimant was performing poorly and should consider other employment options, as coercive and "like an ultimatum." Transcript at 6-7. K.W.'s comments were an unfavorable appraisal of claimant's performance and an invitation to find other work. However, viewed objectively, the comments did not convey that the employer was unwilling to allow claimant to continue to work. Instead, by stating in a text to the co-owner that she was "walk[ing] away from this job," claimant demonstrated that she was not willing to continue to work for the employer for an additional period of time. Exhibit 1 at 2. Therefore, the work separation was a voluntary leaving that occurred on June 13, 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) (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 endometriosis and hemiplegic migraines, permanent or long-term "physical or mental impairment[s]" 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.

At hearing, claimant testified that she sent her resignation text after K.W. harassed her during the June 13, 2021 telephone call by making "microaggression remarks" about claimant's work ethic, and minimizing the impact of claimant's health conditions. Transcript at 13. Claimant testified that K.W. would also make such comments in frequent calls to claimant, sometimes after hours, throughout her tenure with the employer. Transcript at 15. Claimant further testified that if not for the June 13, 2021 conversation with K.W., claimant would have continued working for the employer. Transcript at 58. Thus, the preponderance of evidence supports that the main reason claimant quit was due to K.W.'s treatment of her. However, claimant did not meet her burden to establish good cause to quit for this reason.

It is not evident from the record that K.W.'s treatment of claimant placed her in a grave situation. Other than K.W.'s June 13, 2021 remarks that claimant was not performing well, was inadequate for the job, and should consider other employment options, claimant could not recall the substance of K.W.'s comments with much specificity. However, claimant testified that they were in the nature of, "We all have health issues, and to kind of get over it." Transcript at 19. While the comments may have been dismissive, they do not appear to have subjected claimant to abuse, oppression, name-calling, foul language, or threats of physical harm, such to render claimant's situation grave. *Compare McPherson v. Employment Division*, 285 Or 541, 591 P2d 1381 (1979) (claimants need not "sacrifice all other than economic objectives and, for instance, endure racial, ethnic, or sexual slurs or personal abuse, for fear that abandoning an oppressive situation will disqualify the work from unemployment benefits[.]"). That K.W. would communicate with claimant by calling her was necessitated by the remote nature of claimant's work schedule. That the calls occurred on a frequent basis was not unreasonable given that K.W. was assigned to train and supervise claimant, and claimant was having difficulty meeting work goals. Some of these calls occurred after hours, which claimant felt obligated to take. Persistent calls

made after hours could amount to harassment and present claimant with a grave situation. Here, however, the record shows that claimant was not required to take the calls made after hours and her employment would not have been in jeopardy if she had ignored them.

Even if claimant faced a grave situation based on K.W.'s treatment, she quit without good cause because she failed to pursue reasonable alternatives. If claimant had raised concerns about K.W.'s treatment of her with the employer's co-owner, the employer would have investigated and imposed a plan of correction on K.W. with frequent communication with claimant to see if things were improving. Claimant decided to quit without first raising concerns about K.W. with the co-owner because claimant had perceived the employer's H.R. officer as being dismissive of claimant's health issues and unwilling to limit K.W.'s after hour calls during their weekly check-ins. This caused claimant to think the co-owner was "part of the problem." Transcript at 60. However, claimant did not establish that reaching out to the co-owner about K.W. would have been futile. The co-owner knew claimant had health issues generally, had not made comments dismissive of claimant's health, and credibly testified at hearing that "we would not in any way allow anybody to be abusive to [claimant] . . . that's unacceptable on every level." Transcript at 39. The record therefore fails to show that asking the co-owner to address K.W.'s treatment of claimant would have been futile. Accordingly, claimant failed to show that she faced a situation of such gravity that she had no reasonable alternative but to leave work.

Claimant also testified at hearing that she sent the resignation text because "I do not want to be on bad terms with an employer in the past . . . that impacts my employment opportunities in the future," and "I was concerned with my reputation . . . and I want to have good opportunities with employers." Transcript at 25, 61. To the extent claimant quit work to avoid being discharged, claimant also did not establish that she quit work with good cause. Where a discharge is imminent and would be the "kiss of death" to a claimant's future job prospects, quitting work to avoid a discharge may be with good cause. *McDowell v. Employment Dep't*., 348 Or 605, 236 P3d 722 (2010). Here, however, claimant was not at risk of being discharged because K.W. did not have the authority to discharge claimant, and the employer intended to continue employing claimant as of the time she quit. Further, it was not reasonable for claimant to believe that K.W. had the authority to discharge her. Although K.W. trained and supervised claimant, she was a peer who held the same position as claimant. The employer's owners interviewed and hired claimant, which logically implies that they, and not K.W., had the authority to discharge claimant. Additionally, claimant sent her resignation text to the co-owner, not K.W., which suggests that claimant was aware that work separation matters, including discharges, came under the authority of the co-owner, not K.W. Thus, claimant did not establish good cause to quit to avoid being discharged.

For the above reasons, claimant quit work without good cause and is disqualified from receiving unemployment insurance benefits effective June 13, 2021.

DECISION: Order No. 22-UI-207422 is affirmed.

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

DATE of Service: <u>February 9, 2023</u>

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 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 فورا، 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 دستورالعمل 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