

EMPLOYMENT APPEALS BOARD DECISION
2023-EAB-0357

Reversed
No Disqualification

PROCEDURAL HISTORY: On May 25, 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 unemployment insurance benefits effective May 1, 2022 (decision # 134245). Claimant filed a timely request for hearing. On November 10, 2022, ALJ Frank conducted a hearing, and on November 17, 2022 issued Order No. 22-UI-207661, affirming decision # 134245. On November 23, 2022, claimant filed an application for review with the Employment Appeals Board (EAB).

On January 27, 2023, EAB issued EAB decision # 2022-EAB-1170, reversing Order No. 22-UI-207661 and remanding the matter for further development of the record. On February 27, 2023, ALJ Frank conducted a hearing, and on March 7, 2023 issued Order No. 23-UI-218213, affirming decision # 134245. On March 21, 2023, claimant filed an application for review with EAB.

WRITTEN ARGUMENT: EAB did not consider claimant's written arguments when reaching this decision because he did not include a statement declaring that he provided a copy of his argument to the opposing party as required by OAR 471-041-0080(2)(a) (May 13, 2019).

FINDINGS OF FACT: (1) Mt. Scott Care Home employed claimant as a cook at a residential facility beginning August 16, 2021.

(2) Prior to March 2, 2022, claimant typically worked 21 to 24 hours per week at a wage of \$16.00 per hour.

(3) On March 3, 2022, claimant requested and was placed on indefinite unpaid medical leave because he was unable to perform his job duties due to a foot injury that required surgery. Claimant was instructed by his doctor to keep off the foot entirely for a period of time, then wear a medical boot occasionally thereafter. Claimant did not seek less physically demanding work from the employer because he believed such work was not available.

(4) By April 2022, claimant concluded that he could not return to his work as a cook in the foreseeable future due to his physical limitations from the injury. He therefore decided to seek other employment and to quit working for the employer.

(5) In late April 2022, claimant was offered a primarily sedentary job by another employer, contingent on passing a drug test and background check. The position offered 15 hours per week at a wage of \$14.75 per hour, and was to start on May 5, 2022.

(6) On May 1, 2022, claimant notified the employer that he was resigning, effective immediately. Claimant had not yet submitted to the drug test for the new job.

(7) On May 5, 2022, claimant began the new job as expected.

CONCLUSIONS AND REASONS: Claimant quit work with good cause.

Nature of the Work Separation. If an 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 testified that he would not have given the employer notice of his resignation when he did had he not had an alternate offer of employment. Transcript at 5-6. However, because claimant believed that there was no prospect of being able to resume his work for the employer due to his physical impairment, the continuing employment relationship effectively ended when claimant came to that realization and sought other work. Under these circumstances, claimant’s pursuit of the new employment in late April 2022 is sufficient evidence to conclude that claimant was unwilling to continue working for the employer for an additional period of time due to his physical limitation, even if he did not notify the employer of this until May 1, 2022. Accordingly, the work separation was a voluntary leaving that occurred no later than April 30, 2022.

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). A claimant with a permanent or long-term “physical or mental impairment” as defined at 29 CFR §1630.2(h) 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.

A claimant who leaves work to accept an offer of other work “has left work with good cause only if the offer is definite and the work is to begin in the shortest length of time as can be deemed reasonable

under the individual circumstances. Furthermore, the offered work must reasonably be expected to continue, and must pay [either] an amount equal to or in excess of the weekly benefit amount; or an amount greater than the work left.” OAR 471-030-0038(5)(a). In pertinent part, the Department does not consider a job offer to be definite “if [it] is contingent upon . . . [such things as] passing a drug test, background check, credit check, and/or an employer receiving a contract.” Oregon Employment Department, UI Benefit Manual §442 (Rev. 04/01/10).

The order under review concluded that claimant quit work without good cause because he quit to accept another offer of work that did not meet the criteria set forth in OAR 471-030-0038(5)(a). Order No. 23-UI-218213 at 3-4. The record does not support this conclusion because the record shows, more likely than not, that claimant voluntarily quit working for reasons that constitute good cause in late April 2022, prior to tendering his resignation on May 1, 2022.

Claimant began an indefinite medical leave beginning March 3, 2022, because he was unable to perform his job duties due to a foot injury. Claimant sought other work, at least in part, because this condition physically limited the types of work tasks he could perform. The new job offer he received was contingent on a background check and drug test. It is unclear when the background check was completed, but claimant apparently submitted to the drug test sometime between May 1, 2022, and May 5, 2022. Transcript at 8. Therefore, the job offer could not be considered “definite” at the time claimant notified the employer of his resignation on May 1, 2022. If claimant had quit his job at that time for that reason, he did not have good cause under OAR 471-030-0038(5)(a). However, as discussed above, claimant had quit working for the employer prior to May 1, 2022, when he began seeking work and thereby demonstrated an unwillingness to continue working for the employer for an additional period of time. Therefore, the offer of new employment only determined the timing of when he notified the employer of his resignation rather than whether he would resign. Accordingly, the reasons for claimant’s belief that he could no longer work for the employer, rather than the offer of new employment, must be assessed to determine if he left work with good cause.

Claimant suffered from a long-term physical impairment. Claimant injured his foot in August 2021 and underwent surgery in March 2022, thereafter remaining unable to work at all, in the opinion of his doctor, until May 2022 when he was cleared to perform sedentary work. February 27, 2023 Audio Record at 6:40 to 8:22. In February 2023, claimant testified that due to “severe arthritis” resulting from the injury, his work duties for the new employer remained largely sedentary at that time, with standing and walking amounting to approximately three hours per day, and he otherwise worked at a desk except for “sometimes” performing cooking duties when another employee was absent. February 27, 2023 Audio Record at 17:54 to 18:24. The record shows that claimant quit working for the employer because he believed his physical impairment prevented him from returning to work for the employer indefinitely, causing him to seek other work that he could perform. Claimant faced a grave situation in indefinitely being unable to perform his usual work for the employer as a cook, such that a reasonable and prudent person with the characteristics and qualities of an individual with an impairment such as claimant’s would not have continued to work for their employer for an additional period of time.¹

¹ Moreover, although OAR 471-030-0038(5)(b)(A) provides that leaving work without good cause includes “[l]eaving suitable work to seek other work,” that provision is not applicable to claimant’s circumstances. Claimant left work for the employer to seek other work. However, the work that claimant left was not suitable because the nature of claimant’s impairment made it impossible for him to perform the work. *See* ORS 657.190 (Factors to consider when determining

Further, claimant did not have reasonable alternatives to quitting. Alternatives may be deemed futile if considering them would be fruitless, or if the employer was unwilling to consider them. *Westrope v. Employment Dept.*, 144 Or App 163, 925 P2d 587 (1996); *Bremer v. Employment Division*, 52 Or App 293, 628 P2d 426 (1981). Claimant testified that “there was no accommodation at [the employer’s facility] to do any down work. I wasn’t offered anything like that[.]” Transcript at 4. In contrast, the employer’s witness testified that, had they been given a doctor’s recommendation of lighter work for claimant, “We would have done some stuff where he could sit or stand depending on needs in the kitchen[.]” February 27, 2023 Audio Record at 20:10 to 20:18. The witness elaborated, “If we have two people there, he could have done more like prep work and things like that[.]” February 27, 2023 Audio Record at 20:20 to 20:37. However, the witness later testified that claimant was typically left working alone in the kitchen for 30 minutes per shift while his only coworker took their lunch. February 27, 2023 Audio Record at 21:53 to 22:10. This indicated that the employer did not consistently have two workers present in the kitchen, and demonstrated that it was unlikely such a contingency would have been satisfied to allow claimant sedentary work as described. Therefore, any attempt by claimant to secure a modification to sedentary work from the employer as an alternative to quitting would likely have been futile. Accordingly, claimant had no reasonable alternative to leaving.

For these reasons, claimant voluntarily quit work with good cause and is not disqualified from receiving benefits based on the work separation.

DECISION: Order No. 23-UI-218213 is set aside, as outlined above.

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

DATE of Service: April 28, 2023

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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whether work is “suitable” include, in pertinent part, “the degree of risk involved to the health, safety and morals of the individual,” and the individual’s “physical fitness and prior training”).



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 ໄດ້ໂດຍປະຕິບັດຕາມຄຳແນະນຳທີ່ບອກໄວ້ຢູ່ຕອນທ້າຍຂອງຄຳຕັດສິນນີ້.

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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