

EMPLOYMENT APPEALS BOARD DECISION
2023-EAB-1342

Reversed
No Disqualification

PROCEDURAL HISTORY: On January 13, 2023, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant was discharged, but not for misconduct, and was not disqualified from receiving unemployment insurance benefits as a result of the work separation (decision # 71453). The employer filed a timely request for hearing. On March 8, 2023, notice was mailed to the parties of a hearing scheduled for March 22, 2023. On March 22, 2023, ALJ L. Lee convened a hearing at which the employer failed to appear, and issued Order No. 23-UI-219800, dismissing the employer's request for hearing due to their failure to appear. On March 30, 2023, the employer filed a timely request to reopen the March 22, 2023, hearing.

On September 28, 2023, ALJ Taylor conducted a hearing on the employer's request to reopen, and on November 3, 2023, issued Order No. 23-UI-240293, canceling Order No. 23-UI-219800 and allowing the employer's request to reopen the March 22, 2023, hearing. On November 27, 2023, Order No. 23-UI-240293 became final without claimant having filed an application for review with the Employment Appeals Board (EAB).

On November 14, 2023, and continuing on November 27, 2023, ALJ Amesbury conducted the reopened hearing on the merits of decision # 71453. The employer failed to appear at the November 27, 2023, hearing. On December 1, 2023, ALJ Amesbury issued Order No. 23-UI-242369, reversing decision # 71453 by concluding that claimant voluntarily quit work without good cause and was therefore disqualified from receiving unemployment insurance benefits effective June 12, 2022. On December 7, 2023, claimant filed an application for review of Order No. 23-UI-242369 with EAB.

FINDINGS OF FACT: (1) Claimant worked for Chevron Stations, Inc. as an assistant gas station manager, most recently from June 2018 until November 7, 2022.

(2) In the second half of 2021, the store at which claimant worked experienced an increase in crime, such as theft, vandalism, assaults, threats, robberies, and drug use.

(3) From July 2021 through November 2021, claimant was threatened by customers on several occasions, was assaulted at least once, and witnessed several acts of vandalism. She also learned of coworkers being robbed while they were working.

(4) In late 2021, claimant complained about the safety of the store to her direct supervisor and the area manager, who indicated they would not take any further action to improve store safety. Therefore, in November 2021, claimant contacted the employer's "head of security" to apprise him of the situation. November 14, 2023, Transcript at 19. Based on that call, unarmed security guards were posted at the store beginning in December 2021.

(5) From January 2022 through at least June 14, 2022, the unlawful activity persisted despite the presence of security guards. On January 22, 2022, while working, claimant was robbed by a person claiming to have a gun. The security guard on duty did not intervene to protect claimant during the robbery, nor did security guards intervene during other instances of criminal activity while claimant was present. Claimant believed this was because the employer did not allow the guards to carry or use weapons of any kind, including pepper spray or tasers. Claimant advocated to her supervisors, the head of security, and the employer's human resources department for more effective security guards and security policies, but no changes were made.

(6) At some point after January 2022, the employer hired an employee who was frequently scheduled to work the same shifts as claimant. This employee began dating claimant's daughter, who also worked for the employer. The employee would "watch [claimant's] every move," particularly when opening the safe or securing cash or lottery tickets, "hovering over [claimant's] shoulder and looking at [her] and asking questions. . . he didn't need to be asking about." November 14, 2023, Transcript at 36. This made claimant "very uncomfortable." November 14, 2023, Transcript at 36. The employee also frequently brought up the subject of robbery, stating that he was afraid the store would be robbed and repeatedly asking claimant what she would do in the case of a robbery. This behavior caused claimant to do an internet search on the employee, the results of which caused her to believe that the employee had been convicted of assault and bank robbery. Based on these circumstances, claimant feared that the employee might rob her or conspire with others to rob her while she was working.

(7) On May 23, 2022, after researching the employee's criminal history, claimant asked her supervisors not to schedule the employee to work the same shifts with her because, based on his criminal history and his actions around her, she was afraid of him. They declined the request because claimant "was not supposed to be digging into his past and everything." November 14, 2023, Transcript at 53.

(8) On or about June 14, 2022, claimant "had a mental break/panic attack [and] went to [the] hospital." Exhibit 1 at 4. Claimant's doctor recommended that she should wait before returning to work. Claimant texted her supervisor that she could not "return to that workplace because of the circumstances." November 14, 2023, Transcript at 11. The employer placed claimant on a period of Family and Medical Leave Act (FMLA) leave, effective June 14, 2022, through August 12, 2022. Claimant did not perform work for the employer after June 14, 2022.

(9) On June 15, 2022, the possibility of a transfer to another store was brought up in a phone call with claimant to resolve her complaints. Claimant declined this because she only had the ability to travel to

one other store, and she believed from her previous work at that store that it had at least as much criminal activity.

(10) At some point during her employment, claimant filed two claims for worker's compensation stemming from "the robberies and the attempted robbery" while working for the employer. November 14, 2023, Transcript at 51. At some point during or prior to January 2022, claimant had been diagnosed with work-related post-traumatic stress disorder (PTSD), and she believed that the ongoing crime at the store and having to work with the employee she feared would rob her triggered her "anxiety [and] PTSD." Exhibit 1 at 4. Claimant intended the June 14, 2022, text to be a resignation, which she sent because of the work environment's effects on her mental health condition.

(11) On July 28, 2022, claimant's doctor released claimant to return to work beginning August 13, 2022, and limited her to working only on Saturdays for four hours. Claimant and the employer did not contact one another about claimant returning to work on these or any other terms. Claimant had the option to request an extension of FMLA leave from August 13, 2022, through December 12, 2022, but the employer did not grant an extension because claimant failed to return a certification from her doctor. Claimant did not return the certification because she believed the employer, due to her worker's compensation claim, "had open access to [her medical] records," and because claimant "probably wasn't in [her] right. . . state of mind." November 14, 2023, Transcript at 49.

(12) On November 7, 2022, after claimant failed to return the certification, the employer considered claimant to have voluntarily quit work based on her June 14, 2022, text message to her supervisor.

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

Nature and date 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 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).

Decision # 71453 concluded that claimant was discharged from employment. The order under review concluded that claimant voluntarily quit work effective "June 14 or 15, 2022." Order No. 23-UI-242369 at 4. The record supports the order's conclusion that claimant voluntarily quit work; however, the record shows that the effective date of the work separation was November 7, 2022, rather than June 14 or 15, 2022.

On June 14, 2022, claimant texted the employer that she could not "return to that workplace because of the circumstances," and claimant did not perform any work duties for the employer thereafter. November 14, 2023, Transcript at 11. Claimant testified that she believed this constituted a resignation effective that day. November 14, 2023, Transcript at 11. However, it can reasonably be inferred that the employer did not accept this text as a resignation with immediate effect because the employer instead

placed claimant on a period of FMLA leave that day, which lasted until August 12, 2022. The record shows the employer then processed another request for FMLA leave from August 13, 2022, through December 12, 2022, but ultimately denied the request because claimant failed to return a medical certification. The employer's witness testified that claimant nonetheless remained on an unspecified "leave of absence" until November 7, 2022, "the date that [the employer] received the resignation." November 14, 2023, Transcript at 8. As neither the claimant, nor the employer, offered evidence that a second resignation was given, it can be inferred that the employer decided on November 7, 2022, to deem claimant's June 14, 2022, resignation effective after she failed to secure additional FMLA leave or return to work. Accordingly, the work separation is properly characterized as a voluntary leaving that occurred November 7, 2022.

Voluntary quit. 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 PTSD and anxiety which were 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.

The relevant period to analyze when determining good cause includes the time between which claimant gave notice and the final day claimant worked. See *Constantine v. Employment Dept.*, 200 Or App 677, 117 P3d 279 (2005); *Ponder v. Employment Dept.*, 171 Or App 435, 448, 15 P3d 602 (2000).

Claimant voluntarily quit work because unsafe working conditions due to crime, and the employer's failure to address those conditions worsened claimant's PTSD and anxiety to the point where she could not perform her work. The order under review concluded that claimant "seemed to be unusually sensitive to the realities of her workplace" and determined that claimant did not face a grave situation because an "average person" would not have found the working conditions dangerous. Order No 23-UI-242369 at 5. The order under review erred in failing to assess the gravity of the situation from the perspective of a person with the characteristics and qualities of an individual with the permanent or long-term impairments of PTSD and anxiety. Applying this standard, the record supports that claimant faced a grave situation and had no reasonable alternative to quitting work.

The employer's witness testified that claimant had filed two worker's compensation claims in relation to "the robberies and the attempted robbery" that occurred while working for the employer. November 14, 2023, Transcript at 51. A note from claimant's doctor gave a diagnosis of PTSD that was "work related," but did not state how long claimant had been suffering from that condition. Exhibit 1 at 11. Claimant only testified about being the victim of a January 2022 robbery, and the record does not reveal when claimant filed either worker's compensation claim. On these facts, it can be inferred that claimant was the victim of other robberies or robbery attempts that occurred prior to January 2022, and that claimant suffered from PTSD and anxiety since sometime prior to January 2022 as a result of the robberies. It can therefore also be inferred that these incidents caused claimant to file at least one

worker's compensation claim in connection with those diagnoses prior to January 2022. Therefore, when claimant gave her resignation in June 2022 and it became effective in November 2022, her PTSD and anxiety were, more likely than not, permanent, or long-term impairments for purposes of OAR 471-030-0038(4).

The record shows that the frequent unlawful activity at the employer's store for which claimant was present, either as a victim or witness, exacerbated her PTSD and anxiety symptoms during 2022. Further, a coworker who took an unusual interest in claimant's handling of the store's valuables and constantly brought up the subject of robbery to her caused claimant to fear him, also triggering her mental health symptoms. Claimant requested from various levels of management that the employer remedy these issues, from her direct supervisor to corporate human resources and security officials. In response, the employer posted a security guard at the store beginning in December 2021. However, claimant noticed little effect from this, as the security guards "weren't allowed to do much other than stand there," and "weren't even allowed to. . . escort people out." November 14, 2023, Transcript at 29. Claimant was robbed in January 2022 despite the presence of a security guard.

Though the record suggests that claimant's concern over the coworker she felt was acting suspiciously was a motivating factor in her June 2022 resignation, it can reasonably be inferred that the resignation was also motivated by the continued criminal acts by customers at the store and the perceived ineffectiveness of the security guards. Given the effect of these circumstances on claimant's mental health, causing her to seek hospitalization for a "mental breakdown/panic attack," claimant has shown that no reasonable and prudent person with the characteristics and qualities of an individual with an impairment such as claimant's would have continued to work for their employer under these conditions for an additional period of time. Exhibit 1 at 4. The record therefore shows that claimant submitted her June 14, 2022, resignation because she faced a grave situation.

As discussed above, the employer did not accept claimant's resignation with immediate effect, instead placing her on a period of FMLA leave with her apparent consent. Additional FMLA leave was potentially available to claimant after the initial period ending August 12, 2022, but it was not granted because claimant did not submit a medical certification. The employer did not offer claimant the option to return to work at that time, though her doctor submitted a statement to the employer clearing her to return to work for four hours per week. It is unclear from the record whether claimant would have returned to work then if allowed by the employer, and therefore whether submission of the doctor's statement constituted an attempt by claimant to rescind her earlier resignation. Regardless of whether claimant attempted to rescind her resignation, it can be inferred that the employer deemed her June 14, 2022, resignation effective on November 7, 2022, because the employer testified they considered her employment to have ended that day by resignation, and the record does not show that any other resignation was given. November 14, 2023, Transcript at 8. Because the employer chose the effective date of claimant's resignation, the circumstances at the time the resignation was given, rather than at the time the employment relationship was severed, were considered in determining that claimant voluntarily quit because she faced a grave situation.

Further, claimant did not have a reasonable alternative to quitting. Claimant could have sought additional FMLA leave prior to her resignation becoming effective November 7, 2022, which presumably would have been unpaid. However, claimant had already been on leave, also presumably without pay, since June 14, 2022. A protracted, unpaid leave of absence is not a "reasonable alternative"

to leaving work and being unemployed. *Sothras v. Employment Division*, 48 Or App 69, 616 P2d 524 (1980). Additionally, the record does not suggest that by the end of such leave the employer would have made changes to their policy regarding how security guards performed their jobs, nor does it suggest that crime at the store would have substantially decreased from June 2022 levels. Despite claimant's pleas to various levels of the employer's management, security policies at the store did not change other than the December 2021 addition of security guards. Even after this addition, criminal activity persisted while claimant's requests for additional changes were not implemented, suggesting that further requests would have been futile. Therefore, more likely than not, claimant would have faced the same grave situation regarding criminal activity upon return from leave, and making further complaints or requesting additional leave were therefore not reasonable alternatives to quitting.

Similarly, while the employer offered an alternative to quitting of transfer to another store, claimant lacked transportation to all but one other store. The store that claimant could have reached is the one at which she previously worked, and which she believed from experience had at least the same levels of criminal activity as the store she would have left. While such a transfer may have separated claimant from the coworker whom she feared, it would not have resolved the grave situation of claimant's worsening mental health condition due to exposure to criminal activity and her belief that security guards were essentially prohibited by the employer from intervening to protect her. Therefore, transfer was not a reasonable alternative to quitting. Because claimant had no reasonable alternatives to leaving work, she quit with good cause.

For these reasons, claimant voluntarily quit work with good cause and is not disqualified from receiving unemployment insurance benefits as a result of the work separation.

DECISION: Order No. 23-UI-242367 is set aside, as outlined above.

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

DATE of Service: January 23, 2024

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.

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 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.

Employment Appeals Board - 875 Union Street NE | Salem, OR 97311
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