

EMPLOYMENT APPEALS BOARD DECISION
2018-EAB-1175

Affirmed
No Disqualification

PROCEDURAL HISTORY: On October 29, 2018, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant was discharged within 15 days of a planned voluntarily leaving without good cause (decision # 151812). Claimant filed a timely request for hearing. On November 21, 2018, ALJ S. Lee conducted a hearing, at which the employer failed to appear, and on November 29, 2018, issued Order No. 18-UI-120460, concluding claimant voluntarily left work with good cause. On December 18, 2018, the employer filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Spirit Leatherworks LLC employed claimant as an accounts receivable manager from September 4, 2018 to September 26, 2018.

(2) Claimant worked in a small office with cubicles where employees worked in close proximity to one another in a most open working space. Soon after beginning work, she realized it was filled with individuals who regularly yelled, used foul language, obscenities and racial slurs, and made demeaning comments to each other without correction. When she commented to other workers about the environment, she was told “they were a colorful group”, it was “the culture” there, and that “not many can make it.” Audio Record ~ 16:15 to 17:00.

(3) It was not unusual for the owner and the office manager to yell and scream at each other using foul language and making demeaning comments to one another within earshot of employees including claimant, who was offended by what she heard. The office manager also served as the employer’s human resources representative.

(4) During the last week of claimant’s employment, an issue arose on an important account receivable the office manager believed was due and who told claimant the terms of the account were incorrect and essentially called claimant stupid when she disagreed. The office manager then told claimant “to get it figured out immediately.” Audio Record ~ 10:45 to 11:15. Claimant was so offended by the office manager’s demeaning statements to her that she went out to her car to compose herself. After doing so, she returned and contacted one of the account’s representatives, who told claimant that the terms of the

account were correct and had been the same for 15 years. Claimant then told the employer's sales manager what she had learned. When the sales manager informed the office manager about the actual terms of the account the office manager began screaming at the sales manager.

(5) On September 26, 2018, claimant was working at her cubicle speaking with a customer on the phone while the owner was on the phone right next to her. While speaking with her customer, claimant clearly overheard the owner in conversation, "with every other word out of his mouth [being] 'the f-word'", and then stating to whomever he was speaking to that the person in question "didn't have to worry too much longer because pretty soon we would have another 'nigger president.'" Audio Record ~ 15:00 to 16:00. Claimant was "appalled", started to have a panic attack, and quickly ended her conversation with the customer because she was certain the customer had heard what the owner had said. She became so upset that she left work for the day. Later in the day, claimant decided that her work environment was "unbearable" for her, "degrading in a general sense", and left her with no choice but to quit. Audio Record ~ 9:00 to 10:45. She emailed her resignation to the employer, effective October 3, 2018. However, by return email that day, the employer notified her "not to come back" because there was "no need for her to return to work." The employer only asked claimant to verify her mailing address so that her personal belongings could be sent to her. Audio Record ~ 7:45 to 9:00.

(6) Claimant never told the owner that his foul language and the racial slur he used on her last day as well as the yelling, foul language, obscenities, racial slurs and demeaning comments generally used in the office offended her because the owner scared her. Claimant never addressed the issue of the office manager's demeaning comments to her as well as the employer's offensive working environment with the employer's human resources person, the office manager, because she considered the office manager to be a major offender and believed it would be futile.

CONCLUSIONS AND REASONS: The employer discharged claimant, but not for misconduct.

ORS 657.176(2)(a) requires a disqualification from unemployment insurance benefits if the employer discharged claimant for misconduct. OAR 471-030-0038(3)(a) (January 11, 2018) defines misconduct, in relevant part, as a willful or wantonly negligent violation of the standards of behavior which an employer has the right to expect of an employee, or an act or series of actions that amount to a willful or wantonly negligent disregard of an employer's interest. However, ORS 657.176(8) provides that when an individual has notified an employer that she (or he) will quit work on a specific date, and the employer discharges her, not for misconduct, no more than fifteen days prior to that date, and the quit would have been without good cause, the work separation is adjudicated as if the discharge had not occurred and the planned quit had occurred, and the individual is disqualified from receiving benefits, except that she is eligible for benefits for the period including the week in which the actual discharge occurred through the week prior to the week of the planned quit date.

In determining whether a voluntary leaving was for good cause, "good cause" is defined, in relevant part, as a reason of such gravity that a reasonable and prudent person of normal sensitivity, exercising ordinary common sense, would have 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 the employer for an additional period of time. In determining whether a discharge was for misconduct, misconduct is defined, in relevant part, as a willful or wantonly negligent violation

of the standards of behavior which an employer has the right to expect of an employee, or an act or series of actions that amount to a willful or wantonly negligent disregard of an employer's interest. OAR 471-030-0038(3)(a).

On September 26, 2018, claimant notified the employer she was quitting work, effective October 3, 2018. However, by telling claimant that day that there was “no reason for her to return to work,” the employer discharged her on that day, which was less than 15 days prior to her planned quit date. Absent evidence to the contrary, we infer that the employer discharged claimant because she notified the employer she was quitting work. An employer does not have the right to expect an employee to refrain from quitting. Nor does the record establish that claimant’s discharge was due to any willful or wantonly negligent violation of a reasonable employer expectation. The employer therefore discharged claimant, not for misconduct. The remaining issue to be determined is whether ORS 657.176(8) applies to this case; i.e., whether claimant’s planned quit would have been without good cause.

Claimant decided to quit work after she concluded that her work environment was “unbearable” and “degrading in a general sense” because of the foul language, demeaning comments and racial slurs she heard continually in her office environment. The undisputed record shows that generally, the individuals who worked in that environment yelled, used foul language, obscenities, racial slurs and made demeaning comments to each other without any correction from the office manager or owner, who themselves engaged in such behavior. The record shows that the office manager made demeaning comments to claimant, essentially calling her stupid, once because claimant insisted that the terms of an account receivable she was familiar with was different from the office manager’s recollection of those terms, even though those terms had been in effect for 15 years. The effect of the manager’s comments on claimant on the day in question was serious enough that she had to leave the work environment and remain in her car long enough to compose herself enough to return to work and perform her job. The record also shows that the final incident which caused claimant to quit was being exposed to an offensive racial slur, “nigger president”, uttered by the owner and the foul language used by him loud enough to cause claimant to hang up on a customer who she was certain heard all of the owner’s comments and language while she spoke to the customer about a business matter. The anxiety and embarrassment claimant experienced at that moment caused her to experience a panic attack and leave the work environment for the day, after which she decided she could not bear it any longer and submitted her resignation.

Viewed objectively, the conduct described by claimant that caused her to quit was severe and pervasive enough to create a work environment that would be intimidating, hostile, or offensive to reasonable people, particularly with regard to the racial slurs, sufficient to constitute a hostile work environment, even if the racial comments were not specifically directed at claimant. Such conduct likely violated Title VII of the Civil Rights Act of 1964 and was sufficient to constitute a grave situation for claimant.¹ The remaining issue to determine if claimant had good cause to quit is whether claimant had reasonable alternatives to leaving work when she did.

Nominal alternatives to quitting that may have been available to claimant include requesting the intervention of the employer’s human resources representative or owner to correct the offensive office

¹ See, <https://www.eeoc.gov/laws/types/harassment.cfm>

environment. However, the record shows that both of those individuals were participants in and likely enablers of that environment that caused claimant to quit. For these reasons, appealing to them to intervene and correct the offensive conditions likely would have been futile alternatives to quitting. For that reason, we conclude that claimant's planned quit would have been with good cause.

In sum, after claimant notified the employer of her intention to quit work, with good cause, she was discharged within fifteen days of the planned quit for a reason that did not constitute misconduct. Thus, ORS 657.176(8) does not apply to this case. Accordingly, the employer discharged claimant, but not for misconduct under ORS 657.176(2)(a) and claimant is not disqualified from receiving unemployment insurance benefits on the basis of her work separation.

DECISION: Order No. 18-UI-120460 is affirmed.

J. S. Cromwell and S. Alba;
D. P. Hettle, not participating.

DATE of Service: January 18, 2019

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 desisyong ito.

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 Asuntos Laborales. Si no está de acuerdo con esta decisión, puede presentar una Petición 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 محكمة 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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