EO: 200
BYE: 201938

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

3803
DS 005.00

EMPLOYMENT APPEALS BOARD DECISION
2018-EAB-1184

Reversed
No Disqualification

PROCEDURAL HISTORY: On November 1, 2018, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 90258). Claimant filed a timely request for hearing. On December 4, 2018, ALJ Murdock conducted a hearing, and on December 6, 2018 issued Order No. 18-UI-120876, concluding claimant voluntarily left work without good cause. On December 26, 2018, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant submitted a written argument to EAB. However, claimant did not certify that he provided a copy of the argument to the other parties as required by OAR 471-041-0080(2)(a) (October 29, 2006). Claimant's argument also contained information that was not part of the hearing record and claimant did not show that factors or circumstances beyond his reasonable control prevented him from offering the information during the hearing as required by OAR 471-041-0090(2) (October 29, 2006). For these reasons, EAB did not consider claimant's argument or the new information that claimant sought to present by way of his written argument when reaching this decision.

FINDINGS OF FACT: (1) Optimal Health of Southern Oregon LLC employed claimant as a family nurse practitioner from July 2017 until September 26, 2018.

(2) At hire, claimant and the employer entered into an initial employment contract. The contract set out the compensation that claimant would receive and other terms of claimant's employment. The initial contract did not have a date on which it would terminate or expire.

(3) The employer expected claimant to refrain from using foul language when speaking to coworkers. Claimant understood the employer's expectation as a matter of common sense.

(4) In approximately June 2018, the employer presented a proposed new contract to claimant to replace the initial contract under which he was working. The new contract was for a term of three years. Among other things, the new contract set out that claimant's compensation would remain the same as in the

initial contract and listed certain minimum gross collection earnings that claimant needed to try to achieve. Claimant and the employer then began negotiating the new contract. Claimant asked for the new contract to give him an additional $5,000 in compensation. In August 2018, claimant told the employer he was going to look for new employment. As of approximately late August, claimant told the employer that he had not located new work. The employer then verbally agreed that under the new employment contract claimant's compensation would increase an additional three and one-half percent over that in the initial contract and that the employer would at its own expense provide for health insurance coverage for claimant and his family as an additional benefit. The employer did not indicate to claimant at that time that it would increase the minimum gross collection earnings from that included in the June 2018 proposed contract. Claimant verbally agreed to the most recent terms for the new contract proposed by the employer.

(5) In approximately early September 2018, the employer presented a new employment contract to claimant for his review and signature. This version of the contract, while including the additional compensation and benefits to which claimant had verbally agreed, also included a provision that increased the minimum gross collections earnings from the figure to which claimant had verbally agreed. Claimant indicated to the employer that he had not agreed to the increase in collections and was not comfortable with it.

(6) Around September 17, 2018, claimant told the employer that he had not signed the most recent proposed contract because he also had "other issues" with it. Audio at ~11:10. Rather than further negotiating, the employer delivered a letter to claimant that day withdrawing the proposed new contract. The letter stated in part, "After careful consideration, I have reached the conclusion that [the employer] is not able to meet your requests considering the contract given to you in June 2018. At this time, we are withdrawing the contract and hereby notify you that effective September 30, 2018, [the employer] will no longer require your services." Audio at ~25:52.

(7) After September 17, claimant continued reporting for work and intended to continue working through September 30. On September 26, 2018, claimant was seeing patients. Sometime that morning, a medical assistant knocked on the examination room door and, when claimant answered, told him that he was running behind schedule. Claimant told the medical assistant, "I don't care." Audio at ~12:26. It was later reported to the clinic manager that claimant had used foul language in the interaction with the medical assistant that morning.

(8) After receiving the report about claimant's behavior, the manager approached claimant on September 26 and told him that, due to his behavior, the employer was not going to allow him to continue working until the end of the week and gave him his final check. However, the employer paid claimant through September 30, 2018, the date after which the employer had previously told claimant it would no longer require his services.

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

The Work Separation. On September 17, the employer notified claimant that it would not allow him to continue working for it after September 30 because it had decided to stop negotiating a new contract with him. However, the employer also informed claimant on September 26 that it would not permit him to work for the employer any longer, and not through September 30. Given that there were two manifestations of an intention to end the employment relationship at different times and each had a

different termination date, the issue is the operative work separation for purposes of determining whether claimant is disqualified from benefits.

OAR 471-030-0038(3) (January 11, 2018) sets forth the standard by which the nature of a work separation is determined. 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). 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).

In Order No. 18-UI-120876, the ALJ found as fact that the employer presented the proposed replacement contract to claimant in June 2018 because the "[initial] employment agreement or terms of employment were scheduled to end or expire." Order No. 18-UI-120876 at 1. The ALJ further found that, while the employer was willing to permit claimant to continue working under the proposed replacement contract, "[c]laimant declined to accept the new contract or agreement and the employer [then] scheduled his termination for September 30, 2018." Order No. 18-UI-120876 at 1. Based on these findings, the ALJ concluded that since both parties had expressed an unwillingness to continue working, "[i]n effect, the separation was mutual," and "a mutual agreement to separate is a voluntary quit, not a discharge," citing *Employment Department v. Shurin*, 154 or App 352, 959 P2d 637 (1998)." Order No. 18-UI-120876 at 3. The ALJ disregarded that, after establishing the separation date as September 30, the employer had later decided that it was not willing to allow claimant to continue working after September 26. The ALJ reasoned that September 26 could not have been the date of a work separation by discharge because "the employer merely relieved claimant of his duties for the final days of his employment and paid him as if he had worked through the end of the established separation date of September 30, 2018." Order No. 18-UI-120876 at 3. We disagree with the ALJ and conclude that claimant's work separation was a discharge on September 26, 2018.

At the outset, neither claimant nor the employer's witness testified that the initial employment contract was going to terminate or expire on September 30 or that it was to be effective only for any particular duration. From claimant's characterization of the initial contract as being "open-ended," we infer that it was not limited to a particular term. Audio at ~27:50. Had the employer not decided to unilaterally terminate the initial contract as of September 30, the initial contract presumably would have continued in effect indefinitely. As such, absent the employer notifying claimant that it intended to stop all negotiations and would terminate the initial contract or his employment as of September 30 if he did not agree to accept the terms of the proposed new contract, he cannot be presumed to have known, nor should he have known that failing to do so would end his employment. Indeed, that claimant did not agree to sign the most recent version of the proposed contract on or before September 17, could be viewed as a negotiating tactic, and not as an expression of claimant's unwillingness to continue working for the employer or that he had agreed to the employer's decision to terminate the employment relationship.

On the facts in this record, the ALJ erred in concluding that claimant agreed to the employer's termination of his employment as of September 30 or any other date and in applying *Employment Department v. Shurin*, 154 Or App 352, 959 P2d 637 (1998). By its actions on September 17 in "withdrawing" the proposed replacement contract, and in abruptly and unilaterally declaring that September 30 would be the last day of claimant's employment, the employer expressed its unwillingness to continue in the employment relationship after that date, which would have been the effective work separation by discharge, but for the employer's refusal to allow claimant to work after September 26.

The ALJ erred in disregarding September 26 as the date of the work separation. Although the employer might have paid claimant through September 30, it refused to allow him to continue providing services after September 30. It is well established that for an employment relationship to continue, there must be some *future opportunity* for the employee to *perform services* for the employer, and it is not sufficient that the employee will receive pay for a period when the employer is unwilling to allow the employee to continue providing services. Unemployment Insurance Benefits Manual (4/1/10 rev) §410 (in establishing the date of the separation, the receipt of wages or other payments does not indicate that the work relationship has continued and, "if a worker receives payment *after* the last day worked, the employer may insist the person is still employed [but] **** the employer must show what service the worker was providing."); *Appeals Board Decision,* 18-EAB-1031 (November 30, 2018); *Appeals Board Decision,* 18-UI-0018 (February 2, 2018).

Here, because the record does not show that claimant performed any services for the employer after September 26, 2018, a work separation by discharge occurred on that date despite the employer having decided to and paying claimant through September 30. There is no authority for disregarding this discharge and concluding that the date of the discharge should be the September 30 date that the employer had earlier decided would be the end of claimant's employment. Claimant's work separation was by discharge on September 26, 2018, and the ALJ erred in concluding that it was a voluntary leaving on September 30, 2018.

The Discharge. ORS 657.176(2)(a) requires a disqualification from unemployment insurance benefits if the employer discharged claimant for misconduct connected with work. 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. The employer carries the burden to show claimant's misconduct by a preponderance of the evidence. *Babcock v. Employment Division,* 25 Or App 661, 550 P2d 1233 (1976).

Relying on hearsay statements, the employer's witness contended that claimant used foul language when speaking to the medical assistant on September 26. Audio at ~6:24. Claimant denied that he had done so. Audio at ~12:26, ~13: 31. In support of his denial, claimant presented a written statement from the medical assistant in which she stated that claimant had not used foul language when speaking with her. Exhibit 1. In support of its position, the employer presented written statements from certain of the medical assistant's coworkers stating that the medical assistant had told them on September 26 that claimant used foul language when speaking to her that day. Exhibit 2 at 3-5.

The employer's evidence as to what claimant did and said on September 26 is comprised wholly of hearsay. Claimant's evidence on the same issue is comprised of his own first hand-hand information and hearsay information from the medical assistant that contradicts the employer's hearsay. The evidence on whether claimant willfully or wantonly violated the employer's standards by what he said to the medical assistant is in irreconcilable conflict. On this record, there is no reason to question claimant's credibility or to consider the employer's hearsay evidence more reliable than claimant's first-hand and hearsay evidence. On this record, the employer did not meet its burden to show that claimant used foul language when speaking to the medical assistant on September 26, or that it discharged claimant for misconduct.

The employer discharged claimant but not for misconduct. Claimant is not disqualified from receiving unemployment insurance benefits.

DECISION: Order No. 18-UI-120876 is set aside, as outlined above.

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

DATE of Service: January 31, 2019

NOTE: This decision reverses an order that denied benefits. Please note that payment of any benefits owed may take from several days to two weeks 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.

Please help us improve our service by completing an online customer service survey. To complete the survey, please go to https://www.surveymonkey.com/s/5WQXNJH. If you are unable to complete the survey online and wish to have 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 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 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