

EMPLOYMENT APPEALS BOARD DECISION
2019-EAB-0024

Affirmed
Disqualification

PROCEDURAL HISTORY: On October 24, 2018, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant voluntarily left work with good cause (decision # 143023). The employer filed a timely request for hearing. On December 6, 2018, ALJ Murdock conducted a hearing, and December 14, 2018 issued Order No. 18-UI-121301, concluding that claimant quit without good cause. On December 18, 2018, ALJ Murdock issued Order No 18-UI-121457, amending and correcting Order No. 18-UI-121457, but not substantively changing its reversal of the Department's decision. On January 7, 2019, claimant filed an application for review with the Employment Appeals Board (EAB)

Claimant submitted a written argument in which she presented new information that she did not offer during the hearing. With respect to most of this new information, claimant did not explain why she failed to present it during the hearing, or show that she was prevented from doing so by factors or circumstances beyond her reasonable control as required by OAR 471-041-0090(2) (October 29, 2006). Claimant appeared to suggest, however, that she needed to offer some new information to EAB about what would be the board president's testimony had he appeared at the hearing and had she been able to cross-examine him. However, claimant had arranged in advance of the hearing for the board president to testify on her behalf and had a phone number where the ALJ could have reached him even if he did not appear as a witness for the employer. Audio at ~4:53. In addition, at the conclusion of her testimony, claimant agreed with the ALJ that she had presented hearsay evidence as to what the board president would have testified to in her own testimony, and it was unnecessary to call him as a witness. Audio at ~44:11. Because claimant did not make the showing required to have EAB consider her new information, EAB has not considered it when reaching his decision.

FINDINGS OF FACT: (1) Oregon Supported Living Program employed claimant as director of its arts and culture program from April 2, 2018 until August 23, 2018.

(2) In March 2018, before claimant was hired, the employer's human resources director informed the employer's executive director that certain of the employer's practices did not comply with legal standards. One of those practices involved legally required rest and meal breaks, which all employees were not regularly taking.

(3) In April 2018, shortly after claimant began work, the executive director informed claimant that the employer had recently learned that at least some employees had not been taking legally required breaks. The executive director told claimant to ensure that her subordinates complied with all legal requirements. Around this time, an employee who was subordinate to claimant told claimant that she did not take breaks and had never done so. Hearing this, claimant became concerned that the employer owed back pay to the subordinate for the breaks the subordinate had worked through in the past. From the tenor of the conversation, claimant believed that the subordinate planned to pursue a wage claim against the employer through the Oregon Bureau of Labor and Industries (BOLI). Claimant immediately took steps to ensure that the subordinate took all required rest and meal breaks and reported the conversation with the subordinate to the executive director. Claimant also contacted the human resources department and the payroll department about ensuring that employees took all required breaks.

(4) Around July 6, 2018, claimant met with the executive director. The executive director told claimant to retrieve from the payroll department all the time timesheet information it had relating to the subordinate's work hours since the subordinate was hired. The executive director instructed claimant to work in collaboration with the subordinate to determine all rest and meal breaks the subordinate had skipped since hire and reconstruct accurate time records for the subordinate so that the subordinate would receive all pay owed to her. In the conversation, the executive director mentioned to claimant that the employer was trying to avoid having a BOLI wage and hour claim filed against it. Claimant assumed that the executive director meant that she wanted claimant to falsify the reconstructed time records for the subordinate and pressure the subordinate into believing that the falsified records were accurate so the subordinate would not file a claim with BOLI.

(5) On July 20, 2018, claimant met with the president of the employer's board and expressed that she was concerned about the instructions that the executive director had given her to reconstruct the subordinate's time records. Claimant told the president that she thought she had been asked to falsify time records and, by doing so, to engage illegal conduct for the purpose of assisting the employer in avoiding a BOLI claim. The president told claimant that she had misunderstood the executive director's intentions. Audio at ~39:25. The president told claimant that he, the executive director, and an advisor had met, discussed the fact that two employees had not been paid for all the time that they had worked, and had agreed to "live with the risk" of a BOLI claim. Audio at ~18:15, ~27:50. In that conversation, claimant also discussed with the board president some concerns she had about the funding for the arts and culture program possibly being associated with Medicaid fraud. The president told claimant that he would bring up these issues with the board of directors.

(6) On August 1, 2018, the board president contacted claimant to report the results of his meeting with the Board. He told claimant that the board was going to look into arranging a training on workplace culture. With respect to claimant's other concerns, however, she understood the president to state the board did not plan to do anything other than what it was already doing.

(7) On August 9, 2018, claimant submitted a resignation notice to the employer, effective August 23, 2018. Claimant's stated reason for leaving was that she thought that the executive director wanted her to "manufacture" time sheets for the subordinate, which would break the law, and she thought the employer was requiring her to "cover-up" its "wage theft." Audio at ~9:27, ~32:45.

CONCLUSIONS AND REASONS: Claimant voluntarily left work without good cause.

A claimant who leaves work voluntarily is disqualified from the receipt of benefits unless she proves, by a preponderance of the evidence, that she had good cause for leaving work when she did. ORS 657.176(2)(c); *Young v. Employment Department*, 170 Or App 752, 13 P3d 1027 (2000). "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) (January 11, 2018). 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 her employer for an additional period of time.

The hearing testimony of claimant and the employer's witness, the executive director, was in stark conflict. Claimant generally contended that she quit work because the executive director wanted her to falsify the subordinate's time records and to cover up that the employer had not paid the subordinate all owed wages. In addition, claimant contended that the board president condoned the allegedly unlawful actions that the executive director wanted claimant to take on the employer's behalf. The executive director denied claimant's contentions across the board.

Claimant's assertion that the executive director sought to have her falsify the subordinate's time records was based on her account of the July 6 conversation between her and the executive director. In claimant's version, the executive director asked claimant to take certain text messages that the subordinate had produced and determine from those messages if the employer's historic time records for the subordinate were accurate. Audio at ~25:00. Claimant also contended that, according to the subordinate, the text messages at issue showed the actual hours the subordinate had worked since hire and could be used to calculate the pay that the employer owed to the subordinate. Audio at ~25:03, ~35:18. While claimant testified that the executive director never directly told her to "falsify" the time records she had been asked to retroactively reconstruct for the subordinate, she inferred from the executive director's instruction that she was to pressure the subordinate into agreeing with falsified records. Audio at 25:20. Exerting such pressure over the subordinate was, according to claimant, also intended to have the effect of hiding from BOLI that the employer had failed to pay the subordinate for the meal and rest breaks that the subordinate had unlawfully worked through. Audio at ~32:45, ~37:19.

Assuming arguendo that claimant's account of the July 6 conversation is factually accurate, it is difficult to reconcile those facts with the inferences that claimant drew from them. For example, had the executive director actually wanted claimant to falsify time records and participate in a cover-up, it does not make logical sense that the director would have instructed claimant to use accurate records, like the text messages at issue supposedly were, as the basis for the reconstruction and include the subordinate in the reconstruction process. Furthermore, it is not apparent to us that by the words and context in which the executive director supposedly instructed claimant to reconstruct the subordinate's time records, the director actually intended to have claimant prepare an inaccurate reconstruction and, somehow, to cover

up the correct number of hours that the subordinate had accrued when working through legally mandated breaks.

In addition, the board president's statement that the employer was going to "live with risk" of a BOLI claim, was not reasonably construed by claimant as meaning that the employer intended to continue engaging in unlawful employment practices. It was construed most logically as merely an acknowledgment by the board that the employer was in danger of being the subject of a BOLI claim. Finally, the board president's statement that the board was not going to take further action on claimant's wage and hour concerns also was not a reasonably construed as the employer condoning such violations. Most reasonably interpreted, the statement was likely a confirmation that, like the president, the board considered claimant to have misunderstood that the executive director wanted her to falsify the subordinate's time records and, as such, it was not going to pursue those concerns. Viewed in sum and accepting as accurate claimant's account of her interactions with the executive director and the board president, claimant's inference that she was expected to falsify records and to participate in a cover-up of the employer's allegedly unlawful employment practices was neither logical nor reasonable.

In addition to the tenuous nature of claimant's inferences, burden of persuasion principles militate against claimant's position. In voluntary leaving cases, unless there is a principled reason to doubt the evidence offered by one of the parties, the uncertainty in the evidence must be resolved against claimant since she is the party who carries the burden of persuasion. *See Young v. Employment Department*, 170 Or App 752, 13 P3d 1027 (2000). Here, there is no basis in the record to prefer claimant's credibility over that of the employer's witnesses. The evidence in this record as to whether the employer expected claimant to falsify records or participate in a cover up of unlawful employment practices is thus, at best, evenly balanced. Based on burden of persuasion principles, it must therefore be concluded that the employer did not expect claimant to engage in falsification of records or a cover-up, and that claimant's inferences to the contrary were not objectively reasonable. As such, claimant did not show good that either constituted good cause for her to leave work.

Claimant did not show good cause for leaving work when she did. Claimant is disqualified from receiving unemployment insurance benefits.

DECISION: Order No. 18-UI-121457 is affirmed.

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

DATE of Service: February 12, 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 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 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 دستورالعمل موجود در پایان آن، از دادگاه تجدید نظر اورگان درخواست تجدید نظر کنید.

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