

EMPLOYMENT APPEALS BOARD DECISION
2019-EAB-0080

Affirmed
Disqualification

PROCEDURAL HISTORY: On December 4, 2018, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant voluntarily left work without good cause (decision # 151156). Claimant filed a timely request for hearing. On January 3, 2019, ALJ Griffin conducted a hearing, and on January 4, 2019, issued Order No. 19-UI-122152, affirming the Department's decision. On January 22, 2019, claimant filed an application for review with the Employment Appeals Board (EAB).

EAB considered claimant's written argument to the extent it was based upon the hearing record.

FINDINGS OF FACT: (1) The TJX Companies Inc. employed claimant, last as a store manager, from September 14, 2003 to November 9, 2018.

(2) In May 2018, claimant qualified as caretaker under the Family and Medical Leave Act (FMLA) for her husband who had cancer. She requested and obtained approval from the employer for up to 3 days of intermittent (FMLA) leave per week from May 8 to July 8, 2018. During that two month period, claimant took only 8 days of such leave although she qualified for up to 24.

(3) On June 1, 2018, a new district manager (SB) became claimant's supervisor. From that date on, claimant perceived SB as personally disrespectful, rude, dismissive, unsupportive and as a person who had a personal dislike of her. He frequently failed to greet her or engage in friendly banter with her at the beginning of group meetings when he appeared to do so with others. Although that behavior upset claimant, claimant did not consider SB abusive, vulgar or insulting toward her.

(4) On June 11, 2018, SB gave claimant a written formal counseling dated May 25, 2018, regarding some workplace policy violations that occurred before he became the district manager.

(5) On September 21, 2018, SB spoke to claimant about needing to improve her performance in certain areas of her job and told her he would speak to her about that on October 2, 2018, after he returned from

vacation. Claimant attempted to improve her work performance in the areas discussed and believed she had made progress in those areas. On or about October 2, claimant and SB spoke and SB indicated to her that his intent was to continue to monitor her progress through the upcoming holidays.

(6) In early October 2018, claimant requested and obtained approval from the employer for additional intermittent (FMLA) leave from October 8 to December 8, 2018. Between October 8 and the end of her employment on November 9, claimant took only 2 of 8 requested days of such leave, in part, because she had difficulty obtaining coverage for her absences on those days. She emailed SB about needing coverage for the requested days off but never explicitly told him that her requested days off were for FMLA leave. Rather than directly step in and assist claimant, SB typically suggested that she network with store manager peers within her district and attempt to obtain the coverage herself. Claimant was rarely successful in obtaining coverage because of the reluctance of her peers to provide it. SB could have taken a more active role in facilitating coverage for claimant by directing otherwise reluctant managers to cover for claimant.

(7) On October 22, 2018, SB gave claimant a “corrective action” notice in which he formally identified shortcomings in claimant’s management performance and scheduled a follow-up review for 30 days later.

(8) Claimant was surprised by the October 22 notice and perceived it as evidence of SB’s desire and intent to terminate her employment, which claimant wanted to avoid. On October 25, 2018 claimant gave the employer notice of her intent to resign on November 9, 2018.

(9) On November 9, 2018, claimant resigned because she had difficulty obtaining coverage for her absence when desiring to take FMLA leave, had a difficult relationship with her district manager, and because she wanted to avoid a discharge on her work record.

CONCLUSIONS AND REASONS: We agree with the ALJ, and conclude claimant voluntarily left work without good cause.

A claimant who leaves work voluntarily is disqualified from the receipt of benefits unless she (or he) 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 the employer for an additional period of time.

Claimant quit work, in part, because she had difficulty obtaining coverage for her absence when desiring to take employer-approved FMLA leave. It was undisputed that during her first period of approved FMLA leave, claimant took only 8 days of such leave although she qualified for up to 24. Exhibit 1 at 18. It was also undisputed that during her second period of such leave, from October 8 to her last day on November 9, 2018, she had only taken 2 days of such leave although 8 had been requested. The record shows that claimant often requested the assistance of SB in attempting to obtain coverage for scheduled

days off with minimal results, although she never explicitly told him that her requested days off were for FMLA leave. Exhibit 1. Claimant did not dispute that she had the options of requesting assistance from the regional store manager, the human resources manager, and the regional vice president, who was SB's supervisor, if she was dissatisfied with SB's cooperation in facilitating her leave, which she admitted she failed to do. Audio Record ~ 25:30 to 26:00. Claimant failed to show that clearly explaining to SB that she needed the requested days off to exercise her FMLA leave or requesting the assistance of the regional store manager, human resources manager or regional vice president to do so would have been futile rather than reasonable alternatives to quitting over her difficulty in obtaining coverage for her requested days off. For that reason, to the extent claimant quit work because she had difficulty in exercising her FMLA leave, she quit work without good cause.

Claimant also quit work, in part, because she had a difficult relationship with SB. That claimant felt disrespected by SB because of his minimal communication with her, which she perceived as rude, dismissive, unsupportive, and indicating a personal dislike of her, viewed objectively, did not constitute a situation of such gravity that she had no reasonable alternative but to quit. Many employees work under difficult supervisors with whom they do not get along or do not like, and most do not leave work over it. Claimant did not describe any behavior by SB that could reasonably be characterized as constituting a type of abuse or oppression that might give rise to good cause for leaving work. Audio Record ~ 21:45 to 23:00. *See e.g., McPherson v. Employment Division*, 285 Or 541,557, 591 P2d 1381 (1979) (claimants not required to "sacrifice all other than economic objectives and *** endure racial, ethnic, or sexual slurs or personal abuse, for fear that abandoning an oppressive situation will disqualify the worker from unemployment benefits").

Finally, claimant quit work when she did because she wanted to avoid a discharge on her work record and she believed that the October 22 corrective action notice she received was evidence of SB's desire and intent to terminate her employment. Under OAR 471-030-0038(5)(b)(F), an individual who leaves work to avoid a discharge for misconduct or potential discharge for misconduct has left work without good cause. OAR 471-030-0038(3)(a) 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. On this record, there was little if any evidence that if the employer had discharged claimant, it would have been for misconduct. The record shows that claimant earnestly tried to improve her store's performance and achieve the standards SB wanted to reestablish after becoming district manager and speaking with her about them. Audio Record ~ 18:30 to 20:10. As such, while claimant's success in achieving those standards might have failed to meet SB and the employer's desires over time, her efforts in that regard suggest that the potential failure would not have been the result of willful or wantonly negligent conduct attributable to claimant as misconduct.

Whether quitting work in lieu of a prospective discharge, not for misconduct, is quitting work with good cause depends on whether a reasonable person facing discharge would consider the prospect so grave that resigning was the only reasonable option. At hearing, SB asserted that he considered claimant to be "a quality manager...[who]... had the leadership skills to get the store back in a good position" and that he was "surprised" that she decided to resign after the formal counseling on October 22. Audio Record ~ 34:30 to 35:00. While the record fails to show whether SB ever shared that opinion with claimant, claimant did not dispute that the formal counseling gave her at least 30 days to demonstrate the improvement the employer was seeking. Moreover, at the time claimant quit, she had not been told by

anyone that her discharge from employment was inevitable and reasonably imminent. Although claimant felt that being discharged was likely to have a negative effect on her future employment prospects with the employer, she did not assert or show that she believed being discharged would have a negative effect on her future employment prospects in general. Viewed objectively, claimant failed to show that no reasonable and prudent person in claimant's circumstances, having just been given a corrective action notice to be reviewed in 30 days, rather than quit, would have continued to work for the employer for an additional period of time while attempting to achieve the performance standards the employer had set.

For all these reasons, claimant voluntarily left work without good cause and is disqualified from receiving unemployment insurance benefits until she has earned at least four times her weekly benefit amount from work in subject employment.

DECISION: Order No. 19-UI-122152 is affirmed.

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

DATE of Service: February 22, 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 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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