EO: 200
BYE: 201947

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

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DS 005.00

EMPLOYMENT APPEALS BOARD DECISION
2019-EAB-0090

Reversed & Remanded

PROCEDURAL HISTORY: On December 7, 2018, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant voluntarily left work without good cause and disqualifying claimant from benefits beginning November 18, 2018 (decision # 92418). Claimant filed a timely request for hearing. On January 9, 2019, ALJ Murdock conducted a hearing, and on January 11, 2019 issued Order No. 19-UI-122537, concluding claimant voluntarily left work without good cause, but modifying decision # 92418 to make the disqualification effective on December 2, 2018. On January 24, 2019, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Hybrid Logistics employed claimant from January 23, 2017 until November 20, 2018, last as director of logistics. On September 27, 2017, the employer promoted claimant to the director position from that of logistics specialist or account manager.

(2) From the time she was a child, claimant's bodily reaction to significant stress was vomiting. The vomiting episodes might take place over days.

(3) After the employer promoted claimant to the director position, claimant got along well with her immediate supervisor, the senior director (YH), but had a poor working relationship with her supervisor's supervisor (BR). Claimant regularly interacted with BR and considered him abrasive, condescending, and belittling. BR could be harsh and critical when giving instructions and evaluating people.

(4) By Fall 2018, BR was not pleased with claimant's performance as director. Around that time, BR told claimant that if the sales performance of the office did not improve, the employer would let her go. Also around that time, claimant proposed to YH and BR that the employer hire more effective sales people to improve sales. Claimant's proposal was not implemented. Claimant became very frightened that she was going to lose her job. Claimant began working very long hours in an effort to keep her position, often working nights at home after her shift was over and on weekends.

(5) By October 2018, claimant was experiencing episodes of compulsive vomiting as a result of the stress and pressure she felt from work. Around October 14, 2018, claimant began vomiting up blood. On October 22, 2018, claimant saw a physician for an evaluation. The physician diagnosed claimant with a Mallory's Tear of her esophagus and stomach lining due to severe and prolonged vomiting. The physician ruled out causes for claimant's vomiting other than workplace stress and anxiety. The physician prescribed an anti-nausea medicine to control claimant's vomiting and allow the tear in her esophagus and stomach to heal. Although the physician wanted claimant to take more time off from work, at claimant's request the physician allowed her to return to work on October 24. Claimant brought in to the employer a note from the physician excusing her absences of October 22 and 23.

(6) Around October 2018 and continuing after, claimant spoke several times with YH about the stress she was experiencing and that it was causing her to vomit blood and was making her sick. Claimant also spoke to an acting human resources representative in Portland about her situation. Claimant did not speak to the employer's out of state human resources representative about her situation because she had spoken to YH and the acting human resources representative.

(7) Sometime after claimant returned to work on October 24, she stopped vomiting up blood and the Mallory's tear healed. However, claimant continued to have vomiting episodes that were not accompanied by bleeding.

(8) On November 20, 2018, claimant submitted a resignation to the employer stating her last day would be December 4, 2018. However, YH escorted claimant from the workplace premises that day and would not allow her to continue working. The employer did not want claimant to work after November 20 because claimant had access to confidential customer files and communications, which the employer thought she might misuse if she planned to quit and because the employer thought claimant might make negative references about it. The employer paid claimant through December 4, 2018 despite the fact that she was not permitted to work after November 20.

CONCLUSIONS AND REASONS. Order No. 19-UI-122537 reversed and remanded for further proceedings.

Neither party disputed that on November 20, after claimant announced her intention to leave work on December 4, the employer refused to allow her to continue working. However, the employer paid claimant through December 4. In Order No. 19-UI-122537, the ALJ concluded that, because the employer paid her through the notice period as if she was working, the work separation was voluntary leaving on December 4, 2018. The ALJ reasoned that by paying claimant, the employer "essentially plac[ed] her on a paid leave of absence or administrative leave through December 4, 2018. Order No. 19-UI-122537 at 3. We disagree and conclude that the employer discharged claimant on November 20.

The ALJ erred in concluding that the employer's payment to claimant for the period November 20 to December 4 should negate that it discharged claimant on November 20 by its unwillingness to allow her to continue after that day. 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* 2018-EAB-1184 (January 31, 2019); *Appeals Board Decision,* 2018-EAB-1031 (November 30, 2018); *Appeals Board Decision,* 2018-EAB-0018 (February 2, 2018).

Here, because the record does not show that claimant performed any services for the employer after November 20, 2018, a discharge occurred on that date despite the employer having payed claimant through December 4, 2018. However, the discharge may still be disregarded and the work separation adjudicated as if only the voluntary leaving had occurred if the discharge was no more than 15 days prior to the date of the planned voluntary leaving, the planned voluntary leaving would be for reasons that do not constitute good cause and the discharge was not for misconduct. ORS 657.176(8). If the conditions on ORS 657.176(8) are not met, and the discharge is not disregarded, the effective date of the work separation would be November 20, 2018.

With respect good cause, claimant must prove, by a preponderance of the evidence, that she had good cause for leaving work when she planned to do so. 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 has a permanent or long-term "physical or mental impairment" as defined at 29 CFR §1630(2)(h) must show that no reasonable and prudent person with the characteristics and qualities of an individual with such impairment would have continued to work for her employer for an additional period of time.

In Order No. 19-UI-122537, the ALJ conclude that claimant did not show good cause for leaving work. First, the ALJ reasoned that claimant did not establish that her health condition was "so severe" as of the time she left work that she "could not continue to work for the employer." Order No. 19-UI-122537 at 3. Second, the ALJ reasoned that even if claimant showed that her health constituted a grave circumstance when she left work, she did not show she pursued reasonable alternatives before quitting. *Id.* According to the ALJ, the alternatives that claimant did not pursue were seeking help from the employer to reduce the workplace stress she experienced and "perhaps" seeking medical accommodations or a protected leave during periods of poor health. *Id.* However, the current record is insufficient to support the ALJ's conclusion that claimant did not have good cause for leaving work and the reasons on which that conclusion was based.

The ALJ should explore in more detail the seriousness of the episodes of apparently compulsive vomiting that claimant experienced before not considering it to be a long-term or permanent impairment. For example, the ALJ might inquire of claimant about past episodes of vomiting in reaction to stress she experienced, whether she sustained any injury from those episodes like the Mallory tear in October 2018, whether she sought medical treatment for those prior episodes and the substance of any diagnoses, prognoses or medical evaluations she received at the time. The ALJ might also develop the evidence about what, if anything, claimant's physician told her in October 2018 about the short-term and long-term impacts on her health of the vomiting she was experiencing, what the impact would be if the Mallory tear did not heal on its own, the likelihood that a Mallory tear or other injury as a result of

vomiting would resurface in the future if she continued to experience vomiting and the consequences to claimant's health if it did. The ALJ might also explore with claimant what, if anything, her physician advised her about continuing to work for the employer or in a stressful environment. As well, the ALJ might also make inquiry of claimant if she thought a Mallory tear or other injury from compulsive vomiting was going to recur if she did not leave work when she did and why she thought so. Finally, the ALJ should also develop the evidence about any significant negative consequences claimant sustained from the vomiting episodes other than physical injury

With respect to whether claimant explored reasonable alternatives before leaving work, the ALJ should elicit more detailed information about the "several times" claimant spoke to her supervisor about workplace stress and came to the conclusion that "[h]e understood my situation and what I was experiencing." Transcript at 18. The ALJ might inquire as to when claimant spoke to the supervisor, the substance of their conversations and whether the supervisor offered any advice or alternatives to claimant. The ALJ should also seek similarly detailed information about what claimant told the acting human resources representative in Portland and what the representative told her. Transcript at 18.

The ALJ also should develop the evidence as to what alternatives were concretely available to claimant rather than those that she "perhaps" could have sought. Specifically, the ALJ should develop the evidence sufficiently to determine if there realistically was anything the employer could have done to alleviate claimant's stress other than demoting her and returning her to her prior position of logistics specialist or account manager. The ALJ should also have the employer respond to claimant's hearing testimony that there were no open positions into which she could have been demoted at the time she left work and explore how, if claimant did not know of the option of demotion, she should have been aware of it. Transcript at 38-39. The ALJ should also have the employer identify specifically the medical accommodations it would have provided to claimant to reduce the workplace stress to which she was subject and develop the evidence sufficiently to determine if those accommodations would likely have achieved that result. Finally, the ALJ should obtain information from the employer as to what steps, if any, it was going to take to reduce the workplace stress to which claimant was subject during the time she was away from work on leave so that she would not return to the same stressful circumstances in the workplace. *See Early v. Employment Department*, 274 Or App 321, 360 P3d 725 (2015) (when work made claimant sick and suicidal, a leave of absence was not a reasonable alternative because it would not resolve the conflict that was making claimant sick, it would just postpone the experience of additional stress).

The intent of this decision is not to constrain the ALJ to asking only questions related to the specified subject matter. Therefore, in addition to asking the questions suggested, the ALJ should ask any follow-up questions she deems necessary or relevant to the nature of claimant's work separation and whether or not it should be disqualifying. The ALJ should also allow the parties to provide any additional relevant and material information about the work separation, and to cross-examine each other as necessary.

ORS 657.270 requires the ALJ to give all parties a reasonable opportunity for a fair hearing. That obligation necessarily requires the ALJ to ensure that the record developed at the hearing shows a full and fair inquiry into the facts necessary for consideration of all issues properly before the ALJ in a case. ORS 657.270(3); *see accord Dennis v. Employment Division*, 302 Or 160, 728 P2d 12 (1986). Because the ALJ failed to develop the record necessary to determine whether claimant had good cause for

planning to leave work on December 4, 2018, Order No. 19-UI-122537 is reversed, and this matter remanded for further development of the record.

DECISION: Order No. 19-UI-122537 is set aside, and this matter remanded for further proceedings consistent with this order.

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

DATE of Service: February 26, 2019

NOTE: The failure of any party to appear at the hearing on remand will not reinstate Order No. 19-UI-122537 or return this matter to EAB. Only a timely application for review of the subsequent Order will cause this matter to return to EAB.

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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.

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