

EMPLOYMENT APPEALS BOARD DECISION
2019-EAB-0172

Affirmed
No Disqualification

PROCEDURAL HISTORY: On December 4, 2018, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant voluntarily left work without good cause (decision # 151628). Claimant filed a timely request for hearing. On January 31, 2019, ALJ Scott conducted a hearing at which the employer did not appear, and issued Order No. 19-UI-123784, concluding that claimant had good cause to voluntarily quit work. On February 19, 2019, the employer filed an application for review with the Employment Appeals Board (EAB).

The employer requested that EAB reopen the hearing to allow the employer an opportunity to appear at the hearing and provide evidence on its own behalf. The employer's request is construed as one to have EAB consider additional evidence under OAR 471-041-0090(2) (October 29, 2006), which allows EAB to consider new information if the party offering it shows that it was prevented by factors or circumstances beyond its reasonable from presenting that information at the hearing. In support of its request, the employer stated that its "main witness" was unavailable for the hearing and its "main contact" was not able to reach that witness to secure the witness's participation at hearing. No other details were provided, such as, for example, why the main witness was unavailable; what steps, if any, were taken in advance of the hearing to arrange for the participation of the main witness and how far in advance they were taken; whether or not the unavailability of the main witness was due to reasonably foreseeable or unforeseeable events; whether any other witnesses were able to provide the same testimony that the main witness would have provided; why the main contact was not able to reach the main witness; and why the employer did not seek to have the hearing continued to allow for the participation of the main witness. Without supporting details, EAB has no basis on which to conclude that the alleged lack of availability of the employer's main witness was a factor or circumstance beyond the employer's reasonable control that prevented the employer from offering its information into the hearing record. For this reason, the employer's request to have EAB consider new information under OAR 471-041-0090(2) is denied.

Claimant submitted a written argument to EAB. However, claimant failed to 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).

The argument also contained information that was not part of the hearing record, and claimant failed to 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 written argument or the new information it contained. EAB considered only evidence in the hearing record when reaching this decision.

FINDINGS OF FACT: (1) Relay Resources employed claimant as contracts and quality manager from June 21, 2017 until November 7, 2018.

(2) The employer was a not-for-profit corporation that was among the largest qualified rehabilitation facilities (QRF) in the state of Oregon. The employer employed individuals with disabilities who worked providing janitorial and landscaping services under contracts with private and public entities and agencies. The Oregon Department of Administrative Services (DAS) reviewed and approved the employer's contracts with public agencies. Many of the employer's contracts with public agencies were "set-aside" contracts that were awarded outside of competitive bidding processes.

(3) Claimant oversaw the employer's contract with the Port of Portland. Sometime before July 11, 2018, claimant discovered that the employer's current contract with the Port of Portland very substantially overstated the number of full-time equivalent employees needed to perform the contract work, with the result that the employer was receiving excessive contract payments from the Port of Portland. Claimant determined that the overbilling had been occurring for several years.

(4) Given the nature of a QRF and its special status in being awarded noncompetitive contracts with public agencies, claimant believed that he was under an ethical duty to report to DAS the financial overstatement in the employer's current and historic contracts with the Port of Portland. On July 11, 2018, claimant reported the matter to DAS. Claimant notified the employer's vice-president of operations of the overstatements he had discovered in the Port of Portland contracts and that he had reported it to DAS. The employer's chief executive officer was notified of this irregularity and of claimant's report to DAS.

(5) Soon after claimant spoke with the vice-president of operations, claimant was told that the employer was going to conduct an internal investigation about the overstatements and overpayments that claimant had discovered. Claimant was also told that he was not going to be allowed to participate in that investigation or in determining how best to rectify the irregularities in the contracts with the Port of Portland.

(6) After the employer told claimant that he was not going to participate in the internal investigation, the employer removed all of claimant's duties and responsibilities under all contracts he had overseen with public agencies or bodies, state and federal. Although claimant had substantial experience and expertise in overseeing public contracts, the employer assigned claimant only to work on private contracts in a non-supervisory, non-managerial capacity, and he was no longer oversaw contract performance. As time passed and his job duties were changed, the employer assigned the subordinate employees that claimant had once managed to other projects and contracts. The employer also took away claimant's budgetary authority.

(7) Claimant's first annual performance evaluation occurred sometime after his July 11 report to DAS. Leading up to it, claimant had three very favorable quarterly evaluations. However, despite the fact that the quarterly evaluations for three quarters of the year under review were highly positive, the employer gave claimant a very negative annual evaluation. Sometime around fall 2018, claimant came to believe that the only explanation for the employer's actions in circumscribing his job role since July 11 and the negative annual performance evaluation was that the employer was retaliating against him for having reported the financial overstatements in the Port of Portland contracts to DAS.

(8) On approximately November 6, 2018, the employer informed claimant that the employer planned to assign him to a new role and that, although the employer had not re-written his job description, he was going to be working in an administrative capacity. Claimant objected, stating that he was hired as manager and had management experience and expertise. The employer did not change what it proposed to do with claimant's role. Around that same time, claimant complained to the vice-president of human resources that he thought the employer was retaliating against him for having made the report to DAS. The vice-president told claimant to discuss the matter with his direct supervisor, who had not objected to the actions the employer had taken in connection with claimant since July 11.

(9) On November 7, 2018, claimant voluntarily left work. Claimant decided to quit because he thought the employer was retaliating against him for reporting to DAS the overstatement in the Port of Portland contract by severely curtailing his job responsibilities. Claimant also quit because he feared that he would be blamed for the overstatements in the Port of Portland contract and his professional reputation would be damaged.

CONCLUSIONS AND REASONS: Claimant voluntarily left work with good cause.

A claimant who leaves work voluntarily is disqualified from the receipt of benefits unless he proves, by a preponderance of the evidence, that he had good cause for leaving work when he 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 his employer for an additional period of time.

The employer did not appear to present evidence at the hearing and claimant's testimony was un rebutted. As claimant described the events that caused him leave work, it was not unreasonable for him to think that by changing and severely curtailing his job duties and giving him a highly unfavorable annual evaluation, the employer likely was retaliating against him for informing DAS of the inflated contract payments that the Port of Portland was making under its contract with the employer. That the employer would take such actions against claimant for whistleblowing to DAS likely violated Oregon law. See ORS 659A.199(1) (it is an unlawful employment practice for an employer to, among other things, demote, discriminate, or retaliate against an employee with regard to any terms, conditions or privileges of employment for the reason that the employee has in good faith reported information that the employee believes is evidence of a violation of a state or federal law, rule or regulation); ORS 659A.200(1) ("Disciplinary action" includes but is not limited to any discrimination, demotion, transfer,

reassignment or withholding of work, whether or not the action affects or will affect employee compensation); ORS 659A.203(1)(b)(B) (it is an unlawful employment practice for any public or nonprofit employer to take or threaten to take disciplinary action against an employee for the disclosure of information the employee believes is evidence of, among other things, a gross waste of funds).

Because the employer had sanctioned the unlawful retaliation against claimant, it was not unreasonable for claimant to conclude that it would have been futile to seek to have the employer voluntarily stop those retaliatory actions. On this record, a reasonable and prudent person of normal sensitivity, exercising ordinary common sense, would have concluded that his situation was grave and he had no alternative but to quit if his employer took the job-related actions that were taken against claimant for disclosing to a public authority the inflated terms in a public contract involving the employer. As well, no reasonable and prudent person would have continued working for an employer who retaliated against him in violation of state law as the employer apparently did against claimant. On this record, claimant showed that grave reasons motivated him to leave work when he did.

Claimant showed good cause for leaving work when he did. Claimant is not disqualified from receiving benefits based on his work separation from the employer.

DECISION: Order No. 19-UI-123784 is affirmed.

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

DATE of Service: March 20, 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 ໄດ້ ໂດຍປະຕິບັດຕາມຄໍາແນະນໍາທີ່ບອກໄວ້ຢູ່ຕອນທ້າຍຂອງຄໍາຕັດສິນນີ້.

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 دستور العمل موجود در پایان آن، از دادگاه تجدید نظر اورگان درخواست تجدید نظر کنید.

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