

EMPLOYMENT APPEALS BOARD DECISION
2019-EAB-0218

Reversed & Remanded

PROCEDURAL HISTORY: On January 3, 2019, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant voluntarily left work without good cause (decision # 90743). Claimant filed a timely request for hearing. On February 4, 2019, ALJ Shoemake conducted a hearing, and on February 8, 2019 issued Order No. 19-UI-124311, affirming the Department's decision. On February 28, 2019, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant failed to certify that she provided a copy of her written argument to the other parties as required by OAR 471-041-0080(2)(a) (October 29, 2006). Therefore, we did not consider the argument when reaching this decision.

FINDINGS OF FACT: (1) Bright Horizons Children's Centers employed claimant as a preschool teacher from October 17, 2017 to December 12, 2018.

(2) The employer had ongoing concerns about claimant's work performance and repeatedly counseled and warned her to improve her performance. Claimant made changes to try to bring her performance in line with the employer's expectations, but every time she thought she was doing her work correctly, she was told she was not. Claimant thought she received mixed messages from the employer.

(3) The employer required employees to undergo mandatory training approximately six months after their employment began. Claimant asked about that training and the employer refused to allow her to take it. The employer offered another employee training opportunity for career growth. Claimant asked to take that training, but the employer refused.

(4) On November 13, 2018, the employer placed claimant on a 30-day action plan to improve her work performance. The employer notified claimant at that time that continued unsatisfactory job performance and failure to follow all policies and procedures would result in her termination. The employer gave claimant 30 days to improve her work performance, and notified her that she would be discharged if she did not do so.

(5) Claimant reviewed the plan and noticed the plan included duties she was already performing the same way the plan described. Claimant asked the employer to clarify how she could improve those duties but was told in response that she just needed to improve. The employer did not engage with claimant in a discussion of how she was doing those tasks incorrectly or how to improve on what she was already doing.

(6) Claimant understood from what her supervisors told her that she was out of chances and was going to be discharged when the action plan ended. The employer's unwillingness to allow her to take mandatory and career growth training signaled to her that the employer would not allow her to continue working much longer. She concluded that her ongoing inability to do her work in accordance with the employer's expectations, even though she tried, signaled that she was unlikely to succeed under the action plan, especially after the employer refused to clarify its expectations when she asked.

(7) Claimant concluded she would not be able to complete the plan successfully and would be discharged after 30 days. She did not want a discharge on her employment record. In late November 2018, claimant notified the employer of her intent to resign her job on December 12, 2018, the 30th day of the 30-day action plan, and quit her job on that date.

CONCLUSIONS AND REASONS: Order No. 19-UI-124311 should be set aside and this matter remanded.

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.

The ALJ concluded that claimant voluntarily left work because she believed she would be discharged after being placed on a 30-day action plan. Order No. 19-UI-124311 at 2. The ALJ concluded that claimant left work without good cause because she quit without first having asked human resources for support to be successful, and because she could have "tried her best" during the 30-day plan "and looked at her options at that time," and that she did not show that a possible discharge in 30 days amounted to a grave situation. *Id.* The record requires additional development to support a decision in this case.

As a preliminary matter, the record does not show that claimant could or should have asked human resources for support to successfully complete her action plan as an alternative to quitting work. The record is devoid of evidence that the employer's human resources office was the type that offered or could compel a manager to provide on-the-job support to claimant, that claimant knew the human resources office could provide that type of support, or that claimant knew or should have known to contact human resources. Likewise, the record does not show that "trying her best" was a reasonable alternative to quitting work when she did. First, on this record, claimant had been trying her best for a significant period of time without success. She continued to be confused by what she perceived as mixed

messages, she was not allowed to complete mandatory training, and she was not given clarification or support when she failed to understand the employer's expectations. Trying her best therefore was not a reasonable alternative to quitting work. Second, the effective date upon which claimant quit her job was the 30th day of the action plan; waiting an additional time to explore her options was not an alternative when the date of claimant's likely inevitable discharge was at hand.

The record suggests it is more likely than not that on the date claimant quit her job she was facing inevitable discharge. It is also more likely than not that on the date she quit her discharge was imminent. Claimant had tried her best, unsuccessfully, and it was likely that the only way to avoid a discharge was to quit her job.¹ The fact that claimant was likely facing inevitable, imminent discharge, and had no alternatives that would allow her to avoid discharge, is not dispositive in this case, however, because the record is silent as to what effect a discharge would have on claimant, and in the absence of that information, the record fails to show if such a discharge, even an inevitable, imminent one, was grave.

In *McDowell v. Employment Department*, 348 Or. 605, 236 P.3d 722 (2010), the claimant had good cause to quit work, in part, because having a discharge on his employment record would be "a kiss of death" to his career prospects. In *Dubrow v. Employment Department*, 242 Or. App. 1, 252 P.3d 857 (2011), however, claimant did not have good cause to quit work, in part because she did not show that she faced dire consequences from a discharge. In *Aguilar v. Employment Department*, 258 Or. App. 453, 310 P.3d 706 (2013), claimant had good cause to quit work, in part because she showed that having a discharge "would seriously hamper her future efforts to find another teaching job."

The record in this case does not show whether or not the effect of being discharged from her job as a preschool teacher by the employer amounted to a "grave" situation for claimant. In this case, claimant affirmatively stated that her primary reason for quitting in the face of discharge was to avoid having a discharge on her employment record. The ALJ did not ask claimant why she was concerned about that, what effect she thought a discharge would have on her ability to find work in the future, or on what basis she formed her belief(s) about the effect of a discharge on her record. Absent an inquiry into such matters, and any questions logically resulting from whatever testimony on those points is offered, the record cannot support any decision about whether claimant quit with or without good cause.

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 for a determination of whether claimant quit work with good cause, Order No. 19-UI-124311 is reversed, and this matter is remanded.

DECISION: Order No. 19-UI-124311 is set aside, and this matter remanded for further proceedings consistent with this order.

¹ On this record, claimant's discharge would not have been for misconduct; it appears that her poor work performance was the effect of a lack of job skills or experience rather than willful or wantonly negligent conduct attributable to her as misconduct. See OAR 471-030-0038(1)(c); OAR 471-030-0038(3)(a). Therefore, OAR 471-030-0038(5)(b)(F), which provides that an individual who quits work to avoid a discharge or potential discharge for misconduct, does not apply to this case.

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

DATE of Service: April 1, 2019

NOTE: The failure of any party to appear at the hearing on remand will not reinstate Order No. 19-UI-124311 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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