

EMPLOYMENT APPEALS BOARD DECISION
2019-EAB-0314

Affirmed
No Disqualification

PROCEDURAL HISTORY: On February 5, 2019, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant voluntarily left work without good cause (decision # 154338). Claimant filed a timely request for hearing. On March 15, 2019, ALJ Wyatt conducted a hearing, and on March 22, 2019 issued Order No. 19-UI-126936, concluding that claimant had good cause to quit. On March 27, 2019, the employer filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Baker County employed claimant as a lieutenant in the probation and parole division of the sheriff's office until November 20, 2018.

(2) Many years ago, a physician diagnosed claimant with severe depression. Claimant's depression was ongoing. As of 2018, claimant was receiving treatment for depression from a physician. Claimant was also taking medicine in an attempt to control the depression. The depression affected the speed with which claimant worked, and his ability to pay attention to and focus on work.

(3) Around January 2018, claimant noticed that his depression had intensified and the medicine he was taking had lost its effectiveness. Claimant and his physician began exploring new medication regimes that would control claimant's depression while not affecting his ability to make sound decisions under stressful circumstances, as his job sometimes required. In 2018, among other things, claimant worked on a biennium plan that was filed with the state, prepared an important grant application that was submitted to the state, and maintained various client files.

(4) By June 2018, claimant's depression still was not effectively controlled. In consultation with his physician, claimant decided he needed to take some time away from work to address his mental health issues, "reset" his head and explore new medicines to determine if they would be more effective than his current medicines. Transcript at 53. On approximately July 2, 2018, claimant met with the sheriff and inquired about a leave under the Family and Medical Leave Act (FMLA). While claimant initially requested a two week leave, the sheriff suggested that claimant take a month-long leave. On

approximately July 3, 2018, claimant met with the director of human resources, discussed a FMLA leave with her, obtained paperwork for a leave, and signed a form requesting the leave. Claimant understood the FMLA leave was to begin on July 5, 2018.

(5) On July 7, 2018, although he thought he was on leave, claimant visited the workplace. At that time, claimant saw that his office was in “shambles,” with papers strewn “everywhere.” Transcript at 7. A coworker told claimant that several people had been in his office going through some of his files. Claimant concluded that the employer was conducting some sort of an investigation involving him.

(6) On July 9, 2018, the sheriff called claimant and instructed him to report to the sheriff’s office. As of that day, claimant’s leave had not yet been formally approved under FMLA. Claimant told the sheriff that he was out of town for a medical appointment at that time, and it was agreed that claimant would meet with the sheriff the next day, July 10, 2018.

(7) On July 10, 2018, claimant met with the sheriff and the undersheriff. The sheriff told claimant that there were issues with the work he had been performing and that his filing was not in order. The sheriff told claimant that he was being placed on administrative leave while his work was being investigated. Claimant understood the sheriff to have revoked his FMLA leave but, in fact, his FMLA leave had not yet been approved. It was the sheriff’s intention to keep claimant away from the workplace during the investigation and not to affect claimant’s entitlement to a leave under FMLA. Around this time, claimant consulted with attorney about whether it was appropriate for the sheriff to instruct him to report for work when he was on a FMLA leave. The attorney told claimant that the sheriff had violated his protections under FMLA by calling him in.

(8) By letter dated July 20, 2018, the employer informed claimant that it had begun an investigation of his work performance. In particular, the letter stated that it would be determined if the biennium plan that claimant prepared was timely filed and if claimant had made misrepresentations to the employer about the plan’s status; if claimant had failed to timely complete records and perform filing relating to cases that he oversaw; if claimant had failed to timely file a grant application and made misrepresentations about the requirements of the grant; and if claimant had failed to maintain client files to the employer’s standard. The letter advised claimant that if the investigation substantiated any of the allegations, claimant would be subject to discipline up to and including discharge. However, claimant had not made any misrepresentations about the matters specified in the letter and thought his work had been of acceptable quality.

(9) Sometime around or shortly after July 20, 2018, claimant’s FMLA leave was approved. Because the FMLA leave was unpaid, claimant stopped receiving paychecks from the employer after he exhausted all other sources of paid time off that he had accrued. When claimant’s leave ended and he returned to work, the employer was going to commence an investigation into the areas indicated in the July 20, 2018 letter,

(10) Beginning sometime around approximately August 2018, claimant’s attorney began meeting with the employer to discuss claimant’s employment status. The attorney advised claimant that the employer was probably going to discharge him for the issues raised in the July 20, 2018 letter when he returned to work. The attorney’s evaluation confirmed claimant’s already-existing belief that the employer’s ultimate goal was to let him go. Because the attorney had already advised claimant that it was improper

for the sheriff to have instructed him to report for a meeting while on FMLA leave, claimant thought the employer had a very strong desire to end claimant's employment. In addition, claimant had begun to experience financial hardship as his FMLA leave continued because he exhausted his other paid leave sources and was not receiving a paycheck. Claimant was concerned about his continued ability to support his family.

(11) Sometime later, claimant's attorney and the employer began to negotiate a retirement and separation agreement under which claimant would leave employment. Under the agreement, claimant would receive an amount equal to four month's salary in return for waiving all claims against the employer. The attorney advised claimant to sign the agreement.

(12) On November 20, 2018, claimant signed the separation agreement. Claimant did so because of his continuing mental health issues, his belief that the employer would ultimately discharge him if he returned to work, his attorney's advice that it was in his best interest to resign, and his need for the financial benefits provided under the agreement.

(13) Before claimant left work, he had received no disciplinary warnings from the employer.

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). Leaving work without good cause includes leaving work to avoid what would otherwise be discharge for misconduct or a potential discharge for misconduct. OAR 471-030-0038(5)(b)(F). The standard for showing good cause is objective. *McDowell v. Employment Department*, 348 Or 605, 612, 236 P3d 722 (2010). Claimant had longstanding severe depression, a permanent or long-term "physical or mental impairment" as defined at 29 CFR §1630.2(h). A claimant with that impairment who quits work 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 his employer for an additional period of time.

While it would not be good cause for claimant to leave work to avoid a discharge for misconduct, he left work for a combination of factors, only one of which was his concern that the employer would involuntarily let him go. In connection with a possible discharge, claimant denied that he made any misrepresentations about his work. Transcript at 26. Claimant also testified that, while his cognitive processes might have been slowed as a result of his mental health condition, he did not think that he had failed to timely perform any work or that the quality of his work did not meet the employer's standards. Transcript at 26-27. In view claimant's rebuttal to the employer's allegations and the well-known impacts of an individual's emotional and psychological state on cognitive performance, this record is insufficient to show by a preponderance of the evidence that by his work performance, claimant violated the employer's standards with a willful or wantonly negligent state of mind. *See* OAR 471-030-0038(1)(c) (January 11, 2018), OAR 471-030-0038(3)(a). The record therefore fails to show that

claimant quit work, in part, to avoid a potential discharge for what was, more likely than not, misconduct. As a result, OAR 471-030-0038(5)(b)(F) is inapplicable to claimant's claim.

As of the time claimant quit, the record shows that claimant was sincerely convinced that the employer was going to discharge if he attempted to return to work. Claimant's belief was based on his office having been searched, without notice to him, immediately after he believed his FMLA leave had been authorized, his having been called in to meet with the sheriff to discuss his work performance under circumstances that his attorney advised him violated FMLA, his receipt of a notice informing him that the employer had commenced an investigation into his work performance during his absence, and his attorney's evaluation that the employer was going to discharge him. Under the circumstances, a reasonable and prudent person with a long-standing history of depression who was in a severely depressed episode, as was claimant, would have believed that the employer was going to discharge him if he returned to work from the FMLA leave.

In addition, claimant's testimony about the financial hardship he and his family confronted after he had been on an unpaid leave for five months appeared sincere and heartfelt. Given claimant's belief that the employer was going to let him go, his need for money, and the continuing issues he had with depression, a reasonable and prudent person, with long-standing depression, would have entered into a separation agreement that provided four months of severance pay in lieu of returning to work, being discharged and receiving no severance benefits. The preponderance of the evidence shows that claimant had good cause for leaving work when he did. Claimant is not disqualified from receiving unemployment benefits.

DECISION: Order No. 19-UI-126936 is affirmed.

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

DATE of Service: April 29, 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.

Please help us improve our service by completing an online customer service survey. To complete the survey, please go to <https://www.surveymonkey.com/s/5WQXNJH>. If you are unable to complete the survey online and wish to have a paper copy of the survey, please contact our office.



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.

Employment Appeals Board - 875 Union Street NE | Salem, OR 97311
 Phone: (503) 378-2077 | 1-800-734-6949 | Fax: (503) 378-2129 | TDD: 711
www.Oregon.gov/Employ/eab

The Oregon Employment Department is an equal opportunity employer/program. Auxiliary aids and services are available upon request to individuals with disabilities. Language assistance is available to persons with limited English proficiency at no cost.

El Departamento de Empleo de Oregon es un programa que respeta la igualdad de oportunidades. Disponemos de servicios o ayudas auxiliares, formatos alternos y asistencia de idiomas para personas con discapacidades o conocimiento limitado del inglés, a pedido y sin costo.