

EMPLOYMENT APPEALS BOARD DECISION
2019-EAB-0397

Affirmed
Disqualification

PROCEDURAL HISTORY: On March 7, 2019, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant voluntarily left work without good cause (decision # 152231). Claimant filed a timely request for hearing. On March 26, 2019, ALJ Schmidt conducted a hearing, and on April 2, 2019 issued Order No. 19-UI-127474, affirming the Department's decision. On April 19, 2019, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant failed to certify that she provided a copy of her 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 failed to show that factors or circumstances beyond claimant's reasonable control prevented claimant from offering the information during the hearing as required by OAR 471-041-0090 (October 29, 2006). We considered only information received into evidence at the hearing when reaching this decision. See ORS 657.275(2). Even if we had considered the argument and new information, the outcome of this decision would remain the same for the reasons explained.

FINDINGS OF FACT: (1) Central Oregon Community College employed claimant as assistant director of human resources and Title IX officer from September 8, 2015 to December 31, 2018. Claimant worked under an annual employment contract that expired and was renewed on June 30th each year; the employer was contractually obligated to provide claimant with six months' notice of non-renewal.

(2) On October 24, 2018, the employer placed claimant on a disciplinary plan of assistance for team leadership and professionalism. Claimant disagreed with the plan and sent a letter to the employer's president asking to be taken off the plan of assistance and allowed to prove herself without being on a work plan. On approximately October 29, 2018, claimant met with the employer's human resources director, who told her that the plan of assistance was rescinded and the employer would work with her, and assigned claimant a new supervisor to mentor her going forward.

(3) After October 29th, claimant and her supervisor met one to two times a week, and claimant began feeling “micromanaged but in a bullying, not nice kind of way,” and felt as though the supervision was punitive rather than supportive. Transcript at 12. The employer had removed claimant’s Title IX duties. The supervisor would instruct claimant how to organize her day and coordinate HR processes, but claimant felt the supervisor lacked the HR background to provide that type of instruction. Claimant was told that she was not permitted to have more than approximately 20 emails in her inbox at a time, which claimant felt was not reasonable. She felt that she was held to a higher standard than her supervisor with respect to word processing and spelling. She also felt her authority and judgment were undermined when she was told that she would be written up if she did not write up the front office staff for things they did wrong, even though she felt she had already addressed the problem with the front office staff.

(4) Shortly after the meeting claimant and her supervisor had in October, claimant and her supervisor both told the HR manager that the supervisor had said to claimant that she did not feel claimant would meet expectations. The HR manager was also aware that the supervisor planned to write claimant up for making mistakes.

(5) The employer continued to see performance deficiencies after the October work plan was rescinded. On November 13, 2018, the employer issued claimant another plan of assistance due, citing various deficiencies in claimant’s work. The plan required claimant and her supervisor to meet weekly for the following two months, and for claimant to show specific examples of improvement at each meeting, after which the employer would evaluate claimant’s progress and decide next steps. The next steps could include an extension of the work plan or “a final determination of Administrative Contract renewal.” Exhibit 3. The plan also stated, “Based on the identified performance deficiencies, the [employer] does not intend to renew [claimant’s] Administrative contract” but “can reconsider this decision over the evaluation period and throughout the fiscal year if employee performance improves.” Exhibit 3.

(6) On November 16, 2018, claimant’s supervisor spoke with claimant about the work plan and her employment status, and told her that she “knew I would not meet those expectations.” Transcript at 7. The supervisor told claimant she would “write me up for any little detail that may happen over the next . . . two months . . . and she said I have a steep curve and it would probably be better if I – you know, she hates to see anything negative in my personnel file.” Transcript at 8. Claimant understood she had been “told clearly that they were not intending to renew my contract . . . for the new year.” Transcript at 7. Claimant spoke with the director of risk management, who “agreed that she didn’t think I was gonna be able to meet those parameters” and said, “‘Maybe a graceful exit would be the way to go,’ to avoid the negativity on my file.” Transcript at 10-11.

(7) Claimant had, prior to new management, been a successful employee. Since being given a written warning, told she would not succeed, and told that her contract would not be renewed, she thought she would not be successful in her job no matter what she did. She thought “some cleaning house” was going on, so she did not think the employer’s president would help if she complained. Transcript at 20. She thought if she did not provide a letter of resignation she would be fired, at the end of her contract term if not sooner. It felt “very stressful” and “unbearable” to claimant, and she decided her best course of action was to “have a graceful exit.” Transcript at 20. On November 30, 2018, claimant submitted a letter of resignation, resigning her position effective December 31, 2018.

CONCLUSIONS AND REASONS: Claimant voluntarily left work without good cause.

If the employee could have continued to work for the same employer for an additional period of time, the work separation is a voluntary leaving. OAR 471-030-0038(2)(a) (December 23, 2018). If the employee is willing to continue to work for the same employer for an additional period of time but is not allowed to do so by the employer, the separation is a discharge. OAR 471-030-0038(2)(b).

Claimant suggested at the hearing that her work separation was not voluntary. At the time claimant left work, however, the employer had placed her on a plan of assistance that contemplated her continuing to work for an additional two months. While the supervisor and the director of risk management both indicated to claimant the likelihood that her contract would not be renewed, claimant's contract was still in place until June 30th, approximately six months after the effective date of claimant's resignation. The employer had continuing work available to her; it was claimant's choice to leave when she did on December 31st. Because claimant could have continued to work for the employer for some additional period of time after December 31st, the work separation was a voluntary leaving.

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).

Claimant quit work because she had been informed that her contract was unlikely to be renewed and her employment was going to end June 30th, if not sooner. The plan of assistance set forth a possibility that claimant's contract might ultimately be renewed, but also provided notice of non-renewal, after which she was orally informed by her supervisor and a director that she was unlikely to satisfactorily complete the plan of assistance, she faced a steep climb, and her contract was not likely to be renewed. It is therefore more likely than not on the facts in this case that claimant was facing discharge or potential discharge at the time she quit work, and it is both objectively and subjectively reasonable that she believed her discharge was more than just a possibility. Claimant quit work to avoid a discharge she reasonably believed would occur.

OAR 471-030-0038(5)(b)(F) states that, for purposes of determining whether an individual had good cause to quit work, leaving work without good cause includes "[r]esignation to avoid what would otherwise be a discharge for misconduct or potential discharge for misconduct." The first question is therefore whether claimant's discharge was going to be for misconduct.

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. The preponderance of the evidence in this record is that the employer considered claimant's work performance deficient in a variety of ways and the prevailing thought was that she was not going to be able to improve her performance to the level required for the employer to be willing to renew her contract. The record also shows, however, that claimant had been considered successful in her employment for some time, was facing turnover and changes in her department around October and November that she was struggling to adapt to, and was trying to do her job at the level required. Claimant's efforts to successfully perform her duties at all relevant times indicates that, although the employer was not satisfied with claimant's work performance, her unsatisfactory work was not the result of willful or wantonly negligent misconduct on her part. Claimant's discharge or potential discharge

therefore was not for misconduct, and claimant is not subject to disqualification under OAR 471-030-0038(5)(b)(F).

Claimant therefore quit work to avoid a discharge or potential discharge that was not for misconduct. There is no specific provision in OAR 471-030-0038 that applies to that type of voluntary leaving, so the next question is whether claimant had “good cause” to quit work for that reason under OAR 471-030-0038(4), which defines “good cause,” 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. 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 of time.

Factors to consider when determining whether a prospective discharge, not for misconduct, is a reason of such gravity that a reasonable and prudent person would have no reasonable alternative but to leave include, but are not limited to: the certainty or imminence of discharge; the likelihood of discharge; whether discharge would have a unique or particularly burdensome effect on the individual’s reemployment prospects or prospects of working in the same industry after discharge; whether any pre-discharge reputational harm done to the individual could be undone by quitting; whether any pre-dismissal remedies existed through which an individual might advocate for continued employment or avoid discharge; and whether the working conditions were so oppressive that no reasonable and prudent person would have continued to work for the employer. *See e.g. McDowell v. Employment Dep’t.*, 348 Or 605, 236 P3d 722 (2010); *Dubrow v. Employment Dep’t.*, 242 Or. App. 1, 252 P.3d 857 (2011); *Reynolds v. Employment Dep’t.*, 243 Or. App. 88, 259 P.3d 50 (2011); *Oregon Public Utility Commission v. Employment Dep’t.*, 267 Or. App. 68, 340 P.3d 136 (2014).

In this case, factors that argue in favor of finding good cause include that claimant believed, reasonably, that her employment would end. She wanted to “gracefully exit” on good terms to avoid having a negative warning in her file, a negative reference, or a discharge on her employment record. Transcript at 11-12, 23. The situation at work also took an emotional toll on her, such that she did not “feel good” about going to work and did not “feel healthy” when she came home. Transcript at 21-22. A counselor also advised her “to do what’s right for you and your health and your family,” and claimant did not think continuing to work for the employer was in her best interests, or the employer’s. Transcript at 22.

The factors suggesting good cause are outweighed, however, by factors suggesting that claimant did not have good cause. Although claimant was reasonably likely to be discharged by the employer at some point, the discharge was not imminent – it was not likely to occur until after the plan of assistance ended approximately two months after issuance, or more likely, six months later on June 30th when her employment contract expired. As of December 31, 2018, when claimant quit her job, her possible discharge was therefore not likely to occur for another one to six months. Claimant also had pre-dismissal opportunities to advocate for continued employment or avoid discharge. She was on a plan of assistance that, although a “steep climb,” presented her with some at least minimal pre-dismissal opportunity to improve her performance to the level the employer required. Although claimant wanted to avoid having a warning in her file, receiving a negative reference, or having a discharge on her employment record, as do most individuals in the workforce, claimant did not describe a particular stigmatizing or negative effect a discharge would have on her future employment prospects. While claimant’s working conditions felt subjectively “unbearable” to claimant and had an effect on her

emotional state at home and at work, she did not describe for the record why or how the working conditions were unbearable. Although the conditions under which she was supervised had changed, and the level of supervision she received had become far closer than she was used to, particularly in late-October through mid-November, she did not provide evidence suggesting that the working conditions were hostile, abusive, or tantamount to harassment or unlawful conditions, or indeed different from the conditions that might generally be experienced by any other closely-supervised employees while on a work plan. She did not establish at the hearing that she had a long-term or permanent physical or mental impairment that was affected or exacerbated by the working conditions such that she could not reasonably withstand the close supervision. Nor was she advised to leave work by a counselor or medical care provider.

In sum, claimant established that the working conditions were difficult for her, and that she preferred to leave work on December 31st over remaining employed while the employer decided whether or not she had satisfied the plan of assistance, and whether or not to end or renew her contract for another year. However, the preponderance of the evidence is that the factors suggesting that claimant did not have good cause to quit work to avoid discharge, not for misconduct, outweighed the factors suggesting good cause, and the evidence does not suggest that the conditions of continued employment were so grave that a reasonable and prudent person of normal sensitivity, exercising ordinary common sense, would have no reasonable alternative but to leave work. Claimant therefore quit work without good cause. She is disqualified from receiving unemployment insurance benefits because of her work separation.

DECISION: Order No. 19-UI-127474 is affirmed.

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

DATE of Service: May 24, 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 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.

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.