EO: 200
BYE: 201950

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

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EMPLOYMENT APPEALS BOARD DECISION
2019-EAB-0485

Modified
Request to Reopen Allowed
No Disqualification

PROCEDURAL HISTORY: On January 22, 2019, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant not for misconduct within 15 days of a voluntary leaving that was not for good cause (decision # 81050). Claimant filed a timely request for hearing. On February 26, 2019, ALJ M. Davis conducted a hearing at which the employer did not appear, and on February 28, 2019 issued Order No. 19-UI-125503, reversing the Department's decision. On March 20, 2019, the employer filed a motion to reopen the hearing. On April 30, 2019, ALJ M. Davis conducted a hearing, and on May 3, 2019 issued Hearing Order 19-UI-129288, allowing the employer's request to reopen and affirming the Department's decision. On May 21, 2019, claimant filed an application for review with the Employment Appeals Board (EAB).

The employer's argument contained information that was not part of the hearing record, and did not show that factors or circumstances beyond the employer's reasonable control prevented them from offering the information during the hearing. Under ORS 657.275(2) and OAR 471-041-0090 (May 13, 2019), EAB considered only information received into evidence at the hearing when reaching this decision.

Based on a *de novo* review of the entire hearing record, and pursuant to ORS 657.275(2), the order's findings and analysis with respect to granting the employer's request to reopen the hearing are **adopted.** The remainder of this decision addresses whether claimant is qualified for benefits.

FINDINGS OF FACT: (1) Pacific Surgery Center LLC, a medical practice, employed claimant as operations director from September 21, 2017 until December 20, 2018.

(2) At the time claimant was hired, two physicians owned the employer, Owner 1 and Owner 2. Owner 1 managed the practice. Claimant had a good working relationship with Owner 1 and a poor working

relationship with Owner 2. A dispute developed between Owner 1 and Owner 2 over control of the practice.

(3) A lawsuit was filed in late 2017 and a trial took place between June and December 2018. While the litigation between Owner 1 and Owner 2 was ongoing, a settlement conference took place. In the conference, Owner 2 proposed claimant's layoff as one element in a larger settlement agreement. Owner 1 did not accept that settlement proposal. Around this time, claimant testified as a witness at the trial and stated that she did not want to continue working for the practice if Owner 2 took control. At some point, the employer's general manager told claimant that other staff members had also been called as witnesses during the trial and they had testified that they did not want to work with claimant if she was still operations director after the business dispute was resolved. Claimant also understood the general manager to tell her that Owner 2 had testified at the trial that he did not want claimant to continue working if he obtained control of the practice.

(4) As the lawsuit progressed, the employer's staff became divided between Owner 1 and Owner 2. Claimant became concerned that if Owner 2 took control of the practice, he would discharge her based on his attitude toward her, his desire to put into place a team that he perceived as loyal, and his trial testimony and that of some staff that they were unwilling to work with her. Claimant knew that the medical community in which she worked was small, and if the employer fired her, it would negatively affect her prospects for future employment.

(5) Sometime around late November or early December 2018, the ongoing lawsuit between the owners was resolved by a judicial ruling that Owner 2 could gain control of the practice if he bought out Owner 1. Claimant became aware of the ruling shortly after the judge issued it. Around that time, claimant tried to speak with Owner 2 about his plans to transition the practice to his control, but was unsuccessful. On December 11, 2018, claimant again tried unsuccessfully to speak with Owner 2.

(6) On December 12, 2018, Owner 2 sent claimant an email stating in part, "As for a transition that you mention, it is my hope that [the practice] continues to operate seamlessly. Obviously, at such time [as] the court ordered buyout is fulfilled, the administrative team will change, that is no surprise." Exhibit 2 at 5. Because claimant was a member of the administrative team, she interpreted Owner 2 as stating she would be let go at the time of the buyout or soon after it was fully completed.

(7) Shortly before December 19, 2019, claimant learned that the buyout would occur and control of the practice would transfer to Owner 2 on December 19, 2018. On December 19, 2018, claimant submitted a written resignation to the employer, stating that she would work through the close of business on December 21, 2018. Four other staff also submitted resignations on that day. Claimant quit work because she believed that the employer would discharge her once Owner 2 took control of the practice.

(8) The employer did not want claimant to continue working after she announced that she was leaving. On December 20, 2018, the employer discharged claimant.

CONCLUSIONS AND REASONS: We agree with the Order that claimant's discharge was not for misconduct; however, we find that claimant's planned voluntarily leaving would have been for good cause, the work separation is therefore adjudicated as a discharge, and claimant is not subject to disqualification of benefits.

The Work Separation. ORS 657.176(2)(a) and (c) require a disqualification from unemployment insurance benefits for individuals who are discharged for misconduct or quit work without good cause. ORS 657.176(8) states, "For purposes of applying subsection (2) of this section, when an individual has notified an employer that the individual will leave work on a specific date and it is determined that: (a) The voluntary leaving would be for reasons that do not constitute good cause; (b) The employer discharged the individual, but not for misconduct connected with work, prior to the date of the planned voluntary leaving; and (c) The actual discharge occurred no more than 15 days prior to the planned voluntary leaving, then the separation from work shall be adjudicated as if the discharge had not occurred and the planned voluntary leaving had occurred. However, the individual shall be eligible for benefits for the period including the week in which the actual discharge occurred through the week prior to the week of the planned voluntary leaving date."

There is no dispute that claimant's employment ended on December 20, 2018 when the employer discharged claimant. Order No. 19-UI-129288 determined that ORS 657.176(8) applied to this case because claimant had, at the time of the discharge, planned to quit her job on December 21, and claimant's planned quit was not for good cause. Order No. 19-UI-129288 at 6-7. This conclusion resulted in adjudicating the separation as if the discharge had not occurred and the voluntary leaving had occurred. The Order further concluded that claimant was disqualified from benefits based on the work separation, and was not eligible to receive benefits under ORS 657.176(8) for any period because the discharge and planned voluntary leaving occurred in the same week.

Order No. 19-UI-129288 was correct in concluding that the discharge was not for misconduct. However, the order was incorrect in concluding that claimant's voluntary leaving was not for good cause and, therefore, was also incorrect in concluding that ORS 657.176(8) was applicable to determine the proper characterization of the work separation. Because the discharge should not have been disregarded under ORS 657.176(8), the order was also incorrect in concluding that claimant was disqualified from benefits. These issues are considered below.

The Voluntary Leaving. A claimant who leaves work voluntarily is disqualified from the receipt of benefits unless they prove, by a preponderance of the evidence, that they had good cause for leaving work when they did. ORS 657.176(2)(c); *Young v. Employment Department*, 170 Or App 752, 13 P3d 1027 (2000). "Good cause . . . is such that a reasonable and prudent person of normal sensitivity, exercising ordinary common sense, would leave work." OAR 471-030-0038(4) (December 23, 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 their employer for an additional period of time. Leaving work without good cause includes a resignation to avoid what would otherwise be a discharge for misconduct or potential misconduct. OAR 471-030-0038(5)(b)(F).

The parties did not dispute that claimant left work when she did because Owner 2 had just assumed control of the practice and claimant thought he was going to discharge her soon thereafter. Neither party contended that claimant had engaged in misconduct at any time, and the record does not show that claimant had violated any employer standards. Accordingly, OAR 471-030-0038(5)(b)(F) is inapplicable in determining whether or not claimant had good cause to leave work.

It is well established that, under appropriate circumstances, a claimant who leaves work to avoid a discharge that is not for misconduct may have good cause for that leaving. *See McDowell v. Employment Dep't*., 348 Or 605, 236 P3d 722 (2010) (claimant had good cause to quit work to avoid being discharged, not for misconduct, when the discharge was imminent, inevitable, and would be the "kiss of death" to claimant's future job prospects); *Dubrow v. Employment Dep't.*, 242 Or App 1, 252 P3d 857 (2011) (a future discharge does not need to be certain for a quit to avoid it qualifies as good cause; likelihood is not dispositive of the issue but it does bear on the gravity of the situation).

Order No. 19-UI-129288 concluded that claimant did not show that she had good cause for leaving work due to her belief that Owner 2 was going to discharge her. The order noted that Owner 2 had "testified that while claimant's employment may have ended, he had not [decided] if she would be discharged or when that would occur." Order No. 19-UI-129288 at 6. The order further noted that claimant failed to show at the time she left work that she had no alternatives other than to leave work because she "could have continued to work for the employer and at least attempted to work under the new owner's management." Order No. 19-UI-129288 at 6. The order is not supported by the record.

Owner 2 did assert at times in his hearing testimony that he had not decided if or when he might discharge claimant as of the time she left work. Transcript of April 30, 2019 hearing (Transcript 2) at 11-12, *see also* 16. However, Owner 2's purported uncertainty about claimant's employment status after the buyout was finished on December 19, 2018, was undercut substantially by other of parts of his testimony. Owner 2 testified that in the December 12 email to claimant when he stated that the "administrative team will change" after the buyout, he meant that the employees who had run the practice for the employer before the buyout would change, including claimant. Transcript 2 at 15. Owner 2 repeated this understanding when he testified that after the buyout "likely [claimant] would probably need to be relieved." Transcript 2 at 16. Owner 2 further testified that, after hearing claimant testify in the business dispute trial that she did not want to work for him if he assumed control of the practice, claimant's desire not to work for him "would be something I would honor," presumably meaning that he would discharge claimant. Transcript 2 at 19. Viewing the record as a whole, the weight of the evidence is that Owner 2 had no intention of retaining claimant as an employee for any appreciable period after he bought out Owner 1. Claimant's discharge was, more likely than not, inevitable at the time she left work. Since Owner 2 consummated the buyout one day after claimant notified the employer that she was leaving and one day before claimant planned to leave, it was also likely that the discharge was imminent as of the time she planned to leave work.

The employer did not challenge claimant's testimony that if she allowed the employer to discharge her, it would have negative impact on her ability to secure employment in the future. The record does not show a discharge likely would not have a stigmatizing effect on claimant's job prospects. Given that had she not planned to leave work, claimant's discharge would have been inevitable and imminent and would have had an adverse effect on her future employment prospects, claimant's circumstances likely were grave at the time she decided to leave work.

The reasonable alternatives to quitting cited in Order No. 19-UI-129288 did not exist on this record. Because claimant's discharge was likely impending when she quit work, she could not reasonably have continued to work for the employer for any appreciable period. As such, claimant showed good cause for her planned voluntary leaving. ORS 657.178(8) is inapplicable to claimant's claim and the discharge

that intervened before claimant actually left work may not be ignored in adjudicating whether claimant is disqualified benefits.

The Discharge. ORS 657.176(2)(a) requires a disqualification from unemployment insurance benefits if the employer discharged claimant for misconduct connected with work. "As used in ORS 657.176(2)(a) . . . a willful or wantonly negligent violation of the standards of behavior which an employer has the right to expect of an employee is misconduct. An act or series of actions that amount to a willful or wantonly negligent disregard of an employer's interest is misconduct." OAR 471-030-0038(3)(a) (December 23, 2018). "'[W]antonly negligent' means indifference to the consequences of an act or series of actions, or a failure to act or a series of failures to act, where the individual acting or failing to act is conscious of his or her conduct and knew or should have known that his or her conduct would probably result in a violation of the standards of behavior which an employer has the right to expect of an employee." OAR 471-030-0038(1)(c). The employer has the burden to show claimant's misconduct. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976) (in a discharge case, the employer has the burden to establish misconduct by a preponderance of evidence).

The employer discharged claimant in line with the "common business practice" of not allowing a "disgruntled employee" to continue to work after the employee has tendered a resignation. Transcript 2 at 13. However, claimant did not violate a reasonable employer standard by notifying the employer that she was leaving work. On this record, the employer did not show that it discharged claimant for misconduct. Because the discharge is the operative work separation, claimant is not disqualified from receiving unemployment insurance benefits.

DECISION: Order No. 19-UI-129288 is modified, as outlined above.

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

DATE of Service: <u>June 26, 2019</u>

NOTE: This decision reverses an order that denied benefits. Please note that payment of benefits, if any are owed, may take approximately a week for the Department to complete.

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.

Employment Appeals Board - 875 Union Street NE | Salem, OR 97311
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