EO: 200
BYE: 202011

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

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VQ 005.00

EMPLOYMENT APPEALS BOARD DECISION
2019-EAB-0594

Affirmed
Disqualification

PROCEDURAL HISTORY: On May 10, 2019, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant voluntarily left work without good cause (decision # 75657). Claimant filed a timely request for hearing. On May 31, 2019, ALJ Frank conducted a hearing at which the employer failed to appear, and on June 7, 2019, issued Order No. 19-UI-131292, affirming the Department's decision. On June 26, 2019, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant provided written argument to EAB but did not declare that they provided a copy of their argument to the opposing party or parties as required by OAR 471-041-0080(2)(a) (May 13, 2019). The argument also contained information that was not part of the hearing record, and did not show that factors or circumstances beyond claimant's reasonable control prevented them from offering the information during the hearing as required by OAR 471-041-0090 (May 13, 2019). Additionally, portions of the new information were inadmissible because they were illegible – specifically, in the copies of the text messages all but one of claimant's reply texts were too pale to read. EAB considered only information received into evidence at the hearing when reaching this decision. *See* ORS 657.275(2).

FINDINGS OF FACT: (1) Nike Inc. employed claimant from November 12, 2018 until March 18, 2019 as a global associate merchant for women's apparel.

(2) Claimant's director told claimant at hire that it would train him to perform the work for his position, because he had no prior experience as an associate merchant.

(3) Within the first two weeks of his employment, claimant noticed a "pattern of disrespect [and] hostility" from his director. Audio Record at 7:24 to 7:29. Claimant's director criticized claimant's work and stated that claimant "stress[ed] her out" in front of his coworkers. Audio Record at 7:33 to 7:48. Claimant's supervisor did not allow him to attend certain meetings. When claimant went to meetings, his director told him to leave the meeting. In private, claimant's director told claimant that his "work is

shit." Audio Record at 7:49 to 7:54. Claimant's director did not train claimant how to perform his role and responsibilities. Claimant felt his director was trying to "get [him] fired" and keep him from progressing in the company. Audio Record at 8:13 to 8:18.

(4) On December 18, 2018, claimant called the employer's human resources hotline to set up a meeting to explain his experience with his director to human resources.

(5) On December 20, 2018, claimant's director gave him a performance action plan that was due to expire on February 16, 2019. It was unusual for the employer to begin corrective action within the first six weeks of an employee's employment. Claimant viewed the plan as a "process to push [him] out of the position," and invalid because his director did not teach him how to perform his responsibilities. Audio Record at 8:59 to 9:03, 11:39 to 11:58.

(6) On December 24, 2018, claimant spoke with human resources and gave them examples of text and email messages from his director that he considered disrespectful toward him. Human relations escalated claimant's complaint to the employee relations section within the human resources department. Claimant explained his experiences with his director to the employee relations representative. Claimant explained that he felt his director was disrespectful toward him and did not set him up for success in his position. The representative determined that claimant's director had violated the employer's expectation regarding respect in the workplace. The representative told claimant he would start an investigation. Claimant told the representative that he feared retaliation from his director if employee relations began an investigation. The representative told claimant that the employer has an anti-retaliation policy. Claimant gave him permission to begin an investigation.

(7) Through January 2019, claimant's director continued to treat claimant in a manner claimant considered disrespectful. Claimant contacted the representative he had spoken with in employee relations and told him that his situation "was not sustainable" and that he "needed to be removed from the situation." Audio Record at 11:01 to 11:06.

(8) On February 1, 2019, claimant contacted human resources again and provided a written account of his experiences with his director.

(9) On February 11, 2019, claimant's director began a one-month leave of absence. Claimant began reporting to his senior director instead. Claimant met with his senior director weekly. Claimant explained why he believed he was performing his work well, and the director told him why she was not satisfied with his work performance.

(10) On February 27, 2019, the senior director gave claimant a written warning because he asked his manager a question about a project rather than "taking initiative" to complete the project himself. Audio Record at 17:18 to 17:23. Claimant told the senior director that he felt he was in a "lose, lose" situation because his senior director told claimant he was not "engaged" if he did not ask questions, but also told him that he was "not taking initiative" if he did ask questions. Audio Record at 17:28 to 17:37.

(11) On March 15, 2019, claimant's senior director gave claimant a final warning for using his telephone during a meeting. Claimant had seen other employees use telephones during meetings. The final warning was the last step in the employer's progressive discipline before the final step of discharge. Claimant

concluded that he would receive another warning and would be discharged soon. He did not want to be discharged because if he were discharged, he "can't get back in" to work for the employer. Audio Record at 19:19 to 19:21.

(12) On March 18, 2019, claimant quit work to avoid discharge and due to his directors' treatment of him.

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

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. *Young v. Employment Department*, 170 Or App 752, 13 P3d 1027 (2000) (in a voluntary leaving case, claimant has the burden of proving good cause by a preponderance of the evidence).

To the extent claimant left work to avoid discharge, he did not quit work with good cause. The record shows that it is more likely than not that on the date claimant quit his job he was facing inevitable, imminent discharge, since he was at the end of the employer's corrective action process and was not given the training or support necessary to be successful. Claimant's unrefuted testimony shows that the employer did not train claimant or provide positive support, and that although he believed he was performing his work well, his directors were dissatisfied with his work performance.[1] Although claimant feared retaliation for complaining about his director, claimant did not show by a preponderance of the evidence that the employer gave him corrective action for improper reasons. The fact that claimant was likely facing inevitable, imminent discharge, and had no alternatives that would allow him to avoid discharge, is not dispositive in this case, however, without evidence that such discharge was likely to irreparably harm his future job prospects.

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 question is, then, what effect being discharged was likely to have on this claimant's career prospects.

[1] On this record, had claimant been discharged, it would not have been for misconduct because it appears that his unsatisfactory work performance was attributable to a lack of job skills or experience rather than willful or wantonly negligent conduct. *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.

Claimant testified that he "can't get back in" to work for the employer if he were discharged. Audio Record at 19:19 to 19:21. However, the record does not show that claimant would have suffered any specific, individualized type of harm that was associated with his career prospects. Instead, claimant's testimony showed he feared a discharge would impact his prospects with one employer, Nike Inc. Claimant's testimony did not show that his career would be irreparably harmed or that a discharge would make it unduly burdensome for him to find another job in the merchandising field. Absent evidence that claimant would suffer a particularized harm that was greater than that of most discharged workers, the record does not show that the prospect of a discharge was a grave situation for him. Claimant quit work because of an inevitable, imminent discharge not for misconduct, but that was not a grave situation that amounted to good cause for leaving work.

To the extent claimant quit work because his directors did not meet the employer's standards for respectful treatment toward him, claimant did not leave work for good cause. Claimant did not describe behavior by his directors that could reasonably be characterized as a type of abuse or oppression that might give rise to good cause for leaving work when he did. *See e.g., McPherson v. Employment Division*, 285 Or 541,557, 591 P2d 1381 (1979) (claimants not required to "sacrifice all other than economic objectives and *** endure racial, ethnic, or sexual slurs or personal abuse, for fear that abandoning an oppressive situation will disqualify the worker from unemployment benefits). Claimant asserted only one incident when the director used foul language, and although inappropriate, the record does not show that such language was so common that it was "oppressive." Claimant had the reasonable alternative of continuing to pursue his complaint through employee relations, which had been responsive to his complaint and was conducting an investigation. Claimant failed to meet his burden to show that no reasonable and prudent person in his circumstances would have continued to work for their employer for an additional period of time.

Claimant is therefore disqualified from receiving unemployment insurance benefits because of this work separation.

DECISION: Order No. 19-UI-131292 is affirmed.

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

DATE of Service: <u>July 31, 2019</u>

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.

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