

EMPLOYMENT APPEALS BOARD DECISION
2019-EAB-0619

Affirmed
Disqualification

PROCEDURAL HISTORY: On May 22, 2019, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant voluntarily left work without good cause (decision # 143632). Claimant filed a timely request for hearing. On June 18, 2019, ALJ Seideman conducted a hearing, and on June 19, 2019 issued Order No. 19-UI-131949, affirming the Department's decision. On June 21, 2019, ALJ Seideman issued Amended Order No. 19-UI-132061, amending Order No. 19-UI-131949, again affirming the Department's decision. On July 3, 2019, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant submitted a written argument in which he expressed general dissatisfaction with how the hearing was conducted, how the exhibits were handled, and the ALJ's lack of apparent familiarity with the exhibits. However, EAB reviewed the hearing record in its entirety, which shows that the ALJ inquired fully into the matters at issue and gave all parties reasonable opportunity for a fair hearing as required by ORS 657.270(3) and (4) and OAR 471-040-0025(1) (August 1, 2004).

Claimant's argument 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. 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.

Claimant's argument suggested that Title VII of the federal Civil Rights Act, 42 USC §2000e *et seq.*, and Oregon laws prohibiting employers from discriminating and retaliating against employees, ORS 659A.001 *et seq.*, establish that his work separation amounted to a "constructive dismissal." However, the law governing unemployment insurance claims in Oregon does not recognize the doctrine of constructive dismissal in determining whether a work separation disqualifies a claimant from benefits. *See* ORS 657.005 *et seq.*; OAR 471-010-0005 *et seq.* Because it was not disputed that the facts underlying claimant's work separation showed that claimant voluntarily left work under Oregon unemployment insurance law, the issue for purposes of determining whether claimant is or is not

disqualified from benefits is whether he left work for good cause. It is not whether his separation would be considered a “constructive dismissal” under other statutory schemes or provisions.

FINDINGS OF FACT: (1) Jackson County employed claimant as a senior planner from July 2, 2007 until April 26, 2019. Claimant’s department manager was the Development Services Director.

(2) Around July 2018, claimant thought that the attitude of management toward him changed. At that time, claimant made a recommendation on a transportation project to a government council with which he worked. The council’s technical advisory committee unanimously approved claimant’s recommendation. However, claimant’s recommendation was not adopted because of the action of an individual working at the council. Claimant reported to the employer that he thought the government council or the individual had engaged in fraud to defeat his recommendation, and submitted what he thought was extensive documentation of that fraud. After claimant had reported the alleged fraud, the employer’s Director of Roads and Parks called claimant and said that unidentified “people” were talking about his report. Exhibit 6 at 2. Claimant thought the Director was harassing him for making the report of fraud.

(3) Sometime shortly after claimant reported the alleged fraud to the employer, the Development Services Director visited claimant in his office and, in reference to claimant’s paycheck, stated that claimant should “just take the hush money.” Transcript at 14, 15; Exhibit 1 at 4; Exhibit 6 at 2. Claimant thought the Director was harassing him.

(4) In September 2018, the employer gave claimant his first disciplinary action. The employer issued the disciplinary action before investigating his July report of the government council’s alleged fraud. Claimant thought that he was being disciplined in retaliation for having reported the fraud. Claimant thought the employer was harassing him.

(5) Sometime after September 2018, an employee in the Roads and Parks Department wanted claimant to process a land use application as a Type 2 application when claimant thought the law required it to be processed as a Type 4 application. Exhibit 6 at 2. A Type 4 application involved a more stringent level of review than a Type 2. Claimant told the employee who made the request that the applicable regulations required a Type 4 review, and he would not process the application as a Type 2. Subsequently, the employer chose another planner to process the application. Claimant thought that the employer had tried to have him perform an illegal act.

(6) On April 19, 2019 at 3:03 p.m., the Parks Program Manager sent claimant an email that was copied to the Development Services Director, the Director of Roads and Parks, and others. In the email, the Parks Program Manager stated that he had received a call from a member of a government council who had said that at a recent meeting claimant made an inappropriate comment that “was awkward and reflected poorly on the [the employer],” and the member thought claimant had been “questioning whether [the employer] is doing an adequate job... .” Exhibit 3 at 1. The email went on to state that the Parks Program Manager had received past comments from other “folks” that claimant had made statements at other meetings that “were a bit out of line as well.” Exhibit 3 at 1. The email noted that the Parks Program Manager did not “recall you [claimant] providing us with any productive thoughts, only criticism, and this criticism is of your very employer and you are doing it in front of other policy makers.” Exhibit 3 at 1. The Parks Program Manager continued, “In the future I would highly appreciate

your support for working towards a solution, in contrast to your current negative comments. Exhibit 3 at 1.

(7) Claimant responded to the Parks Program Manager's email at 3:35 p.m. on April 19, 2019. He copied all of the recipients on the email to which he was responding as well as the government council member who had reported claimant's comment to the Parks Program Manager. Claimant stated he thought his comments at the meetings had not been "accurately conveyed" to the Parks Program Manager or had been "misunderstood." Exhibit 4 at 1. Claimant stated that he had not intended to be critical of the efforts of the Parks Program. The Parks Program Manager replied to claimant at 4:21 p.m. on April 19, 2019, copying all whom claimant previously copied. The Parks Program Manager stated that claimant's comments "may have been misinterpreted, but it has happened more than once, which is what lead me to be suspicious." Exhibit 5 at 1. The email concluded, "We can use your help sending a more positive, realistic message and that's what I am asking for." Exhibit 5 at 1.

(8) On April 20, 2019, the Development Services Director, who had been copied on the April 19 string of emails between the Parks Program Manager and claimant, responded to them. His response was addressed to claimant and the Parks Program Manager, with copies to all others who had been copied as well as to claimant's immediate supervisor. The Development Services Director apologized for "the awkward or inappropriate comments made by one of our staff [i.e. claimant]" and stated that he "valued and respected" the partnership with the government council and its members and all participating jurisdictions. Exhibit 5 at 1. The Development Services Director stated that he was on vacation, but would return to work on April 29, and he would contact the Parks Program Manager at that time "to discuss moving forward." Exhibit 5 at 1. The Development Services Director also asked the Parks Program Manager about the date of the next meeting of the Bicycle Committee so either he or claimant's immediate supervisor could attend. Claimant was a member of the Bicycle Committee.

(9) Based on the April 19 emails from a manager other than his own that were critical of him, claimant concluded that the employer was harassing and retaliating against him for the fraud he had reported around July 2018. Claimant thought it was inappropriate for a manager other than his own to have evaluated his behavior in an email copied to his own manager and without having first raised the issue with him. Claimant thought the Parks Program Manager had used "personal, accusatory, intimidating, and dismissive" language in the emails. Exhibit 6 at 1. Claimant also thought that his manager had not properly supported him because he apologized to the Parks Program Manager and the council of governments without first having heard claimant's account of what he actually had said. Claimant also concluded that when the Development Services Director inquired about the next meeting of Bicycle Committee and stated that he or claimant's immediate supervisor would be attending that he intended to replace claimant as a member of that committee, which claimant thought was a further act of harassment and retaliation. Claimant also concluded that the Development Services Director's email of April 20 indicated that the Director was going to take disciplinary action against claimant when the Director returned to work on April 29.

(10) Sometime before April 26, 2019, claimant spoke with his immediate supervisor and learned that a meeting among the Development Services Director, the Director of Roads and Parks, and claimant's immediate supervisor was scheduled to occur sometime after the Development Services Director returned from vacation on April 29. Claimant thought the meeting was to consider disciplinary action against him. When claimant spoke with his immediate supervisor about the Development Services

Director's April 20 email, she stated to claimant that she thought claimant might have lost the support of the Development Services Director.

(11) Claimant never reported to the employer's human resources department that he thought he was being harassed, retaliated against, subjected to inappropriate disciplinary actions and a toxic and hostile workplace, or that he was not adequately supported. Claimant thought he would be "black listed" if he contacted the human resources department for assistance. Transcript at 25.

(12) On April 26, 2019, claimant submitted a written resignation to the employer effective immediately. Claimant resigned because he did not want the employer to allegedly harass or retaliate against him, or subject him to what he perceived to be a toxic and hostile workplace, any longer, he thought the Development Services Director no longer supported him, and he thought he would face disciplinary action on or soon after April 29, 2019.

CONCLUSIONS 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.

Claimant left work due to what he perceived to be the employer's harassment and retaliation against him, which he thought was going to culminate in the employer taking disciplinary action against him on or shortly after April 29, 2019. Claimant also left work due to an allegedly hostile and toxic work environment and the lack of support from his manager, the Development Services Director. These reasons are considered below.

With respect to harassment and retaliation, claimant cited events beginning with his report of the alleged fraud of the governmental council in July 2018 and contended that various incidents that occurred afterward did so because he had reported that fraud. However, claimant failed to show causal connections between the later incidents and the reported fraud, other than that the incidents occurred after he reported the fraud. Claimant also failed to show that the incidents likely were harassing or evidence of a toxic work environment.

For example, claimant did not explain why the employer would harass or retaliate against him for reporting fraud on the part of an entity separate from the employer and none is obvious. It also is not apparent how the Director of Roads and Parks telling claimant that "people" were talking about his report of fraud, and failing to identify those people by name, constituted harassment or retaliation. There was no evidence that claimant asked for the "people" to be identified, no evidence as to what the "people" were supposedly saying, and no context ruling out that the comment of the Director of Roads and Parks was innocuous. With respect to the Development Services Director telling claimant that he should consider his paycheck as "hush money," claimant did not provide information about the context

in which the statement was made, what he was not supposed to mention in exchange for the paycheck, or a basis for concluding that the statement was intended to be harassing, threatening, or intimidating. There also was no reliable connection between the statement about hush money and remaining silent about the alleged fraud report of July 2018.

Similarly, claimant did not show a tie between the disciplinary action in September 2018 and the fraud report in July 2018 that suggested or tended to suggest that the disciplinary action was undertaken in retaliation for the fraud report, or to harass claimant for having made the report. The evidence did indicate that the employer issued the September 2018 disciplinary action for other than a neutral purpose.

Claimant's account of the allegedly illegal processing of a land use application was presented as an example of a toxic work environment. However, claimant did not show that the employer's request for him to process a land use application using a Type 2 rather than a Type 4 level of review was likely an attempt to induce claimant to engage in unlawful activities. Claimant stated that the employer "suggest[ed]" that he use the Type 2 process, and not that the employer required him to use the Type 2 process. Transcript at 9. Claimant conceded that the employer accepted his refusal to use the Type 2 process, did not try to coerce him, and did not continue to try to persuade him to use the Type 2 process. Claimant also did rule out that the disagreement between him and the employer as to the appropriate level of review was a good faith difference of opinion rather than an instruction that he engage in an unlawful review. Finally, while claimant testified that the employer assigned another planner to review the land use application when he declined to process it as a Type 2, claimant did not indicate the level of review that ultimately was used to process the application, or that it was reassigned to another planner solely to secure a Type 2 level of review. While being asked to perform unlawful acts may on appropriate facts constitute good cause for leaving work, claimant did not show either that the employer tried to induce him to do so or that the application was ultimately processed in an illegal manner.

The April 19 emails clearly show that the Parks Program Manager was displeased with claimant's reported comments. While claimant may have thought the comments he made were inaccurately reported to the Parks Program Manager or misconstrued, the evidence fails to show that the Parks Program Manager did not receive the reports referred to in the email. The evidence also does not show that the Parks Program Manager sent the April 19 email to claimant for any reason other than he sincerely thought that claimant had made public comments that reflected poorly on the employer, and wanted to advise claimant about how those comments had been construed and to stop making them. The evidence does not suggest that the Parks Program Manager exceeded his authority when he sent the email of April 19 to claimant, copied to the Development Services Director, before discussing the reported comments with claimant, or that him doing so was an irregular practice. In sum, the evidence does not show a basis for concluding that the Parks Program Manager sent the email to claimant for purposes of harassing him, treating him unfairly, or subjecting him to retaliation.

The April 20 email that the Development Services Director sent in response to his receipt of the April 19 email exchange also does not evidence a continued pattern of harassment or retaliation toward claimant. Claimant did not show that the Development Services Director sent it for any reason other than in response to the April 19 emails exchanged between the Parks Program Manager and claimant. While claimant may have thought it best for the Development Services Director to hear his account of the comments before apologizing to the Parks Program Manager, the circumstances plausibly did not allow

it. The Development Services Director was away on a lengthy vacation and it was clear from the emails that the Parks Program Manager was displeased with the reports he had received about claimant's comments. Claimant did not rule out that the Development Services Director chose promptly to apologize to the Parks Program Manager before consulting with claimant as a matter of professional courtesy and to avoid strained inter-department relations. The evidence did not show that the April 20 email was sent for purposes of harassing claimant or subjecting him to retaliation. Nor does the evidence show a basis for concluding the alleged failure of the Development Services Director to continue to support claimant, as indicated in the email, constituted a grave situation, or good cause for claimant to leave work.

With respect to the above incidents and the emails of April 19 and 20, 2019, the evidence also did not show that the employer interacted with claimant in a manner that would constitute good cause for leaving work. There was no indication that claimant was subjected to personal insults, slurs, tirades, or the like. The evidence does not show that claimant experienced the type of oppression or abuse in the workplace that previously has been found to constitute good cause to leave work. *See McPherson v. Employment Division*, 285 Or 541, 591 P2d 1381 (1979) (claimants need not "sacrifice all other than economic objectives and, for instance, endure racial, ethnic, or sexual slurs or personal abuse, for fear that abandoning an oppressive situation will disqualify the work from unemployment benefits"; the law "does not impose upon the employee the one-dimensional motivation of Adam Smith's 'economic man'").

Claimant stated that he also left work on April 26 because he thought he would be the subject of disciplinary action after the Development Services Director returned from vacation on April 29. While the circumstances do suggest that claimant likely would be required to explain the comments that the Parks Program Manager referred to in the April 19 email, the evidence does not show that any employer representative ever referred to a disciplinary action being taken against claimant. In addition, even if the employer pursued a disciplinary action based on claimant's alleged comments, claimant did not establish that he would be unable to show that the discipline was not merited and avoid the discipline. On this record, defending against the disciplinary action, if one was pursued, was a reasonable alternative to quitting. Moreover, even if discipline were imposed, claimant did show that the likely consequences of it were grave.

As final matter, in lieu of quitting, claimant had the recourse of seeking redress through the employer's human resources department for the various alleged actions that he thought the employer had taken against him for improper reasons. Rather than suggesting that he was not aware of the human resources department, claimant testified that he did not seek redress through it because he feared being "black listed." Transcript at 25. Aside from that general assertion, the record does not show specific circumstances indicating that claimant's stated concern was reasonable or plausible. Claimant did not show that seeking to redress through the human resources department was likely futile and was not a reasonable alternative to leaving work when he did.

In sum, claimant did not meet his burden to show that the employer engaged in behavior that constituted good cause for him to leave work under the circumstances. Claimant also did not show that the disciplinary action he thought would occur on or soon after April 29, or the loss of support he perceived from the Development Services Director was good cause for him to leave work. Claimant is disqualified from receiving unemployment insurance benefits based on his work separation from the employer.

DECISION: Order No. 19-UI-132061 is affirmed.

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

DATE of Service: August 9, 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.

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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 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 Empleo. Si no está de acuerdo con esta decisión, puede presentar una Aplicación 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

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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
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