

EMPLOYMENT APPEALS BOARD DECISION
2019-EAB-0646

Reversed
No Disqualification

PROCEDURAL HISTORY: On May 22, 2019, the Oregon Employment Department (the Department) served notice of an administrative decision concluding voluntarily left work without good cause and was disqualified from benefits effective April 28, 2019 (decision # 142131). Claimant filed a timely request for hearing. On June 17, 2019, ALJ Snyder conducted a hearing, and on June 25, 2019 issued Order No. 19-UI-132275, affirming the Department's decision. On July 12, 2019, claimant filed an application for review with the Employment Appeals Board (EAB).

EAB considered claimant's written argument when reaching this decision, to the extent it was relevant and based upon the hearing record.

FINDINGS OF FACT: (1) The Department of Consumer and Business Services (DCBS) employed claimant as worker's compensation division employer compliance manager from February 2, 2015 to April 30, 2019.

(2) Claimant had difficulty performing his job to the standards required throughout his employment and received ongoing coaching about his performance, a work plan, and warnings to improve his performance immediately to avoid being discharged. Claimant tried to improve but was not successful.

(3) Claimant attempted to transfer to a different position and applied for job rotations with different agencies, but did not get the jobs he sought. By late March or early April 2019, the employer notified claimant that they had decided to fire him, that no improvement in his job performance would save his job, and he would not be allowed to continue to work for DCBS in any capacity.

(4) Claimant's job coach, who also worked for the employer, told claimant that his discharge was imminent and would occur within a day or two of April 1st. Claimant was interested in maintaining his eligibility for future employment with other state agencies, and the coach strongly advised claimant that if he wanted to work for the state again it would be better for him to quit than be discharged. Claimant then asked the employer if he could resign in lieu of being terminated, and the employer agreed.

(5) On April 1, 2019, claimant submitted a resignation with a planned effective date of April 30, 2019. Claimant did not know when he submitted the resignation whether or not the employer would agree to allow him to have such a long notice period, but he wanted to try to continue working through April so he could finish projects, and because he had scheduled a surgical procedure for mid-April and wanted to make sure that his employer-provided insurance would cover the procedure.

(6) The employer accepted claimant's resignation, and claimant quit effective April 30, 2019.

CONCLUSIONS AND REASONS: Claimant voluntarily left work with 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).

The order under review concluded that claimant voluntarily left work without good cause because "OAR 471-030-0038(5) specifies that resignation to avoid what would otherwise be a discharge for misconduct or potential discharge for misconduct is considered leaving work without good cause." Order No. 19-UI-132275 at 3. However, while the order correctly paraphrases OAR 471-030-0038(5)(b)(F), that rule does not apply to this case.

OAR 471-030-0038(5)(b)(F) (December 23, 2018) only applies to discharges "for misconduct" or potential discharges "for misconduct." OAR 471-030-0038(3)(a) defines "misconduct" as "a willful or wantonly negligent violation of the standards of behavior which an employer has the right to expect" or "[a]n act or series of actions that amount to a willful or wantonly negligent disregard of an employer's interest is misconduct." However, OAR 471-030-0038(3)(b) also specifically states that "mere inefficiency resulting from lack of job skills or experience" is "*not* misconduct." (Emphasis added.)

In this case, it appears that claimant struggled to adequately perform his job duties for years. Despite ongoing coaching, work plans, warnings, and all of claimant's efforts to improve his work performance, his attempts were not successful. It does not appear on this record that claimant intentionally violated the employer's standards or was even indifferent to them. Rather, it appears that despite claimant's best efforts he lacked the job skills and/or experience to perform the duties required of a successful worker's compensation division employer compliance manager. Claimant's lack of skills or experience is not misconduct. Therefore, while the record establishes that the employer planned to discharge claimant had he not quit, claimant's discharge or potential discharge would *not* have been for misconduct. OAR 471-030-0038(5)(b)(F) therefore does not apply to this case, much less dictate the outcome of it.

The rule that applies to claimant's voluntary leaving is OAR 471-030-0038(4). That rule states, "[g]ood cause . . . is such that a reasonable and prudent person of normal sensitivity, exercising ordinary common sense, would 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 their employer for an additional period of time.

It is more likely than not that when claimant resigned on April 1st the employer had plans to discharge him, not for misconduct, within a day or two at most. Although claimant continued to work throughout a

30-day notice period, the employer had made it clear to claimant that he could not save his employment no matter what he did, and that continuing work was not available for claimant anywhere in that agency. Claimant was facing an inevitable, imminent discharge, and had no alternatives that would allow him to avoid being discharged.

A discharge may be grave if the effects the discharge would have on a particular worker are likely to be disproportionate as compared to the effects discharges usually have on an average worker. To determine whether claimant's situation was grave, then, the question is what effect being discharged was likely to have on claimant generally, or upon his future career prospects. In *McDowell v. Employment Department*, 348 Or. 605, 236 P.3d 722 (2010), the Oregon Court of Appeals concluded that 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 *Aguilar v. Employment Department*, 258 Or. App. 453, 310 P.3d 706 (2013), the 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." In *Dubrow v. Employment Department*, 242 Or. App. 1, 252 P.3d 857 (2011), however, the claimant did not have good cause to quit work, in part because she did not show that she faced dire consequences from a discharge.

Turning to the facts of this case, it is more likely than not that claimant faced a grave situation. While his career at DCBS was ending without a prospect to return to employment with that particular agency, claimant had a desire to continue his career in state service by working for another agency, and had applied for positions before quitting his job. Claimant's career coach strongly recommended that if claimant wanted to have a chance of becoming employed by a different state agency, he should avoid being discharged and quit instead. The coach's advice implied to claimant that if the employer discharged him he would likely become unemployable in state service, a "kiss of death"-type prospect that any reasonable and prudent person in claimant's position likely would have considered grave.

Claimant therefore established on this record that he quit work because of a situation of such gravity that he had no reasonable alternative but to leave. Claimant is not disqualified from receiving unemployment insurance benefits because of this work separation.

DECISION: Order No. 19-UI-132275 is set aside, as outlined above.

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

DATE of Service: August 16, 2019

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 ໂດຍປະຕິບັດຕາມຄໍາແນະນໍາທີ່ບອກໄວ້ຢູ່ຕອນຫ້າຍຂອງຄໍາຕັດສິນນີ້.

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.

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