EMPLOYMENT APPEALS BOARD DECISION
2019-EAB-0740

Reversed & Remanded

PROCEDURAL HISTORY: On June 28, 2019, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant voluntarily left work without good cause (decision # 91108). Claimant filed a timely request for hearing. On July 24, 2019, ALJ Snyder conducted a hearing at which the employer failed to appear, and on August 1, 2019, issued Order No. 19-UI-134339, affirming the Department's decision. On August 7, 2019, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant submitted written argument to EAB. 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. However, because the case is being remanded to the Office of Administrative Hearings (OAH) for another hearing to develop the record, the parties may offer new information at the hearing on remand. At that time, the ALJ will decide if that information is relevant to the issues on remand and should be admitted into evidence, and the parties will have the opportunity to respond to the information. As it will state on the OAH notice for the hearing on remand, if the parties have documents that they wish to have considered at the hearing, they must provide copies of the documents to all parties and to the ALJ at OAH prior to the date of the hearing.

FINDINGS OF FACT: (1) Nike IHM Inc. employed claimant from 2017 until June 3, 2019 as a senior equipment engineer.

(2) Two of claimant's employee benefits were health insurance and participation in the employer's profit sharing plan. The profit sharing plan dispersed shares annually at the beginning of June to current employees.

(3) During 2018, the employer put claimant under the supervision of a new manager. Based on a performance review that claimant received at the end of 2018 that concluded that claimant did not

consistently meet the employer's expectations, claimant's manager put claimant on a 90-day performance action plan (PAP).

(4) During the PAP that began in January 2019, claimant had his six-month performance review. Although claimant had worked to meet the employer's expectations, claimant's manager provided claimant with no positive feedback and described claimant's performance as "unsuccessful." Audio Record at 6:14.

(5) Despite claimant's efforts to meet the manager's expectations and the requirements of the PAP that began in January, claimant's manager gave claimant an entirely negative review with no positive feedback at the end of the PAP.

(6) After the first PAP ended, claimant's manager put claimant on a second PAP containing eight action items. Claimant completed and complied with all the action items, but his manager's response to claimant's performance was a negative review with no positive feedback.

(7) During 2019, claimant asked human resources ten to twelve times for support to address his concerns that his manager treated him unfairly. Human resources asked claimant questions, but claimant received "virtually no response" from human resources and no assistance. Audio Record at 15:46.

(8) In mid-April 2019, claimant's manager gave claimant a disciplinary action plan that stated on the plan that failure to meet the plan could result in discharge. Because claimant's manager had not made a "single positive comment . . . in the entire year [claimant] worked for him," claimant believed the probability that the manager would find claimant met the expectations of the disciplinary plan was "zero." Audio Record at 11:41 to 12:14.

(9) On May 20, 2019, claimant gave notice to his manager that he was voluntarily leaving work on June 3, 2019. Claimant wanted to remain eligible to receive a profit share and employer-provided health insurance in June 2019. If the employer discharged him before June 2019, claimant would not receive his annual profit share, or health insurance for June 2019. The manager told claimant that claimant's separation date would be June 3, but that the employer would not require him to report to work again.

CONCLUSIONS AND REASONS: Order No. 19-UI-134339 should be set aside and this matter remanded.

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

Order No. 19-UI-134339 concluded that claimant voluntarily left work to avoid a potential discharge.[1] Order No. 19-UI-134339 further concluded that claimant voluntarily left work without good cause because "OAR 471-030-0038(5)(b)(F) specifies that [a] resignation to avoid what would otherwise be a . . .potential discharge for misconduct is considered leaving work without good cause.[2] *See* OAR 471-030-0038(5)(b)(F). The record requires additional development to support a decision in this case.

The record does not support a conclusion that claimant quit to avoid a potential discharge *for misconduct*. "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). Claimant's uncontroverted testimony at hearing was that he "worked pretty hard to meet his [manager's] expectations" during the year he worked with him, but the manager was predisposed to "document his failure" and ignored "any success that [claimant] ever did." Audio Record at 24:04 to 24:44. The record does not show that claimant consciously engaged in conduct that amounted to a willful or wantonly negligent disregard of the employer's interest. On this record, claimant's conduct that resulted in his potential discharge was not misconduct.

The record shows that more likely than not, claimant faced inevitable discharge and having received no assistance from human resources, had no reasonable alternatives that would allow him to avoid discharge. The record also shows that it would be beneficial for claimant to quit in June instead of waiting to be potentially discharged in May because if he were discharged in May, he would not receive health insurance for June or annual profit sharing. However, the fact that claimant was likely facing inevitable discharge, had no alternatives that would allow him to avoid discharge, and would potentially lose one month of health insurance and annual profit sharing is not dispositive in this case. It is also necessary to determine if claimant's discharge was imminent, and the gravity such a discharge would pose for claimant. *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).

Regarding the imminence of claimant's discharge, the record does not show what the next step would be for someone in claimant's position according to the employer's progressive discipline policy or after allegedly failing to complete three action plans successfully. The record does not show what, if anything, made the April action plan different from the previous plans such that claimant believed he would be discharged at the end of the plan instead of receiving a new action plan. The record does not show if claimant knew of any other pre-disciplinary or disciplinary processes that might still be available to him prior to discharge, or if there was potential to contest a discharge. Claimant testified that the action plan ending on May 30 posed discharge as a potential outcome. Audio Record at 7:36 to 7:46. The record does not show if claimant's manager, or other supervisor, ever referred to discharging

[1] Order No. 19-UI-134339 at 3.

[2] *Id*.

claimant verbally or in writing. Claimant testified that he expected to be discharged and escorted off the employer's property on May 30. Audio Record at 11:32 to 11:41. The record does not show why claimant had that expectation, or if claimant had seen others in his position treated in that manner. The record does not show if claimant had information showing the employer was preparing to make personnel changes or was seeking a replacement for his position.

Regarding the gravity of claimant's situation, the record does not show why losing his profit share and June health insurance coverage created a grave situation for claimant, such as the dollar amounts associated with the profit share and his insurance, and his ability to afford to lose the profit share or pay for insurance. The record does not show if there were any other reasons claimant felt being discharged would be a grave situation for him, such as the impact of a discharge from the employer on his prospects for reemployment in the engineering field within his labor market.

ORS 657.270 requires the ALJ to give all parties a reasonable opportunity for a fair hearing. That obligation necessarily requires the ALJ to ensure that the record developed at the hearing shows a full and fair inquiry into the facts necessary for consideration of all issues properly before the ALJ in a case. ORS 657.270(3); *see accord Dennis v. Employment Division*, 302 Or 160, 728 P2d 12 (1986). Because further development of the record is necessary for a determination of whether claimant's potential discharge was imminent and created a situation of such gravity that no reasonable and prudent person would have continued to work for their employer for an additional period of time, Order No. 19-UI-134339 is reversed, and this matter is remanded.

DECISION: Order No. 19-UI-134339 is set aside, and this matter remanded for further proceedings consistent with this order.

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

DATE of Service: <u>September 12, 2019</u>

NOTE: The failure of any party to appear at the hearing on remand will not reinstate Order No. 19-UI-134339 or return this matter to EAB. Only a timely application for review of the subsequent order will cause this matter to return to EAB.

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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 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 دستورالعمل موجود در پایان آن، از دادگاه تجدید نظر اورگان درخواست تجدید نظر کنید.

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