

EMPLOYMENT APPEALS BOARD DECISION
2019-EAB-0818

Reversed
No Disqualification

PROCEDURAL HISTORY: On May 1, 2019, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant voluntarily left work without good cause (decision # 111628). Claimant filed a timely request for hearing. On May 31, 2019, ALJ Frank conducted a hearing at which the employer did not appear, and on June 7, 2019, issued Order No. 19-UI-131303, affirming the Department's decision. On June 17, 2019, claimant filed an application for review with the Employment Appeals Board (EAB). On July 24, 2019, EAB issued Appeals Board Decision 2019-EAB-0558, reversing and remanding this matter. On August 7, 2019, ALJ Frank conducted a hearing at which the employer did not appear, and on August 9, 2019 issued Order No. 19-UI-134767, affirming the Department's decision. On August 22, 2019, claimant filed an application for review with EAB.

FINDINGS OF FACT: (1) Lehigh Hanson Services LLC employed claimant as an excavator operator from October 1, 2018 until March 28, 2019.

(2) In 2006 claimant sustained a brain injury while working. The Worker's Compensation Division rated claimant as having a permanent disability of 40 percent due to the brain injury. As a result of the injury, claimant was not able to return to his regular work in logging and after receiving vocational rehabilitation training, he entered the preferred worker program. Claimant understood that he should show his preferred worker card to an employer if issues arose about his work performance.

(3) Claimant had memory issues from the brain injury. The brain injury sometimes made it difficult for claimant to understand things. Claimant had trouble securing employment.

(4) During claimant's employment, a supervisor frequently called claimant to his office to criticize how claimant performed his work. Claimant often received contradictory instructions from the supervisor. As time passed, claimant came to think that the supervisor wanted to discharge him. Claimant discussed his concerns about the supervisor's intentions with several coworkers. Claimant was aware the supervisor would have to get approval from upper management to discharge him. However, the coworkers told

claimant that the supervisor was consistently able to get upper management's approval to discharge any subordinate employee that he desired. The coworkers told claimant that the supervisor "knows everybody in the industry" and if an employee ran afoul of the supervisor, the supervisor would create a negative impression of the employee with other employers in the industry. Audio Record of August 7, 2019 Hearing at 13:30.

(5) On December 3, 2019, the employer held a "stand down safety meeting," which closed the entire plant, ostensibly because claimant had picked up an agate while standing next to the high wall. Audio Record of May 31, 2019 Hearing at 11:50. Claimant and other employees had been picking up agates in this manner since claimant was hired. Claimant was unable to find any policies that prohibited picking up agates as he had done. Claimant thought his supervisor was harassing him. At around this time, claimant showed his preferred worker card to the supervisor, hoping that the card would cause the supervisor to treat him more leniently. Claimant and the supervisor discussed claimant's status as a preferred worker. At the end of the discussion, the supervisor told claimant, "I don't care" and gave the preferred worker card back to claimant. Audio Record of May 31, 2018 Hearing at 26:50.

(6) Sometime around approximately late December 2018, claimant spoke with the supervisor about receiving a raise that he believed the supervisor had promised him. Claimant and the supervisor disagreed about what the supervisor had promised. The supervisor told claimant, "I will build a case against you." Audio Record of May 31, 2019 Hearing at ~29:03. Claimant interpreted the statement to mean that the employer was going to find reasons to discharge him. At around that time, the supervisor told claimant that if the employer discharged him the discharge would be on his work record. Audio Record of May 31, 2019 Hearing at 24:08.

(7) Beginning around late February and continuing until around mid-March 2019, claimant's excavator had a faulty pump and was leaking oil on the pit floor. Claimant notified the employer of the problem. The employer fixed the problem around March 14.

(8) Sometime during the week of March 18 through 23, 2019, claimant's supervisor called claimant to his office and showed claimant a handwritten list of claimant's alleged performance deficiencies since December 1, 2018. At that time, the supervisor also blamed claimant for the oil that spilled from the excavator before the pump was repaired. The supervisor then told claimant that if he had one more problem, "I will move to have you written up." Audio Record of May 31, 2019 Hearing at 16:50. The supervisor told claimant that, at that time, he would get claimant's union representative and the employer's upper management involved. Claimant interpreted this comment to mean that the supervisor wanted to have him discharged. Claimant did not think the employer had a legitimate basis to discharge him based on the list.

(9) As of late March 2019, claimant had not complained to members of management who were the supervisor's superiors about the supervisor's treatment of him or that he was concerned that the supervisor was going to have claimant discharged. Claimant did not because there were no members of management on-site other than the supervisor and claimant had never spoken to the other members of management. Those other members of management worked out of the employer's offices in Washington and Texas. Claimant did not contact the human resources department because such communications needed to be made electronically, claimant was not familiar with computers, and his password had stopped working.

(10) On March 28, 2019, claimant's supervisor again called claimant to his office. The supervisor gave claimant a printed list of the same performance deficiencies that had appeared on the handwritten list a week earlier. The supervisor told claimant that he was "moving to see" if he could have claimant discharged based on deficiencies appearing on the list. Audio Record of May 31, 2019 Hearing at 18:09. The supervisor asked claimant if he wanted to say anything in response to the listed incidents. Claimant told the supervisor that the employer was responsible for the spilled oil on the pit floor, not him, because he had notified the employer of the faulty pump and the employer had delayed fixing the problem. The supervisor responded, "That's bullshit." Audio Record of May 31, 2019 Hearing at 23:39. Claimant then stated, "I'm done" and left, intending to quit work. Audio Record of May 31, 2019 Hearing at 23:40.

(11) Claimant voluntarily left work on March 28 because he thought his discharge was imminent and, if he was discharged, the supervisor would communicate negative information about him to prospective employers that would impede his ability to secure new employment.

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). "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). Leaving work without good cause includes resigning to avoid a discharge or potential discharge for misconduct. OAR 471-030-0038(5)(b)(F). Claimant was 40 percent disabled from a brain injury, which is a permanent or long-term "physical or mental impairment" as defined at 29 CFR §1630.2(h). A claimant with an impairment who quits work must show that no reasonable and prudent person with the characteristics and qualities of an individual with such an impairment would have continued to work for their employer for an additional period of time.

Order No. 19-UI-134767 concluded that claimant did not have good cause for leaving work to avoid being discharged. Apparently based on claimant's uncontroverted hearing testimony, the order first found that had the employer discharged claimant, the discharge or potential discharge would not have been for misconduct. Order No. 19-UI-134767 at 5. The record supports that conclusion. The order then reasoned that claimant did not show that the employer's discharge of him was grave reason to quit because that discharge would not have been for misconduct, which "served to lessen the likelihood of claimant's being fired." *Id.* Additionally, the order reasoned that if claimant had shown that his discharge was a grave circumstance, claimant still "had the reasonable alternative of pleading his case to the other decision-makers involved in the process and on whose judgment his continuing employment depended" in lieu of quitting. *Id.* The record does not support those conclusions.

The Supreme Court recognized in *McDowell v. Employment Dep't.*, 348 Or 605, 236 P3d 722 (2010) that under appropriate circumstances a claimant might have good cause for leaving work to avoid a discharge, not for misconduct. The circumstances that constituted good cause for the claimant in *McDowell* were that the discharge was imminent and inevitable at the time of the leaving and the discharge would be the "kiss of death" to claimant's future job prospects as a teacher. *See also Dubrow v. Employment Dep't.*, 242 Or App 1, 252 P3d 857 (2011) (a future discharge did not need to be certain

for a quit to avoid it to qualify as good cause; likelihood is not dispositive of the issue but it does bear on the gravity of the situation).

Here, claimant showed that his discharge likely was inevitable and imminent at the time he left work. Claimant's uncontroverted testimony showed that the supervisor's work criticisms of him had escalated over time, and included the supervisor refusing to take into account claimant's status as a preferred worker, continuing to criticize claimant's work, warning claimant that he was building a case against him, and telling claimant that a discharge would appear on his work record. When the supervisor's behavior culminated on March 28 with the supervisor reviving the list of deficiencies that he had warned claimant about a week earlier it was not unreasonable for claimant to conclude that the supervisor planned to act very soon to discharge him based on that list. Audio Record at 11:36 to 12:27. While the supervisor may have needed upper management's authorization to discharge claimant, claimant's uncontroverted testimony was that the supervisor's recommendations were consistently followed, or "he got what he wanted" and "discharged anybody he wanted to, everybody knew it." Audio Record at 12:04 to 12:19. It was not unreasonable for claimant to conclude that upper management was likely to follow a recommendation to discharge claimant that came from the supervisor. Claimant showed that more likely than not the employer's discharge of him was imminent and inevitable as of March 28, the date on which he left work.

Claimant also showed that if the employer discharged him it likely would have a negative impact on his future employment prospects. Claimant understood that the supervisor had contacts and influence throughout the industry, and claimant knew not to "cross" the supervisor. Audio Record of August 7, 2019 Hearing at 13:14 to 13:37. Claimant also had in the past experienced difficulty in securing employment because employers were reluctant to hire a worker with a brain injury, which likely would compound the impact of a negative job reference from the supervisor. Given this combination of factors, claimant showed that if the employer discharged him, it likely would have a stigmatizing impact on his prospects to secure future employment.

Claimant did not have reasonable alternatives to quitting work under the circumstances. It was not unreasonable for claimant to conclude that it would be futile to seek the intervention of other decision makers that might be involved in his discharge in order to forestall the discharge, because they did not work on site, were located out of state, claimant did not know them, and he had never spoken to them. With respect to the employer's human resources office, it was located in Texas and claimant did not have the computer skills to contact that office, nor was his password working. On this record, seeking the intervention of other decision makers or the human resources department likely was not a reasonable alternative to quitting, and the preponderance of the evidence does not suggest that other alternatives existed at the time he quit.

Claimant left work when he did with good cause. Claimant is not disqualified from receiving unemployment insurance benefits.

DECISION: Order No. 19-UI-134767 is set aside, as outlined above.

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

DATE of Service: September 26, 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 ໂດຍປະຕິບັດຕາມຄໍາແນະນຳທີ່ບອກໄວ້ຢູ່ຕອນທ້າຍຂອງຄໍາຕັດສິນນີ້.

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 الاستئناف 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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