

EMPLOYMENT APPEALS BOARD DECISION
2019-EAB-0833

Modified
Not Disqualified June 2, 2019 through June 15, 2019 (Weeks 23-19 through 24-19)
Disqualified Effective June 16, 2019 (Week 25-19)

PROCEDURAL HISTORY: On June 25, 2019, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant from work, but not for misconduct, within 15 days of the date claimant planned to voluntarily quit work without good cause, and was disqualified from benefits effective June 16, 2019 (decision # 154107). Claimant filed a timely request for hearing. On August 1, 2019, ALJ Shoemake conducted a hearing, and on August 9, 2019 issued Order No. 19-UI-134760, modifying decision # 154107 by concluding that claimant voluntarily left work and was disqualified from benefits effective June 2, 2019.¹ On August 27, 2019, claimant filed an application for review with the Employment Appeals Board (EAB).

EAB did not consider claimant's written argument when reaching this decision because she did not include a statement declaring 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). Claimant's argument also referenced information that was not part of the hearing record, and asked that EAB let her know how to submit the additional evidence. The letter EAB mailed to the parties on September 6, 2019 included information about submitting additional evidence, and providing such evidence and copies of the written argument to the other party. Claimant did not thereafter submit any additional evidence, or notify EAB that she provided a copy of her argument to the employer, and the deadline for doing so has expired.

FINDINGS OF FACT: (1) Rite Aid employed claimant as a wellness ambassador from November 1, 2018 to June 7, 2019.

(2) Claimant had concerns that she was being harassed or sexually harassed at work by the store leader. Claimant called, texted, and told the district manager that she had something to discuss, and passed the district manager a note saying so, but the manager was not responsive to claimant's attempts to have a

¹ The order under review stated that it affirmed decision # 154107, but since the outcome changed both the nature of the work separation and the effective date of claimant's disqualification, the order actually modified decision # 154107.

discussion. Claimant never communicated to the district manager that she wanted to discuss concerns the store leader was harassing or sexually harassing her.

(3) The employer had a human resources department, as noted in the employee handbook the employer provided to claimant when hired. The handbook also indicated that if an employee was being harassed or had ethics concerns that they could call or email a hotline, and provided the information about how to do so. The store manager had given claimant information about contacting the employee assistance program (EAP), which included a confidential resource for employees to report complaints or problems at the stores. Claimant did not contact human resources, call or email the hotline, or use the EAP.

(4) On June 7, 2019, claimant sent her store leader a text message indicating that she was going to quit her job and wanted the store leader to be the first to know. Claimant reported to work later and turned in a written notice. The store leader had already consulted with human resources about how to handle claimant's situation, since claimant had been having serious health problems and a sick child; they decided to terminate claimant's employment immediately on June 7th so she did not have to try to work when recovering from illness, but decided to give her full pay for the two-week notice period she would have worked had she not been terminated.

CONCLUSIONS AND REASONS: The employer discharged claimant, not for misconduct, within 15 days of the date claimant planned to voluntarily leave work without good cause. Claimant therefore is not disqualified from receiving benefits during the week in which the discharge occurred through the week prior to the week in which she planned to quit work, and is disqualified from benefits beginning the week in which the planned voluntary leaving was to occur.

Individuals who are discharged for misconduct or voluntarily leave work without good cause are disqualified from receiving unemployment insurance benefits effective the week in which the separation occurred.² However, when an individual has notified the employer that they will leave work on a specific date, and it is determined that the voluntary leaving would be for reasons that do not constitute good cause, and the employer discharged the individual, not for misconduct, within 15 days prior to the planned voluntary leaving date, then the separation is adjudicated as if the planned voluntary leaving had occurred, except the individual is eligible for benefits "the period including the week in which the actual discharge occurred through the week prior to the week of the planned voluntary leaving date."³

Voluntary Leaving. Claimant notified the employer on June 7th that she was going to leave work in two weeks, on June 21st. The first question therefore is whether claimant had good cause for the planned voluntary leaving. Claimant has the burden to establish good cause by a preponderance of the evidence.⁴ "Good cause . . . is such that a reasonable and prudent person of normal sensitivity, exercising ordinary common sense, would leave work."⁵ The standard is objective.⁶ 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.

² ORS 657.176(2).

³ ORS 657.176(8).

⁴ See *Young v. Employment Department*, 170 Or App 752, 13 P3d 1027 (2000).

⁵ OAR 471-030-0038(4) (December 23, 2018).

⁶ *McDowell v. Employment Department*, 348 Or 605, 612, 236 P3d 722 (2010).

Claimant alleged that she was subjected to repeated instances of harassment and sexual harassment by her store leader, including instances in which the manager read claimant a sexual poem she wrote, showed claimant a video in which a coworker had a visible erection, exposed claimant to naked pictures of herself and men, and laughed when claimant objected to those things as unprofessional.⁷ Claimant further alleged that she was not allowed to complain to anyone other than the store leader and district manager, neither of whom were willing to do anything to address the problem. Taken alone, claimant's testimony described a situation of gravity and a lack of reasonable alternatives to leaving work.

The store leader, however, testified that none of that happened, and that it was claimant who tended to be sexual and use sexual innuendo in the workplace.⁸ The store leader testified that the hearing was the first time she was hearing claimant's complaints of harassment, and that none of them were true.⁹ The store leader also refuted claimant's claim that she had no avenues through which to report her concerns by providing unrefuted testimony that contact information for human resources and a hotline were in the employee handbook claimant received upon hire, and that the store leader had provided claimant with another resource through which she could complain.

While claimant referred to the existence of text messages and surveillance video that would substantiate that her version of events was more credible than that of the employer's store leader, no such evidence was offered into the hearing record or presented to EAB on review. The sum total of the evidence about the circumstances that prompted claimant to quit work when she did was irreconcilably conflicting testimony by the individuals involved in most of the incidents. Absent a basis for concluding that either witness was more or less credible than the other, the evidence as to what happened was equally balanced. Where the evidence is equally balanced, the party with the burden of persuasion – here, claimant – has failed to meet that burden.

The preponderance of the evidence in the record does not show that claimant had good cause to quit work. Claimant's planned voluntary leaving on June 21st therefore would have been without good cause.

Discharge. The employer discharged claimant on June 7th, after she submitted notice of her resignation, but within 15 days prior to the date claimant planned to quit work. The next issue is therefore whether the discharge was for misconduct. “[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.”¹⁰

The employer discharged claimant on June 7th because she was having health issues and the employer wanted claimant not to have to work out her two weeks' notice. The reason the employer decided to discharge claimant is not attributable to claimant as misconduct.

Notably, the employer had decided to paid claimant full wages during the two week period following the discharge. The employer's decision to pay claimant did not change the nature or the date of the

⁷ See e.g. Audio recording at 16:00 to 16:45; 17:00 to 17:10.

⁸ Audio recording at 31:00 to 31:30.

⁹ Audio recording at 31:45 to 32:15.

¹⁰ See ORS 657.176(2)(a); OAR 471-030-0038(3)(a).

discharge, because the continuing relationship between claimant and the employer was severed on June 7th when the employer determined it was no longer willing to employ claimant.¹¹

The employer therefore discharged claimant, not for misconduct, effective June 7th, less than 15 days before the date of claimant's planned voluntary leaving without good cause.

Conclusion and Disqualification Period. Because the employer discharged claimant, not for misconduct, within 15 days of claimant's planned voluntary leaving without good cause, the work separation must be adjudicated as a voluntary leaving. On the basis of claimant's voluntary leaving, she is disqualified from receiving unemployment insurance benefits. However, claimant is eligible for benefits for the week in which the discharge occurred (June 2, 2019 through June 8, 2019, week 23-19) and the week prior to the week of her planned voluntary leaving (June 9, 2019 through June 15, 2019, week 24-19). Claimant is then disqualified from benefits under ORS 657.176(2)(c) effective June 16, 2019, and until she ends the disqualification by earning four times her weekly benefit amount from work in subject employment.

DECISION: Order No. 19-UI-134760 is modified, as outlined above.

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

DATE of Service: October 2, 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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¹¹ *See* OAR 471-030-0038(1)(a) (defining "work"); OAR 471-030-0038(2)(b) (defining a "discharge" as when the employee is willing to continue to work for the same employer for an additional period of time but is not allowed to do so).



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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