

EMPLOYMENT APPEALS BOARD DECISION
2019-EAB-0922

Affirmed
No Disqualification

PROCEDURAL HISTORY: On July 30, 2019, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant voluntarily left work with good cause (decision # 104332). The employer filed a timely request for hearing. On September 4, 2019, ALJ F. Scott conducted a hearing, and on September 6, 2019, issued Order No. 19-UI-136226, affirming the Department's decision. On September 23, 2019, the employer filed an application for review with the Employment Appeals Board (EAB).

EAB did not consider the employer's written argument when reaching this decision because they 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).

The ALJ explained the procedure for the hearing, but did not explain the legal standards for determining if the work separation was a discharge or a quit, or the burden of proof on the parties in either a discharge or a quit case. However, because the record does not show that either party was prejudiced by the ALJ's omission, EAB did not remand this matter for another hearing.

FINDINGS OF FACT: (1) USA Roofing & Waterproofing LLC employed claimant from March 2018 until June 12, 2019 as crew leader and roof installer.

(2) By June 2019, claimant and the owner did not have a good working relationship. The owner considered claimant "argumentative" and often argued with claimant. Audio Record at 20:55. Claimant felt mistreated and "picked on" by the owner, who often yelled at him. Audio Record at 7:57.

(3) The employer had a zero tolerance fall prevention safety policy that required all employees to be tied off any time they were working at heights of six feet or higher. On June 12, 2019, the owner arrived at a work site in the morning where claimant was working 30 feet above the ground. Claimant was not tied off as required by the employer's fall prevention policy. The owner began to yell at claimant. Claimant told the owner to "leave [him] alone," and became "argumentative," which angered the owner and caused the situation to become "heated." Audio Record at 8:12; 18:35 to 18:36. The owner walked

toward claimant and “got really close into [claimant’s] face,” making claimant feel “uncomfortable.” Audio Record at 8:22 to 8:28. Claimant pushed the owner back, away from him. The owner “charged at [claimant] and grabbed [claimant],” and then “drew back and hit [claimant].” Audio Record at 8:32 to 8:39. Claimant was upset, picked up his belongings, and left work.

(4) Later on June 12, 2019, the owner called claimant and sent him a text message stating, “I need guys to work, so if you’re finished, let me know. And if you are, I understand. I’m going to start looking for replacements.” Audio Record at 18:56 to 19:04. Claimant did not respond to the owner’s call or text because he “was not in the mood to talk at the time.” Audio Record at 9:09 to 9:15. Sometime before June 22, 2019, claimant received his remaining wages from the employer.

(5) On June 22, 2019, claimant told the owner that he needed to work and asked the owner to allow him to return to work. The owner agreed that claimant could work for him again as a roof installer, but not as a crew leader.

(6) On June 22, 2019, the owner attempted to provide claimant with details about a work assignment on June 23, 2019. The owner believed that claimant received the information.

(7) On June 23, 2019, the owner expected claimant to report to work. Claimant did not receive the information the owner attempted to provide him regarding work on June 23, and did not report to work on June 23. The owner told a coworker to call claimant. Claimant did not receive a call from the coworker.

(8) On June 24, 2019, claimant sent the owner a text message stating, “I need to work . . . please let me know what is going on.” Audio Record 20:02 to 20:06. The owner called claimant and told him that he was “fired” because he was a no call, no show for work on June 23, 2019. Audio Record at 20:06.

CONCLUSIONS AND REASONS: Claimant voluntarily left work with good cause.

Work Separation. The first issue in this case is the nature of the work separation. If the employee could have continued to work for the same employer for an additional period of time, the work separation is a voluntary leaving. OAR 471-030-0038(2)(a) (December 23, 2018). If 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 by the employer, the separation is a discharge. OAR 471-030-0038(2)(b).

On June 12, 2019, when claimant left work, the owner sent claimant a text message asking if claimant “was finished” or would return to work. The owner’s message shows that, as of June 12, claimant could have continued to work for the employer for an additional period of time. However, claimant did not respond to the text message. It was not until June 22, 2019 that claimant discussed the possibility of returning to work with the owner. Although the owner was willing on June 22 to re-employ claimant, the parties’ agreement on June 22 did not change the nature of the work separation that occurred on June 12, when claimant left work and was not willing to return to work, or even speak with the owner. The work separation was a quit.

Voluntary Quit. 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). 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 quit work on June 12 because the owner mistreated him at work. The owner often yelled at claimant and he and claimant often argued. Just such an argument on June 12 culminated in the owner hitting claimant. The owner asserted that he hit claimant in self-defense. Audio Record at 18:40 to 18:48. However, the record shows that claimant had pushed the owner away from him when the owner came “uncomfortably” close to claimant, and that the owner “charged” claimant at that point. Once claimant pushed the owner away, the owner could have retreated rather than moving back toward claimant and hitting him. Moreover, even if the owner considered claimant’s conduct argumentative or insubordinate, yelling at and hitting claimant was an improper response. The record shows that the owner and claimant had repeated disagreements in the past. Yelling and violence could reasonably reoccur based on the escalated tension between the owner and claimant. No reasonable and prudent person would continue to work in an environment where they feared mistreatment of that type. *See McPherson v. Employment Division*, 285 Or 541, 557, 591 P2d 1381 (1979) (a claimant is not required to “sacrifice all other than economic objectives and *** endure racial, ethnic, or sexual slurs or personal abuse, for fear that abandoning an oppressive situation will disqualify the worker unemployment benefits). *See also* Appeals Board Decision 11-AB-3308 and Appeals Board Decision 11-AB-2272 (supervisors’ fits of temper and verbal abuse created good cause for voluntarily leaving work). Claimant faced a grave situation because he could not avoid working with the employer’s owner, and claimant did not have a reasonable alternative but to leave work on June 12.

Even had this decision been decided as a discharge based upon claimant’s failure to contact the employer on June 22 or June 23 about becoming re-employed, claimant would not have been disqualified from receiving benefits based on this work separation. The evidence is no more than equally balanced between claimant and the employer about whether claimant received the details from the owner about reporting to work on June 23. Because the employer did not show by a preponderance of the evidence that claimant knew or should have known the employer expected him to work on June 23, claimant’s failure to report to work or call the employer on June 23 was not misconduct.¹

DECISION: Order No. 19-UI-136226 is affirmed.

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

DATE of Service: October 28, 2019

¹ ORS 657.176(2)(a) requires a disqualification from unemployment insurance benefits if the employer discharged claimant for misconduct connected with work. “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). *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976) (in a discharge case, the employer has the burden to establish misconduct by a preponderance of evidence).

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 desisyong ito.

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 ໄດ້ໂດຍປະຕິບັດຕາມຄໍາແນະນຳທີ່ບອກໄວ້ຢູ່ຕອນທ້າຍຂອງຄໍາຕັດສິນນີ້.

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.

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