

EMPLOYMENT APPEALS BOARD DECISION
2019-EAB-0931

Modified
Benefits Allowed Weeks 50-18 to 51-18
Benefits Denied Effective Week 52-18 Until Requalified

PROCEDURAL HISTORY: On July 25, 2019, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant voluntarily quit work without good cause, and was disqualified from receiving benefits effective December 16, 2018 (decision # 90635). On August 14, 2019, claimant filed a timely request for hearing. On September 16, 2019, ALJ Wyatt conducted a hearing, and on September 24, 2019 issued Order No. 19-UI-136968, concluding the employer discharged claimant, but not for misconduct, and claimant was not disqualified from receiving unemployment insurance benefits because of this work separation. On September 30, 2019, the employer filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) North Clackamas School District #12 employed claimant as assistant secretary; except for two years claimant took off work, claimant was employed from approximately 2004 through December 11, 2018.

(2) Claimant previously worked for one school in the district. She experienced problems with the employer's human resources department, which had erroneously denied claimant's FMLA-OFLA leave applications. Claimant had received written warnings for using what she thought should have been protected leave. Claimant filed a complaint to the Oregon Bureau of Labor and Industries; the process was exhausting and emotionally taxing for claimant, and ultimately the complaint was dismissed.

(3) Subsequent to claimant's complaint about the employer's handling of her FMLA-OFLA applications, the employer revised the website and some policies regarding employees' use of FMLA-OFLA protected leave for their children. Claimant also transferred to a new school. The employer agreed to remove the written warnings from her file.

(4) In late 2017 through October 2017, claimant worked for Alder Creek. Things were "really great" for one year, and she received a good performance review. Transcript at 16.

(5) In October 2018, a new principal began working at Alder Creek. He almost immediately criticized claimant for missing too much time taking her child to medical appointments. Claimant thought he was criticizing leave that was protected under FMLA-OFLA, and thought that was inappropriate.

(6) The principal also engaged in conduct claimant considered harassing. Claimant was late performing parking lot duty because she was on the phone with a student's parent. The principal raised his voice to her; she felt unfairly scolded, and told the supervisor he was unprofessional and inappropriate. The principal suspended claimant for a day. Claimant asked her union for mediation after the incident, and to help her discuss her workload and issues with the principal. Claimant felt the union was unhelpful.

(7) The principal assigned claimant to perform duties outside when there was an air quality issue. Claimant thought the principal knew that working outside would aggravate her asthma because she had made a joke about her asthma earlier the same day. Claimant suspected that the principal had asked her to work outside knowing that it would be difficult for her.

(8) On one occasion, a coworker said he wanted to perform parking lot duty by himself. That day, claimant did not do her scheduled parking duty. Claimant was later instructed that the principal was the only person who could direct whether she did parking duty. On two other occasions, claimant was late for lunch duty because she was helping parents who had asked for her help. The principal told claimant that she should have performed lunch duty and told the parents she would help them another time.

(9) Claimant considered all of those events to constitute harassment by the principal.

(10) The principal became concerned about claimant's punctuality with respect to her scheduled duties. On December 10, 2018, the principal gave claimant a letter instructing her to attend a meeting in human resources the next day. Claimant did not think she would be treated fairly at the meeting. She was concerned the process would be stressful and would not work out in her favor.

(11) On December 10, 2018, claimant decided not to attend the meeting and submitted a two-week notice of her intent to quit her job. Claimant had in the past gone to human resources, the superintendent, and the school board with other concerns, but did not report her concerns about the principal to them prior to quitting work because they were either "not really available" or did not take complaints about individuals. Transcript at 26. She was also concerned that one of the employer's associate human resources directors had a personal problem with her.

(12) The employer thought it would be appropriate to pay claimant for her notice period in lieu of having her continue working. On December 11, 2018, the employer discharged claimant, approximately 13 days prior to the date of her planned resignation.

CONCLUSIONS AND REASONS: The employer discharged claimant, but not for misconduct, within 15 days of claimant's planned voluntary leaving without good cause.

The order under review concluded that the employer discharged claimant, but not for disqualifying misconduct, thirteen days before claimant planned to quit her job. Order No. 19-UI-136968 at 3. The record supports the order's conclusion. "Misconduct" means "a willful or wantonly negligent violation of the standards of behavior which an employer has the right to expect of an employee is misconduct."

OAR 471-030-0038(3)(a) (December 23, 2018). In this case, the employer decided it would be appropriate to give claimant a payout in lieu of working through her notice period, and did not allege or show that claimant engaged in misconduct.

The order under review also noted that ORS 657.176(8) could potentially apply to claimant's work separation, because her discharge occurred within 15 days of the date she planned to voluntarily quit her job. ORS 657.176(8) provides:

For purposes of applying subsection (2) of this section, when an individual has notified an employer that the individual will leave work on a specific date and it is determined that: (a) The voluntary leaving would be for reasons that do not constitute good cause; (b) The employer discharged the individual, but not for misconduct connected with work, prior to the date of the planned voluntary leaving; and (c) The actual discharge occurred no more than 15 days prior to the planned voluntary leaving, then the separation from work shall be adjudicated as if the discharge had not occurred and the planned voluntary leaving had occurred. However, the individual shall be eligible for benefits for the period including the week in which the actual discharge occurred through the week prior to the week of the planned voluntary leaving date.

The order under review summarily stated that law did not apply to claimant's case, "because I [the ALJ] am persuaded that claimant's leaving would have been for good cause under Employment Department law," and ORS 657.176(8) only applies to cases where the voluntary leaving was without good cause. The record does not support the summary conclusion that claimant would have had good cause to quit her job had she not been discharged, however, and further analysis is necessary to determine the applicability of ORS 657.176(8) to claimant's work separation.

For purposes of determining whether an individual had good cause to quit work, "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). "[T]he reason must be of such gravity that the individual has no reasonable alternative but to 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.

Claimant planned to voluntarily leave work because the principal and human resources wanted to meet with her about her punctuality with respect to performing her duties, and she was concerned the process would be stressful and unfair because she thought the principal harassed her and one of the human resources people had a personal problem with her. However, claimant's situation was not of such gravity that she had no reasonable alternative but to leave work. Although the principal had raised his voice to claimant, that occurred over two months earlier and does not appear to have been repeated. Claimant alleged that the principal intentionally assigned her to outside duties knowing the poor air quality would affect her asthma, yet testified that she had only made a joking comment about her asthma that day and had not informed him at the time of the assignments that she was unable to do them. The principal's instructions to claimant with respect to prioritizing lunch duty over speaking with parents appears to have been within his rights as a supervisory manager; the instructions not to refrain from performing her

duties without his consent likewise appear to be within his rights. The situations claimant described do not appear to have constituted harassment, nor did claimant establish that she faced a grave situation.

Claimant had reasonable alternatives to quitting work when she planned to quit. She had the alternative to attend the meeting on December 11th to learn what the principal's concerns were and discuss the validity of them. She had the reasonable alternative to ask for union representation at that meeting, and seek advice after the meeting ended about what her options were under the employer's collective bargaining agreement, or if she indeed had any options. She had the alternative of discussing her specific concerns with the principal and human resources. If she felt they would not listen to her because of their history with her, or if she was unwilling to talk to them because of her perceptions that they would treat her unfairly, claimant also had the alternatives to report her concerns to the superintendent and school board. Had she complained and the employer's response been unsatisfactory, further complaints would likely have been futile. She had not, however, at the time she decided to quit work, notified the employer that she thought her principal was harassing her or asked the employer to rectify the situation. She had previously complained to the employer and the Bureau of Labor and Industries, and as a result of her complaints the employer had updated its website, changed policies, transferred her, and removed warnings from her file. Although stressful for claimant, given the outcome of prior complaints and the options available to claimant at the time she decided to resign and the employer's response to claimant's past concerns, it was more likely than not reasonable for claimant to have pursued those same avenues of complaint under the circumstances described, rather than quitting work.

For those reasons, claimant's planned voluntary leaving would have been without good cause. Because the employer discharged claimant, but not for misconduct, 15 days prior to the date she planned to voluntarily leave work without good cause, ORS 657.176(8) requires that claimant be disqualified from receiving benefits effective December 23, 2018 (week 52-18). However, she is not disqualified from benefits during the weeks of December 9, 2018 through December 22, 2018 (weeks 50-18 to 51-18).

DECISION: Order No. 19-UI-136968 is modified, as outlined above.

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

DATE of Service: November 7, 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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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 ໄດ້ ໂດຍປະຕິບັດຕາມຄໍາແນະນໍາທີ່ບອກໄວ້ຢູ່ຕອນຫ້າຍຂອງຄໍາຕັດສິນນີ້.

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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