EO: 200
BYE: 201935

State of Oregon
Employment Appeals Board
875 Union St. N.E.
Salem, OR 97311

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VQ 005.00
DS 005.00

EMPLOYMENT APPEALS BOARD DECISION
2019-EAB-1027

Reversed
Disqualification

PROCEDURAL HISTORY: On August 21, 2019, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant voluntarily left work without good cause, and was disqualified from receiving benefits effective July 21, 2019 (decision # 63018). On September 9, 2019, claimant filed a timely request for hearing. On September 30, 2019, ALJ Scott conducted a hearing, and on October 4, 2019 issued Order No. 19-UI-137536, concluding that the employer discharged claimant, but not for misconduct. On October 24, 2019, the employer filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Wireless Structures Consulting, Inc. employed claimant as a forklift driver from February 27, 2019 to July 26, 2019.

(2) Claimant and a lead worker had heated arguments at work in which claimant's lead worker yelled. The lead worker tended to yell at everyone when he was upset about personal matters. In May 2019, the lead worker apologized after an argument, and claimant and the lead worker both told a supervisor that they had resolved the problem.

(3) On approximately July 11, 2019, claimant and the lead worker had another argument in which the lead worker yelled at claimant and told him he was not performing his duties correctly. The lead worker sent claimant home to cool down, and told their supervisor he had done so. The supervisor spoke with claimant as claimant left. Claimant told the supervisor that he was giving notice of his intent to quit work effective July 26, 2019, and he was going to find a job somewhere else. On July 12, 2019, the employer began advertising to hire a new forklift driver.

(4) After claimant resigned, claimant perceived that the lead worker's behavior changed. Claimant thought he could work with the lead worker again, or maybe transfer to the welding department, so he could keep his job.

(5) On July 23, 2019, claimant asked the supervisor if he could withdraw his resignation and continue working, but said he would understand if the employer did not allow it and had other work lined up. He

said the only reason he was quitting was that the lead worker yelled at him. The supervisor told claimant he would see what he could do.

(6) The supervisor spoke to the owner about claimant's request to withdraw his resignation. They considered claimant's past issues, where they were in the process of hiring claimant's successor, and the direction the company was heading. On July 25, 2019, the employer decided not to allow claimant to rescind his resignation, and on July 26, 2019, the effective date of claimant's resignation, claimant's employment ended.

CONCLUSIONS AND REASONS: Claimant voluntarily left work without good cause.

Nature of the work separation. The Department concluded that claimant voluntarily left work without good cause. Decision # 63018. The order under review concluded that the employer discharged claimant, but not for misconduct. Order No. 19-UI-137536 at 2. The first issue is therefore 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.[1] 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.[2]

On approximately July 11, 2019, claimant notified the employer of his intent to resign from his job on July 26, 2019. Claimant could have continued to work for the employer indefinitely had he not chosen to submit his resignation. On July 23rd, however, claimant changed his mind about quitting his job and asked to withdraw his resignation. The employer refused. The question is whether the employer's refusal changed claimant's work separation from a quit to a discharge.

The order under review concluded it did, reasoning under OAR 471-030-0038(2) that the employer's refusal to allow claimant to withdraw his resignation meant that claimant was willing to continue working for the employer but the employer would not allow him to do so, making the work separation a discharge.[3] However, while OAR 471-030-0038(2) "eliminates most disputes" about the nature of the work separation, "some circumstances are not fully resolved by the language of the rule" and additional analysis is required.[4] This is one of those cases.

There is no factual dispute that the employer refused to allow claimant to withdraw his resignation, indicating that the employer was not willing to allow claimant to continue to work past his notice period. However, there is also no factual dispute that the employment relationship between claimant and the employer would not have ended when it did except that claimant decided to quit his job and voluntarily submitted notice of his resignation to the employer. The question is, then, whether the employer's refusal to allow claimant to rescind his voluntary resignation changes the nature of the work separation from a voluntary leaving caused by claimant or a discharge caused by the employer. Guidance from the Oregon Court of Appeals suggests that it does not.

[1] OAR 471-030-0038(2)(a) (December 23, 2018).
[2] OAR 471-030-0038(2)(b).
[3] Order No. 19-UI-137536 at 3.
[4] *Roadhouse v. Employment Dep't.*, 283 Or. App. 859, 391 P.3d 887 (2017) (so stating).

In *Schmelzer v. Employment Div.*, claimant and the employer agreed on May 12th that claimant's employment would end on May 22nd, contingent on claimant maintaining insurance coverage for a dental appointment scheduled for the end of May.[5] On May 20th or 21st, the employer told claimant that she was insured until the end of May, thus resolving the only contingency concerning the planned end to claimant's employment. Claimant later decided that she wanted to work until May 29th to be doubly sure that she maintained insurance coverage and the employer would not allow her to do so. Claimant argued on appeal that the employer's refusal to extend the date of her employment meant that the employer had discharged her. The Court affirmed EAB's conclusion that claimant had voluntarily left work.

In *J. R. Simplot v. Employment Div.*, claimant submitted notice of his resignation with an effective date of June 23, 1989.[6] The employer notified claimant he would not be allowed to work after June 9, 1989, even though claimant was willing to continue to work through his notice period. EAB concluded that claimant was discharged. The Court reversed EAB's decision, concluding that EAB had erred in concluding that claimant was discharged. Reasoning in part that "[t]he resignation was totally the idea of claimant" and that claimant "admitted several times in his testimony that he quit his employment," the Court concluded that claimant quit his job.

In *Employment Dept. v. Hemke*, the Court reversed EAB to determine that claimant quit his job because he "agreed to a mutually acceptable termination date."[7] Likewise, in *Employment Dept. v. Shurin*, the Court reversed EAB to determine that claimant – acting as dual roles as an employee and corporate director for his corporation – mutually agreed with himself to sell the business and end his employment, had quit his job because "ignor[ing] the role claimant played in effecting his own termination" would "elevate form over substance."[8]

We also decline to elevate form over substance in deciding this case. This case is most akin to *Counts v. Employment Dept.*, where the Court affirmed EAB's decision that claimant voluntarily left work because he "objectively demonstrated that he was no longer willing to work for the employer when he submitted his notice of resignation," and, when he changed his mind, "expressed a willingness to continue working if the [employer] wanted him to do so."[9] The Court concluded that there was "substantial evidence to support the Board's finding that petitioner was no longer willing to work for the city when he submitted his notice of resignation" and that EAB's "finding that claimant later was willing either to allow his resignation to stand or to work is also supported by substantial evidence."

In this case, claimant asked to withdraw his resignation, but also said he would understand if the employer did not allow it and had some other things lined up. The preponderance of the evidence in this case is that claimant's resignation was "totally [his] idea," that the employer did not have plans to discharge claimant at the time, and that claimant set the termination date, to which the employer agreed. The fact that the employer did not agree to change that mutually agreed upon date did not change the nature of this work separation from a quit to a discharge. The preponderance of the evidence is that claimant voluntarily left work.

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[5] *Schmelzer v. Employment Div.*, 57 Or. App. 759, 646 P.2d 650 (1982).
[6] *J. R. Simplot v. Employment Div.*, 102 Or. App. 523, 795 P.2d 579 (1990).
[7] *Employment Dept. v. Hemke*, 155 Or. App. 303, 963 P.2d 750 (1998).
[8] *Employment Dept. v. Shurin*, 154 Or. App. 352, 959 P.2d 637 (1998).
[9] *Counts v. Employment Dept.*, 159 Or. App. 22, 976 P.2d 96 (1999).

Voluntary leaving. 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.[10] "Good cause . . . is such that a reasonable and prudent person of normal sensitivity, exercising ordinary common sense, would leave work."[11] "[T]he reason must be of such gravity that the individual has no reasonable alternative but to leave work."[12] The standard is objective.[13] 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 did not show good cause for quitting his job. Although claimant had unpleasant interactions with the lead worker that included yelling, and generally speaking yelling in the workplace is inappropriate, the record does not show that was a grave situation that left him no reasonable alternative to quit his job when he did. The circumstances under which claimant quit his job suggest that he likely quit in the heat of the moment after being sent home after an argument with the lead worker, and not because he thought his working conditions were too grave to continue. Claimant did not have complaints about the lead worker during his notice period. Additionally, had claimant subjectively considered his situation grave, it is unlikely that he would request to withdraw his resignation and return to work under the supervision of the same lead worker that had caused him to quit in the first place.

Claimant also had the reasonable alternative to discuss the situation with a supervisor and allow the employer the adequate opportunity to address his concerns. For instance, claimant resolved a previous conflict with the lead worker on one occasion and told the supervisor that their relationship was fine. Claimant did not ask for the supervisor to help with the situation after that time, or communicate to the supervisor that his problems with the lead worker were ongoing. Claimant also knew there were other jobs within the company that would remove him from the supervision of the lead worker, but he did not pursue that option. Speaking with a supervisor or pursuing a transfer were reasonable alternatives to quitting work.

For those reasons, claimant's voluntary leaving was without good cause, and he is subject to disqualification from benefits until he requalifies under Employment Department law.

Alternative analysis. In the alternative, even if we had agreed with the order under review and concluded that claimant's work separation was a discharge, the outcome of this decision would likely remain the same because the discharge occurred within 15 days of claimant's planned voluntary leaving, and ORS 657.176(8) would apply.

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

[10] ORS 657.176(2)(c); *Young v. Employment Department*, 170 Or App 752, 13 P3d 1027 (2000).
[11] OAR 471-030-0038(4).
[12] OAR 471-030-0038(4).
[13] *McDowell v. Employment Department*, 348 Or 605, 612, 236 P3d 722 (2010).

> (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 first question is therefore whether or not claimant's planned voluntary leaving was for reasons that constitute good cause. For the reasons already stated, above, claimant's planned voluntary leaving would not be for good cause.

The next question is whether the employer's decision to discharge claimant within 15 days of his planned voluntary leaving was for misconduct.[14] Here, the employer decided not to allow claimant to withdraw his resignation, thus discharging him, because of past issues claimant had with his lead worker and work, where they were in the process of hiring claimant's successor, and the direction the company was heading. The employer did not attribute the decision to discharge claimant to his commission of a willful or wantonly negligent violation of the employer's standards of behavior or disregard of the employer's interest. Claimant's discharge therefore was not for misconduct.

Because, under this alternative analysis, claimant's discharge, not for misconduct, would have been within 15 days prior to the date of the planned voluntary leaving, the work separation would be adjudicated as though the discharge had not occurred and the planned voluntary leaving had occurred, except claimant would 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. Because the discharge would have occurred in the same week as the planned voluntary leaving, however, claimant would still be disqualified from receiving benefits for the whole period.

DECISION: Order No. 19-UI-137536 is set aside, as outlined above.

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

DATE of Service: <u>November 27, 2019</u>

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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[14] "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).

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

هذا القرار قد يؤثر على منحة البطالة الخاصة بك، إذا لم تفهم هذا القرار، إتصل بمجلس منازعات العمل فورا، 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 دستورالعمل موجود در پایان آن، از دادگاه تجدید نظر اورگان درخواست تجدید نظر کنید.

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