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

428
DS 005.00
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# EMPLOYMENT APPEALS BOARD DECISION
# 2019-EAB-1102

*Modified*
*Eligible Week 38-19*
*Disqualification Effective Week 39-19*

**PROCEDURAL HISTORY: PROCEDURAL HISTORY:** On October 11, 2019, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant, but not for misconduct, within 15 days of a planned voluntary leaving without good cause (decision # 80608). Claimant filed a timely request for hearing. On November 8, 2019 and November 12, 2019, ALJ Monroe conducted a hearing, and on November 15, 2019, issued Order No. 19-UI-139886, affirming the Department's decision. On November 19, 2019, claimant filed an application for review with the Employment Appeals Board (EAB).

**FINDINGS OF FACT:** (1) Gladstone Machine Works employed claimant as a shop manager from August 17, 2018 to September 17, 2019.

(2) Although claimant was a skilled machinist, he believed that his position involved managing shop employees only rather than working on a machine when a business necessity occurred. When such situations arose, claimant refused to work on a machine, which drew criticism from the employer, which in turn irritated claimant who considered such criticism "being bullied." Exhibit 1; Exhibit 2 (Text messages between claimant and the employer's chief financial officer (CFO)).

(3) Prior to April 2019, the employer gave claimant instructions concerning the information and documentation that was necessary for him to provide to justify equipment purchases, orders, or shop supplies at the location where claimant worked. On April 2, 2019, an employer owner sent claimant an email criticizing his credit card purchases and orders because he had not provided the necessary documentation, and suspending his authority to use his employer credit card or otherwise order any shop supplies. Exhibit 2 (April 2, 2019 email). Claimant considered the employer's email a "threat." Exhibit 1.

(4) On August 13, 2019, claimant fired an experienced machinist (EL) because he threatened to physically harm a coworker (JR), who admittedly started a verbal confrontation between them by making a degrading comment to EL. That day, claimant sent a summary email to the employer's human

resources department notifying it of his actions in terminating EL and why, but omitted mention of JR's role in starting the confrontation. The employer conducted an investigation, learned how the confrontation started, that JR felt badly about making the degrading comment to EL, and that JR was okay with having EL reinstated. The employer then rehired EL because he was a valuable machinist working on an important order for a customer the employer determined would not get completed without EL's work. Exhibit 2 (August 26, 2019 text message to claimant). When claimant learned that the employer had rehired EL, he became upset because he believed his authority as shop manager had been undermined. Thereafter, claimant complained to the CFO that he felt threatened by EL after his return to the shop. When asked by the CFO why he felt threatened, claimant only responded that EL was occasionally late or insubordinate and "looked at me weird." Transcript at 47. When asked by the CFO if EL had said or done anything to claimant to make him feel threatened, claimant admitted that EL had not. Transcript at 47.

(5) At or near the end of August 2019, claimant received a paycheck that showed that he had been awarded 160 hours of vacation time, just like he had in late August the year before. In 2018, the employer had given claimant that much vacation time in advance for the year as a hiring incentive. However, the employer had just finished an audit and was told it was necessary for claimant to accrue his vacation on a per month basis, in advance, as other employees did. Consequently, on claimant's next paycheck the 160 hours were deleted and his paycheck showed only 1/12 of the160 hours had been accrued. When claimant complained, the CFO explained the reason for the employer's action and that claimant had not lost the 4 weeks' vacation per year he had been promised at hire, as after 12 months, he would have accrued the same 160 hours.

(6) At about the same time, claimant also complained that he had not been awarded 40 hours of additional annual paid time off (PTO) he also had been promised prior to hire. However, when the CFO asked for documentation, claimant could not provide it, even though the issue had been clarified before claimant's hire. An earlier email from the employer had confirmed "Four weeks vacation to start. You will also be eligible to take the days…non-paid personal time off…that you may need from time to time even if you've already used your four weeks…" Exhibit 2 (June 1, 2018 email to claimant).

(7) On September 17, 2019, claimant sent an email to the CFO notifying him that claimant was resigning, effective September 27, 2019. When asked why, claimant responded,

> Everything here you promised me did not come true. You took all my authority away. I always get in trouble for things I think I've done properly…always negative emails…I'm just dead weight around here and I'm the type of guy who likes to earn his wage. This just makes it easier for me to resign because you guys were not gonna lay me off. At this point I'm taking time off or possibly retiring.

Transcript (November 8, 2019 hearing) at 40. The employer had a practice of discharging employees immediately upon receipt of a resignation notice to avoid possible sabotage to its product during the time between the notice and a proposed quit date. When claimant arrived at work on September 17, 2019, the employer discharged him immediately, consistent with its practice.

**CONCLUSIONS AND REASONS:** The employer discharged claimant, not for misconduct, within fifteen days of claimant's planned quit without good cause.

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 September 17, 2019, claimant notified the employer that he was quitting work on September 27, 2019. However, the employer did not allow claimant to work through his notice period consistent with its admitted practice in such matters. Because claimant was willing to continue working for the employer until September 27, but was not allowed to do so by the employer, the work separation was a discharge that occurred on September 17, 2019.

The employer discharged claimant because it routinely discharged individuals who quit work. They did not discharge claimant because he had engaged in conduct they considered a willful or wantonly negligent violation of the standards of behavior the employer had the right to expect of him. The employer therefore did not discharge claimant for misconduct. *See* OAR 471-030-0038(3)(a).[1]

ORS 657.176(8) states, "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."

Claimant notified the employer he would end his employment on September 27, 2019. The employer discharged him, not for misconduct, on September 17, 2019, less than 15 days prior to his planned quit date. Therefore, it is necessary to determine whether claimant's planned quit would have been without 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). "[T]he reason must be of such gravity that the individual has no reasonable alternative but to 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.

To the extent claimant quit work when he did because he believed the employer had not given him the 160 hours of annual vacation time and 40 hours of annual additional PTO he believed he had been

[1] "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).

promised in 2018, he failed to show good cause. The employer explained and claimant did not dispute that claimant was still scheduled to receive 160 hours vacation time each year with the only difference being that he would not receive the total hours in advance of accruing them but would instead accrue the same total number of hours on a monthly basis. Transcript (November 8, 2019 hearing) at 15-17, 42-43. With regard to the 40 hours of additional annual PTO claimant asserted that he had been promised around the time of his hire, the record does not show that claimant had been promised those hours. The employer's June 1, 2018 email to claimant clarified that although claimant would be allowed additional hours off beyond his vacation hours, those hours would not be paid. Under the circumstances, claimant failed to show that the employer did not give him the PTO he was promised when he was hired, and failed to show that his concerns about his PTO were so grave that he had no reasonable alternative but to leave work.

To the extent claimant quit work when he did because he believed the employer had unfairly "taken all [his] authority away" by rehiring EL shortly after claimant had terminated his employment, claimant failed to establish good cause for doing so. The employer's investigation revealed that JR did not object to the employer's desire to rehire EL because JR admitted his degrading comment to EL had started the confrontation, a fact that claimant had failed to report to the employer. The employer's investigation also revealed that claimant's reported fear of EL was not objectively reasonable because it was based solely on claimant's subjective report that EL "looked at me weird" rather than objective facts that EL had said or done anything to claimant to make him feel threatened. The employer also reported that one of the reasons it took away claimant's firing authority was because claimant had demonstrated bias in making prior firing recommendations against EL because EL previously had criticized claimant for not "lift[ing] a finger to do anything" in the shop and outwardly questioning, "Why does this guy not have to work?" Transcript (November 8, 2019 hearing) at 45-46. However, even after the employer's investigation, the only limitation they placed on claimant's firing authority was that he was required to consult with them before making any such decisions. The employer placed no limitation on claimant's authority to hire employees. Claimant failed to show that that reported reason for quitting work was so grave that a reasonable and prudent shop manager of normal sensitivity, exercising ordinary common sense in claimant's circumstances, would leave work.

To the extent claimant quit work when he did because he was tired of receiving "negative emails" from the employer, claimant also failed to establish good cause for quitting work for that reason. The record shows that the employer notified claimant that they expected certain documentation justifying his purchases, which claimant failed to provide, and that they had sent him a critical email for that reason. Exhibit 2 (April 2, 2019 email to claimant re purchasing). The record also shows that the employer sent claimant a critical email concerning claimant's failure to ensure that the employer's equipment at the site in question was in good working order. Exhibit 2 (April 2, 2019 email to claimant re maintenance). Although the emails may have been critical, claimant did not establish that they were unfair or unreasonable. Under those circumstances, claimant failed to show that the emails created a situation of such gravity that no reasonable and prudent shop manager in claimant's circumstances would have refrained from sending the employer a resignation notice on September 17, 2019.

For those reasons, claimant failed to establish good cause for quitting his job. His planned voluntary leaving was therefore without good cause.

Because claimant notified the employer of his intention to voluntarily quit work, without good cause, but was discharged within fifteen days of his planned quit for a reason that did not constitute misconduct, ORS 657.176(8) requires that claimant's work separation be adjudicated as though the discharge did not occur and claimant's planned voluntary leaving without good cause did occur.

Decision # 80608 and Order No. 19-UI-139886 determined that the effective date of claimant's disqualification from benefits was September 29, 2019.[2] However, ORS 657.176(8) states that in cases like these, the individual is only 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." In this case, the week in which the actual discharge occurred and the week prior to the week of the planned voluntary leaving date were both the same week, week 38-19 (September 15, 2019 through September 21, 2019). That means claimant is only considered eligible for benefits through September 21, 2019. The disqualification from benefits based upon claimant's planned voluntary leaving is effective week 39-19 (September 22, 2019 to September 28, 2019), the week in which the planned voluntary leaving occurred, which makes the effective date of the disqualification September 22, 2019, not September 29, 2019.

In sum, claimant is disqualified from benefits effective September 22, 2019.

**DECISION:** Order No. 19-UI-139886 is modified.

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

**DATE of Service: <u>December 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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[2] *See* Decision # 80608 and Order No. 19-UI-139886 at 3.

# 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.

**Employment Appeals Board -** 875 Union Street NE | Salem, OR 97311
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