EO: 700
BYE: 202047

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

218
VQ 005.00

EMPLOYMENT APPEALS BOARD DECISION
2020-EAB-0050

Modified
No Disqualification

PROCEDURAL HISTORY: On December 17, 2019, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant quit work without good cause (decision # 81119). Claimant filed a timely request for hearing. On January 15, 2020, ALJ Amesbury conducted a hearing, and on January 16, 2020, issued Order No. 20-UI-142784, modifying the Department's decision and concluding the employer discharged claimant, not for misconduct, within fifteen days of a planned quit without good cause, and that claimant was eligible for benefits for weeks 50-19 and 51-19, but disqualified beginning December 22, 2019 (week 52-19).

On January 21, 2020, claimant filed a timely application for review of Order No. 20-UI-142784 with the Employment Appeals Board (EAB). Claimant submitted several written arguments. Claimant's arguments contained information that was not part of the hearing record, and did not show that factors or circumstances beyond claimant's reasonable control prevented them from offering the information during the hearing. Under ORS 657.275(2) and OAR 471-041-0090 (May 13, 2019), EAB considered only information received into evidence at the hearing when reaching this decision.

FINDINGS OF FACT: (1) Geiser Grand, a Baker City, Oregon hotel and restaurant, employed claimant as a construction and maintenance worker from March 26, 2018 until December 10, 2019. Claimant was paid an hourly wage of $11.00 per hour which was about half of the market rate for construction workers in his area, but he was given a performance bonus that doubled his earnings if he worked most of his scheduled work hours.

(2) The employer required its hotel employees to punch a time clock to track their work hours and to provide at least 10 days' notice of planned absences. Claimant was generally aware of those expectations, but because he worked primarily a construction worker, his direct supervisor reported his work hours for him and had excused claimant from punching a time clock. Claimant's work attendance had been exemplary for more than a year, but became sporadic around November of 2019.

(3) Around that time, claimant began to experience personal difficulties with the mother of his six-month old son, when the mother "got on drugs and started going all crazy." Transcript at 7. The mother threatened to leave with their son, the threat of which forced him to miss work to care for and protect his son from the mother and also to prepare for and attend court appearances to obtain legal custody and a protective order. Exhibit 2. Claimant had attempted to obtain child care from providers that would protect his son from being taken by the mother, but when referred to various providers, learned that such child care for a six-month old child was not available. Claimant notified two of his work supervisors of his situation and that he was forced by those circumstances to miss work to provide care and security for his son while continuing to seek a satisfactory child care option. Between early November and December 9, 2019, claimant missed most of his scheduled work days for those reasons. Claimant spoke with his direct supervisor and they decided he would attempt to return to work on December 9, 2019.

(4) In the meantime, the employer's management had become dissatisfied with claimant's increasing absences from work and decided to impose requirements designed to keep track of his attendance. On December 9, 2019, the employer gave claimant an employee warning notice based on his poor attendance over the prior month. Exhibit 1, C. The employer placed claimant on probation during which time he was given new restrictions. Claimant was required to clock in and out from work at all times, and to complete leave requests in advance if he was unable to report for work. He also was prohibited from even possessing a cell phone while at work. Transcript at 20. If claimant violated these new restrictions, his performance bonus would be forfeited. Transcript at 9-10.

(5) On December 9, 2019, after being presented with the warning notice, returned home to provide care for his child. He then sent an email to the employer complaining about what he perceived as the unfairness of the new restrictions and how it had been impossible for him to attend more work than he had based on the need to provide child care and security for his child. Exhibit 1, D. Because claimant disagreed with the restrictions, he decided to quit to focus on his son's welfare and enable him to seek other work.

(6) On December 10, 2019, claimant notified the employer by email that he was giving a two-week notice of his intent to quit, unless the employer agreed to remove the condition that future performance bonuses would be based on his attendance, given that his hourly wage already was substantially below the local market wage for construction workers. Exhibit 1 (December 10, 2019 email chain). Later, on December 10, 2019, the employer sent claimant an email response in which it stated, "We accept your voluntary quit effective immediately." Exhibit 1, F.

CONCLUSIONS AND REASONS: The employer discharged claimant, but not for misconduct.

ORS 657.176(2)(a) requires a disqualification from unemployment insurance benefits if the employer discharged claimant for misconduct connected with work. ORS 657.176(2)(c) requires a disqualification from unemployment insurance benefits if a claimant leaves work voluntarily unless they prove, by a preponderance of the evidence, that they had good cause for leaving work when they did. However, However, ORS 657.176(8) provides that when an individual has notified an employer that he will quit work on a specific date, and the employer discharged him, not for misconduct, no more than fifteen days prior to that date, and the quit would have been without good cause, the work separation is adjudicated as if the discharge had not occurred and the planned quit had occurred, and the individual is disqualified

from receiving benefits, except that he is 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 quit date.

Under ORS 657.176(8), the first issue to be analyzed is whether claimant quit work with or without good cause. Under ORS 657.176(2)(c), "[g]ood 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) (December 23, 2018). 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.

Order No. 20-UI-142784 concluded that claimant quit work without good cause because he did not establish that he faced a situation of such gravity that no reasonable person in his circumstances would have continued to work for his employer for an additional period of time.[1] The order concluded that claimant's situation was not grave because claimant failed to show that the employer's new proposed restrictions for him, such as "punching a time clock, applying in advance for absences, and reporting to work as scheduled," were unreasonable.[2] The order also concluded that the employer's warning that claimant would lose his bonus pay, essentially half of his earnings, for violations of the new restrictions did not pose a grave situation for claimant.[3] However, the order's conclusions and reasoning were not supported by the record.

The employer's new attendance reporting restrictions, on their face, were reasonable. Punching a time clock, applying in advance for planned absences and reporting for work as scheduled are common requirements in most work settings. However, claimant was being required to comply with those attendance reporting requirements before he was able to secure a safe environment for his child. The undisputed record shows that claimant's concerns for his child's care and safety were valid. Claimant had been forced by the other parent's drug use and threats to prepare for and attend court appearances to obtain legal custody and a protective order "to protect the well-being of his child." Exhibit 2 (Letter from attorney). It was also undisputed that there were "few child care options for infants" in claimant's county of residence, necessitating that claimant care for and protect the child himself until he found satisfactory child care. Exhibit 2 (Email from county child care resource). Under those circumstances, it was unlikely that claimant would have been able to meet the employer's attendance reporting requirements, making his suspension or discharge by the employer inevitable. Even if claimant ultimately had not been suspended or discharged, it is more likely than not that he would have lost his performance bonus for not being able to work all of his scheduled hours, reducing his earnings by half to an amount substantially below the market value for the construction work he performed for the

[1] Order No. 20-UI-142784 at 4.

[2] Order No. 20-UI-142784 at 4.

[3] Order No. 20-UI-142784 at 4.

employer, making that work unsuitable.[4] Exhibit 1 (December 10, 2019 email chain). Viewed objectively, under those circumstances, a reasonable and prudent person of normal sensitivity, exercising ordinary common sense, would have quit work to focus on his son's welfare and enable him to seek work that paid a wage that would allow him to support himself and his child.[5] Accordingly, claimant's planned quit was with good cause.

Because claimant's planned quit was with good cause, ORS 657.176(8) does not apply and the remaining issue to be determined is whether the employer discharged claimant for misconduct under ORS 657.176(2)(a). "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).

On December 10, 2019, claimant notified the employer he was quitting work in "two week[s]," on December 24, 2019. Exhibit 1 (December 10, 2019 email chain). However, the employer accepted his planned resignation immediately and discharged him that day.[6] Exhibit 1 (December 10, 2019 email chain). The preponderance of the evidence shows that the employer discharged claimant because he notified the employer that he remained unable to find child care for his six-month old child, leaving him unable to return to work under a set schedule at that time, and unwilling to accept an expected cut in his earnings due to his personal circumstances which would likely prevent him from working all of his scheduled hours. Exhibit 1, D and F. Viewed objectively, while an employer may reasonably expect an individual to report to work for his scheduled shifts, it is not reasonable to expect claimant to report to work at the expense of his infant child's safety and support. The record shows that claimant had tried and been unable to find child care that met the safety requirements necessary due to the mother's threats,

[4] ORS 657.190 provides, in relevant part: "In determining whether any work is suitable for an individual, the Director of the Employment Department shall consider, among other factors, the degree of risk involved to the health, safety and morals of the individual, the physical fitness and prior training, experience and prior earnings of the individual, the length of unemployment and prospects for securing local work in the customary occupation of the individual and the distance of the available work from the residence of the individual."

[5] To the extent claimant's planned quit was forwarded to the employer to enable him to seek other construction work that paid market wage, OAR 471-030-0038(5)(b)(A) does not apply. That rule provides, in relevant part,

(5) In applying section (4) of this rule:
***
(b) Leaving work without good cause includes, but is not limited to:
(A) Leaving suitable work to seek other work[.]

Because the employer only paid claimant $11.00 per hour for his construction work, which, on this record was substantially below the market rate, that work was unsuitable for claimant. Leaving unsuitable work to seek other work is not without good cause under OAR 471-030-0038(5)(b)(A).

[6] OAR 471-030-0038(2)(a) states, "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)(b) states, "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." Because claimant was willing to continue working for the employer for two weeks after December 10th, and the employer would not allow him to do so, the work separation on December 10th was a discharge.

and had to miss work to care for the child himself. His inability to report to work therefore was not the result of willful or wantonly negligent conduct attributable to claimant as misconduct.

The employer therefore discharged claimant, not for misconduct, and claimant is not disqualified from receiving unemployment insurance benefits on the basis of his work separation.

DECISION: Order No. 20-UI-142784 is modified, as outlined above.[7]

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

DATE of Service: February 26, 2020

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.

Please help us improve our service by completing an online customer service survey. To complete the survey, please go to https://www.surveymonkey.com/s/5WQXNJH. If you are unable to complete the survey online and wish to have a paper copy of the survey, please contact our office.

[7] This decision reverses an order that denied benefits. Please note that payment of benefits, if any are owed, may take approximately a week for the Department to complete.

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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