

EMPLOYMENT APPEALS BOARD DECISION
2020-EAB-0082

Affirmed
No Disqualification

PROCEDURAL HISTORY: On November 25, 2019, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant quit working for the employer without good cause (decision # 63600). Claimant filed a timely request for hearing. On January 2 and January 13, 2020, ALJ L. Lee conducted a hearing, and on January 17, 2020 issued Order No. 20-UI-142984, concluding the employer discharged claimant, but not for misconduct. On January 29, 2020, the employer filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Hardy & Holmes, LLC (aka Gorge Capital) employed claimant from January 2004 until October 30, 2019.

(2) Claimant performed primarily administrative assistant duties for the employer. Claimant lived and worked in the Portland metropolitan area. The median hourly wage for an administrative assistant in the Portland area in 2019 was \$18.87 per hour (\$39,249.60 annually for full time work).

(3) Prior to her work separation, claimant's annual salary was \$69,000. The employer decided to reduce claimant's salary in response to an anticipated reduction in its income. On September 11, 2019, the employer gave claimant a new salary agreement and an updated employment agreement to sign that would become effective November 1, 2019. Claimant's job duties would remain the same under the new agreements; it was not a promotion. The employer offered to discuss any questions claimant might have about the agreements. The salary agreement provided that claimant's salary would be \$42,000 annually. The new employment contained a noncompetition clause that prohibited claimant from "engaging in any business competitive with the employer" in the United States for one year after a work separation from the employer. Exhibit 2. Claimant's continuing employment was contingent upon her signing the salary and employment agreements.

(4) On October 14, 2019, the employer sent claimant an email stating that it required a signed copy of the employment agreements back from claimant by October 18, 2019.

(5) Claimant was not willing to accept an annual salary of \$42,000 or a noncompetition clause. On October 17, claimant sent the employer an email response stating that she would not sign the employment agreements, stating, "I'm respectfully declining to sign this contract. Let me know what the next steps might be." Exhibit 2.

(6) On October 23, 2019, one of the employer's owners met with claimant to discuss the salary agreement and new employment contract. The owner told claimant the employer was not willing to negotiate claimant's annual salary, but was willing to improve her health insurance coverage. The owner did not offer to modify or remove the noncompetition clause from the employment contract. Claimant reiterated that she would not sign the salary agreement or employment contract. The owner told claimant the new terms became effective on November 1, and asked claimant to ask any questions and give the employer her decision regarding the agreements by October 29. By October 30, 2019, claimant did not respond to the employer with a change in her decision not to accept the new salary and employment agreements.

(7) On October 30, 2019, the employer sent claimant a letter stating that claimant's employment "will end as of October 30, 2019," and that the decision was "not reversible." Exhibit 2. The letter stated that the employer ended claimant's employment because claimant did not sign the salary agreement and employment agreement by October 18, 2019. Exhibit 2.

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

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). "Work" means "the continuing relationship between an employer and an employee." OAR 471-030-0038(1)(a).

Claimant asserted that she did not want to quit and hoped she and the employer could negotiate a different contract. Transcript at 21. However, she was not willing to accept an annual salary of \$42,000 or the employer's proposed noncompetition clause. It is undisputed that claimant could have continued to work for the employer under those new terms. Therefore, because the employer had continuing work available for claimant under the new terms of employment, but claimant was not willing to continue working for the employer under those terms, the work separation was a quit. OAR 471-030-0038(2)(a).

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) (December 23, 2018). "[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.

Claimant left work, in part, because the employer reduced her pay by nearly 40 percent. However, despite the sharp decrease, to the extent claimant left work due to a reduction in pay, she left work without good cause. OAR 471-030-0038(5)(d) provides that if an individual leaves work due to a reduction in the rate of pay, the individual has left work without good cause unless the newly reduced rate of pay is ten percent or more below the median rate of pay for similar work in the individual's normal labor market as determined by employees of the Employment Department. On this record, the preponderance of the evidence shows that claimant's position was similar to that of an administrative assistant. The reduced rate of pay was not ten percent or more below the median rate of pay for administrative assistant work in the Portland area. Rather the annual salary of \$42,000 was more than the median rate of pay of \$39,249.60 annually for full time administrative assistant work. Accordingly, under OAR 471-030-0038(5)(d), the employer's proposed reduction in claimant's salary did not constitute good cause for claimant's decision to leave work.

However, to the extent claimant left work because she was not willing to accept a noncompetition agreement, claimant left work with good cause. ORS 653.295(1)(a)(A) and (B) provide, in pertinent part, that unless the noncompetition agreement is entered into upon a job advancement, a noncompetition agreement between an employer and employee is voidable and may not be enforced by a court of this state unless the employer informs the employee in a written employment offer received by the employee at least two weeks before the first day of the employee's employment that a noncompetition agreement is required as a condition of employment. The employer's noncompetition clause was voidable and unenforceable with regard to an employee such as claimant, because she was not a new hire and was not being offered the noncompetition clause pursuant to a promotion.

Nor does the record show that it would have been anything but futile for claimant to negotiate about the noncompetition clause. Although the employer reduced the duration of another employee's noncompetition clause, and testified that it would have been "open to modifying [claimant's noncompetition clause]," or "rearranging it so that it wasn't as restrictive," the employer did not assert and the record does not otherwise show that the employer would have removed the clause from the employment agreement. Transcript at 42, 53. Even had the clause been modified, it would remain voidable and unenforceable. No reasonable and prudent person would continue to work for an employer that requires its employee to accept a voidable and unenforceable condition of employment to continue working.

Claimant had good cause to leave work when she did. She is not disqualified from receiving unemployment insurance benefits based on this work separation.

DECISION: Order No. 20-UI-142984 is affirmed.

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

DATE of Service: March 6, 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.

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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

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

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