

EMPLOYMENT APPEALS BOARD DECISION
2020-EAB-0134

Reversed & Remanded

PROCEDURAL HISTORY: On December 19, 2019, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that the employer discharged claimant for misconduct (decision # 132927). Claimant filed a timely request for hearing. On January 29, 2020, ALJ Frank conducted a hearing, and on January 31, 2020 issued Order No. 20-UI-143690, concluding that claimant quit working for the employer without good cause. On February 11, 2020, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant submitted written argument to EAB but did not declare that they provided a copy of their argument to the opposing party or parties as required by OAR 471-041-0080(2)(a) (May 13, 2019). The argument also contained information that was not part of the hearing record, including a copy of a May 31, 2019 letter from claimant's doctor, and did not show that factors or circumstances beyond claimant's reasonable control prevented them from offering the information during the hearing as required by OAR 471-041-0090 (May 13, 2019). EAB considered only information received into evidence at the hearing when reaching this decision. *See* ORS 657.275(2).

The parties may offer new information such as claimant's May 31, 2019 letter into evidence at the remand hearing. At that time, it will be determined if the new information will be admitted into the record. The parties must follow the instructions on the notice of the remand hearing regarding documents they wish to have considered at the hearing. These instructions will direct the parties to provide copies of such documents to the ALJ and the other parties in advance of the hearing at their addresses as shown on the certificate of mailing for the notice of hearing.

FINDINGS OF FACT: (1) Cascade Living Group Oregon employed claimant beginning in November 2017, last performing housekeeping, until her employment ended after June 2019.

(2) Claimant had thrombosis in her legs, which affected her ability to work. Claimant missed work due to the thrombosis, and at some point, claimant's doctor released claimant to perform light duty work.

(3) The employer gave claimant Family Medical Leave Act paperwork that it expected to receive back from claimant within two weeks. Claimant did not know if the doctor sent her FMLA paperwork to the employer. The employer did not receive the completed FMLA paperwork from claimant or her doctor.

(4) On July 18, 2019, the employer processed claimant's work separation.

(5) In December 2019, claimant learned that her employment with the employer had ended.

CONCLUSIONS AND REASONS: Order No. 20-UI-143690 is reversed, and this matter remanded for further proceedings.

Order No. 19-UI-137392 concluded that claimant's work separation was a voluntary leaving, and that claimant voluntarily left work without good cause. However, additional information is needed to determine the nature of the work separation and, if it was a quit, whether claimant had good cause to quit work when she did, or alternately, if it was a discharge, if the employer discharged claimant for misconduct.

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).

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). Claimant had thrombosis, a permanent or long-term "physical or mental impairment" as defined at 29 CFR §1630.2(h). A claimant with an impairment who quits work must show that no reasonable and prudent person with the characteristics and qualities of an individual with such an impairment would have continued to work for their employer for an additional period of time.

ORS 657.176(2)(a) requires a disqualification from unemployment insurance benefits if the employer discharged claimant for misconduct connected with work. "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). "[W]antonly negligent" means indifference to the consequences of an act or series of actions, or a failure to act or a series of failures to act, where the individual acting or failing to act is conscious of his or her conduct and knew or should have known that his or her conduct would probably result in a violation of the standards of behavior which an employer has the right to expect of an employee." OAR 471-030-0038(1)(c). In a discharge case, the employer has the burden to establish misconduct by a preponderance of evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

Claimant missed work due to thrombosis. The record does not show with credible evidence¹ when claimant began to miss work due to thrombosis, nor does it show if claimant expected the condition to continue indefinitely, or improve. The record is not clear what claimant's duties were when she began missing work. The record shows that claimant brought the employer one or two letters from her doctor regarding her ability to work. However, the record does not show when claimant provided those letters to the employer, who claimant gave the letters to, what the letters stated, or the employer's response to those letters. The record shows that the employer gave claimant "FMLA paperwork" regarding requesting leave from work under the Family Medical Leave Act, and apparently ended the employment relationship because it did not receive the completed FMLA paperwork back from claimant or her doctor. Audio Record at 9:38. However, the record does not show with credible evidence when the employer gave claimant the paperwork, or when the employer gave it to claimant in relation to the doctor letters it received from claimant. Nor does the record show any details regarding the paperwork such as why the FMLA paperwork was required in addition to the letters claimant had already provided. The employer expected claimant to return the FMLA paperwork to the employer within two weeks. The record does not show what, if anything, the employer told claimant about its expectations for the FMLA paperwork such as a deadline for returning the FMLA paperwork to the employer. The record does not show if any of claimant's absence from work was paid, or when she exhausted paid leave.

The record shows that claimant spoke with her "immediate supervisor" while she was absent from work, but the record does not show when or how often those communications occurred, the supervisor's position with the employer, or the content and context of those communications. The record does not show what the employer's expectation was regarding claimant maintaining contact with the employer during her absence from work, or if and how claimant knew or should have known those expectations. The employer's assistant manager testified that the employer "attempted multiple times to reach out to [claimant]" by telephone, and once by mail, but did not receive a response. Audio Record at 13:00 to 13:10. Claimant testified that she did not receive telephone messages from the employer, or a letter. Audio Record at 21:33 to 21:51. The record must be developed regarding this disparity in the testimony and how the employer's testimony relates to claimant's assertion that she spoke with her immediate supervisor during her absence. The record does not show if claimant had a change of address or telephone number during her absence from work, and if she informed the employer of those changes. Claimant testified that she gave the FMLA paperwork to her doctor, but did not verify that the doctor sent it to the employer. 18:57 to 20:18. The record does not show if claimant discussed the FMLA paperwork with her doctor or her supervisor after she initially gave it to her doctor.

Claimant's doctor released claimant to perform light duty work. The record does not show if the employer knew claimant could perform light duty work, or if the employer had any light duty work claimant could perform. If the employer had light duty work, the record does not show if it ever offered such work to claimant, or if not, why not. Essentially, the record does not show if a leave of absence was a futile alternative to quitting for claimant because claimant could only perform light duty work, and the employer had no light duty work available.

Claimant learned from a letter in December 2019 that she was no longer employed. The record does not show if the letter was from the employer or what it stated. The employer stated that it ended claimant's

¹ The testimony from the employer's witness at hearing as to dates and its communications with claimant were not credible because the testimony was generally based on estimates, hearsay, and prefaced by the phrase, "I believe . . .," or her admission of uncertainty as to the details.

employment in July 2019. The record does not show if it notified claimant, or how it notified claimant that the employment relationship had ended.

ORS 657.270 requires the ALJ to give all parties a reasonable opportunity for a fair hearing. That obligation necessarily requires the ALJ to ensure that the record developed at the hearing shows a full and fair inquiry into the facts necessary for consideration of all issues properly before the ALJ in a case. ORS 657.270(3); *see accord Dennis v. Employment Division*, 302 Or 160, 728 P2d 12 (1986). Because further development of the record is necessary for a determination of the nature of the work separation and whether claimant is disqualified from benefits based on her work separation, Order No. 20-UI-143690 is reversed, and this matter is remanded.

DECISION: Order No. 20-UI-143690 is set aside, and this matter remanded for further proceedings consistent with this order.

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

DATE of Service: March 19, 2020

NOTE: The failure of any party to appear at the hearing on remand will not reinstate Order No. 20-UI-143690 or return this matter to EAB. Only a timely application for review of the subsequent order will cause this matter to return to EAB.

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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 ໂດຍປະຕິບັດຕາມຄຳແນະນຳທີ່ບອກໄວ້ຢູ່ຕອນທ້າຍຂອງຄຳຕັດສິນນີ້.

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 الاستئناف 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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