

EMPLOYMENT APPEALS BOARD DECISION
2020-EAB-0335

Affirmed
No Disqualification

PROCEDURAL HISTORY: On March 2, 2020, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant quit work without good cause and was disqualified from receiving unemployment insurance benefits effective January 26, 2020 (decision # 152529). Claimant filed a timely request for hearing. On April 10, 2020, ALJ Janzen conducted a hearing, and on April 14, 2020, issued Order No. 20-UI-147972, concluding claimant quit work with good cause. On May 1, 2020, the employer filed an application for review with the Employment Appeals Board (EAB).

Both parties submitted written argument for EAB's review. Claimant's argument 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 and each party's written argument to the extent it was based thereon.

FINDINGS OF FACT: (1) Benton Hospice Service Inc. (BHSI) employed claimant from January 2014 to January 30, 2020.

(2) From January 2014 to approximately May 2019, the employer employed claimant as its executive director. Beginning in November 2019, the employer employed claimant as the chief executive officer (CEO) of the Oregon Nonprofit Hospice Alliance (ONHA), of which the employer was one of four member organizations. Hospice of Redmond, Care Partners, and Klamath Hospice also were member organizations of ONHA. Claimant remained on the employer's payroll while working in her new role and the employer billed her services to the member organizations of ONHA in equal shares. As the CEO

of ONHA, claimant reported directly to the ONHA board of directors and “no one else.” Transcript at 30. The employer’s board president was also the board president of ONHA.

(3) In 2019, the executive director of Hospice of Redmond accused an employee of the employer of sexual harassment. The employer hired an outside attorney to conduct an investigation of the complaint and the investigation concluded that sexual harassment claim “was valid” and the victim “did not contribute to it.” Transcript at 13. The ONHA board directed claimant to obtain a copy of the report for its review, but the employer refused to provide one to claimant.

(4) On November 11, 2019, claimant met with the employer’s board president and inquired about why the employer “was interfering in [claimant performing her] duties.” Transcript at 14. The board president responded that “her loyalty was to [the employer] and not to ONHA,” chastised claimant for not taking the employer’s side because the “rumor” was that it was the victim’s fault that the harassment happened, and told her that she “didn’t trust [her]” or “the rest of the board.” Transcript at 12, 13-15. The board president’s statements disturbed claimant, who concluded that it was her duty to report those statements to the ONHA board because she believed the board president had a conflict of interest as board president for both the employer and ONHA, and violated her duty of loyalty to the ONHA board.

(5) On November 15, 2019, claimant met with the ONHA board, without the employer board president present, and reported the board president’s statements to her as well as her concerns that the board president was interfering with claimant’s performance of her duties as CEO of ONHA. The ONHA board eventually concluded that those matters needed to be investigated, as well as a “root cause analysis” of the harassment complaint, including attempted mediation of that dispute. Transcript at 16. The ONHA board assigned the executive director of Klamath Hospice to conduct the investigation and claimant to arrange for the mediation.

(6) Between November 15 and early January 2020, the investigation into claimant’s complaint and the root cause analysis of the harassment complaint was not conducted and the mediation did not occur, in part, because the Hospice of Redmond, who had employed the harassment victim, refused to mediate and expressed its desire to withdraw from the alliance.

(7) During the first week of January 2020, at an ONHA board meeting and at the employer’s request, claimant was dismissed from the meeting before the board discussed the status of the investigations or voted on Hospice of Redmond’s request to leave the alliance, which were actions claimant typically would have participated in as CEO.

(8) On the day following the board meeting, a board member disclosed to claimant that after she was dismissed from the meeting, the board president characterized claimant’s report of her statements to claimant in November as an “inappropriate sharing of a confidential . . . conversation,” and discussed claimant as “not being the correct leader for [ONHA].” Transcript at 20. Claimant also learned that the board president disclosed that claimant’s annual review “was overdue” and that the board president would be the one to conduct it. Transcript at 20.

(9) On January 13, 2020, claimant sent an email to the ONHA board that she considered both her dismissal from the board meeting and the board president’s decision to perform claimant’s annual review to be “retaliation” for claimant’s November 15 complaint to the ONHA board concerning the

board president's statements to her and interference with her job duties. Transcript at 22. She also requested that a different board member conduct her annual performance review. That same day, a board member sent claimant an email stating that claimant "had committed professional suicide by reporting retaliation," and suggested that claimant discuss the matter with ONHA's human resources consultant. Transcript at 22-23.

(10) Shortly thereafter, claimant contacted the consultant and discussed her situation with her. The consultant told claimant that it appeared that the employer had "constructively discharged" her from her employment because by preventing claimant from performing her job duties, it had effectively terminated her without formally having done so. Transcript at 25.

(11) On January 20, 2020, after receiving no response to her retaliation complaint and concluding retaliation by the employer against her would continue, claimant gave the employer written notice of her intent to resign on January 30, 2020.

(12) On January 30, 2020, claimant quit her employment because after receiving no response to her retaliation complaint, learning that the board president had described her to the full board as "not . . . the correct leader for [ONHA]," and being told that she "had committed professional suicide by reporting retaliation," and had already been "constructively discharged," claimant concluded that she had no choice other than to resign.

CONCLUSIONS AND REASONS: Claimant voluntarily left work with 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) (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 quit work on January 30, 2020 to avoid what was, more likely than not, a certain discharge not for misconduct.¹ In written argument, the employer asserted that claimant failed to show that her discharge was likely or imminent. Employer's Written Argument at 2. However, the employer did not contest claimant's evidence that the employer's board president had told the full ONHA board in January that by filing her complaint, claimant had inappropriately shared a confidential conversation between her and claimant in November, and asserted that claimant was "not . . . the correct leader for [ONHA]." Nor did the employer dispute at hearing that an ONHA board member told claimant a week

¹ An individual who leaves work to avoid a discharge for misconduct or potential discharge for misconduct has left work without good cause. OAR 471-030-0038(5)(b)(F). OAR 471-030-0038(3)(a) defines misconduct, in relevant part, as a willful or wantonly negligent violation of the standards of behavior which an employer has the right to expect of an employee, or an act or series of actions that amount to a willful or wantonly negligent disregard of an employer's interest. Only misconduct connected with work is potentially disqualifying. ORS 657.176(2)(a).

before her resignation notice that claimant had committed “professional suicide” by alleging retaliation by the board president in January. Finally, the employer did not dispute that the employer’s board president was about to conduct claimant’s annual review and that in the opinion of the ONHA human resources consultant, by the time claimant quit, the employer had already “constructively discharged” her from her employment. The record shows that more likely than not, when claimant quit, she faced a grave situation because her discharge from employment was both inevitable and imminent.

Claimant’s inevitable discharge was likely to occur because of the employer’s board president’s statement to the ONHA board that claimant was “not . . . the correct leader for [ONHA].” The record shows that, more likely than not, the president’s statement was retaliatory and influenced by her opinion that claimant had divulged a confidential conversation with her in November by reporting to ONHA that the board president had demonstrated a conflict of interest by telling her, with regard to the harassment complaint, that “her loyalty was to [the employer] and not to ONHA.” While that report may have angered the board president, claimant made the report because she felt it was her duty to ONHA to do so. As the CEO of ONHA, claimant believed that she reported directly to the ONHA board and “no one else.” As such, while claimant’s actions might have failed to meet the board president’s belief regarding to whom claimant owed her loyalty, claimant’s efforts to perform her duty, as she understood it, were not the result of willful or wantonly negligent conduct attributable to claimant as misconduct.

Whether quitting work in lieu of a prospective discharge is quitting for good cause depends on whether a reasonable person facing discharge would consider the prospect sufficiently grave that resigning was the only reasonable option. *See McDowell v. Employment Department*, 348 Or 605, 612, 236 P3d 722 (2010) (claimant faced imminent discharge, without pre-dismissal remedies, and a discharge would be the “kiss of death” to his future employment prospects). Here, days before claimant submitted her resignation, an ONHA board member essentially told claimant that her discharge was inevitable when he told claimant she “had committed professional suicide by reporting retaliation.” Shortly thereafter, the ONHA human resources consultant essentially told claimant that her discharge was imminent when she advised claimant that she had already been “constructively discharged” by the employer because it was interfering with her ability to perform her job duties for ONHA. When claimant asked the ONHA board that a board member other than the employer’s board president perform her annual review, she received no response. We infer from the claimant’s resignation under those circumstances that she believed that a discharge was not only likely to happen soon, but likely to have a negative effect on her future employment prospects as an executive director or chief executive officer of a non-profit organization. Any reasonable and prudent person in claimant’s circumstances would have reached the same conclusion – that the benefit of resigning without a negative annual review outweighed the possible benefit any amount of continuing work might have offered – and, like claimant, would have quit work when she did. Accordingly, the record establishes that claimant quit work with good cause and she is not disqualified from receiving unemployment insurance benefits because of this work separation.

DECISION: Order No. 20-UI-147972 is affirmed.

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

DATE of Service: June 1, 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.

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

ទោរទៅ – តម្រូវការនេះមិនមែនជាភារកិច្ចរបស់រដ្ឋទេ បើសិនជាអ្នកមិនបានបំពេញតម្រូវការនេះទេ រដ្ឋអាចដកសិទ្ធិរបស់អ្នកបាន។ បើសិនជាអ្នកមិនយល់ស្របចំពោះសេចក្តីសម្រេចនេះទេ លោកអ្នកអាចដាក់ពាក្យប្តឹងសុំឲ្យមានការពិនិត្យរឿងក្តីឡើងវិញជាមួយតុលាការឧទ្ធរណ៍រដ្ឋ Oregon ដោយអនុវត្តតាមសេចក្តីណែនាំដែលសរសេរនៅខាងចុងបញ្ចប់នៃសេចក្តីសម្រេចនេះ។

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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