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

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DS 005.00
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EMPLOYMENT APPEALS BOARD DECISION
2020-EAB-0731

Modified
No Disqualification

PROCEDURAL HISTORY: On October 7, 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 March 1, 2020 (decision # 142534). Claimant filed a timely request for hearing. On November 4, 2020, ALJ Moskowitz conducted a hearing, and on November 9, 2020 issued Order No. 20-UI-156225, modifying the Department's decision by concluding the employer discharged claimant, not for misconduct within 15 days of a planned quit without good cause and claimant was disqualified from receiving benefits effective March 15, 2020. On November 19, 2020, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant filed a written argument in support of the application for review. However, claimant 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, 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).

FINDINGS OF FACT: (1) Alliance Services, LLC employed claimant as a support worker for developmentally disabled clients from February 11, 2019 to March 6, 2020.

(2) During the course of her employment, claimant became frustrated with what she perceived as a lack of adequate training for supporting developmentally disabled clients. Although claimant had been told that such training was available, when she requested it, she never received it and thought it was necessary for performing her job. She also became frustrated with her direct supervisor's statements to her about what claimant's clients reportedly told the supervisor. Claimant's supervisor told claimant "none of her clients liked" her, that her clients told the employer "to get rid of [her]" and that her clients "had problems with [her]", after which claimant determined that none of those comments were true.

Transcript at 7-8. Claimant sent an email to the employer's executive director expressing her dissatisfaction with her supervisor and hope that he would assign her a different one, without success.

(3) In February 2020, claimant's arm became infected after contact with a developmentally disabled client, the infection spread to one of claimant's eyes. Claimant notified the employer by email about her infection but received no response regarding what she should do about her care and treatment for the injury.

(4) On March 5, 2020, during a meeting with her supervisor claimant again asked about the "care plan" for an on-the-job injury because her eye condition had persisted and she needed to know who would pay for her treatment. Transcript at 7, 23. Her supervisor responded, "[If you're] not dead, it doesn't really matter…And if you ever complain about me being your supervisor, you're gonna have to deal with it cause I'm the only one up here." Transcript at 7. Claimant started to shake, decided she "just couldn't" continue her employment under those conditions, stood up and gave her supervisor two weeks' notice of her intent to quit on March 19, 2020. Transcript at 7. Claimant submitted her two weeks' notice because the employer had ignored her inquiries regarding her work injury and persisting infection and her supervisor had just told her it would do no good to complain about the supervisor or the injury and infection any further.

(5) Later on March 5, 2020, the executive director heard that claimant had told another employee that she might sue the employer after her employment ended due to its lack of response regarding her work injury and infection. He also received an email from claimant in which she expressed how much stress the employer had created for her and stated, "stress can kill you just like a bullet can." Transcript at 6. The executive director then sent an email to claimant accepting her resignation immediately and informing her the employer "no longer needed" her to work during her notice period. Transcript at 6. Claimant did not learn of the employer's email before she reported for work on March 6, 2020, which then became her last day of employment.

CONCLUSIONS AND REASONS: The employer discharged claimant, not for misconduct, within 15 days of claimant's planned voluntary leaving with good cause.

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) (September 22, 2020). 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).

ORS 657.176(2)(c) provides that 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.

However, 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."

The order under review concluded that claimant's planned quit on March 19, 2020 was without good cause, but that the employer discharged claimant not for misconduct on March 6, 2020, within fifteen days of claimant's planned quit and applied ORS 657.176(8). Order No. 20-UI-156225 at 2-6. Although the record supports the order's conclusion that the employer discharged claimant, not for misconduct, it does not support its conclusion that claimant's planned quit was without good cause.

Work Separation. 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). There is no dispute that when claimant notified the employer on March 5, 2020 that she planned to quit work on March 19, 2020, she was willing to continue to work for the employer until that day. Nor is there any dispute that on March 6, 2020, the employer told claimant after she arrived at work that November 6, 2020 would be her last day. Accordingly the work separation was a discharge that occurred on March 6, 2020.

Discharge. The employer discharged claimant on March 6 because the executive director had concluded the employer "no longer needed" claimant to work during her notice period, particularly after hearing that claimant might sue the employer and receiving the email from claimant in which she stated, "stress can kill you just like a bullet can." Viewed objectively, expressing an intent to explore litigation options after employment ended did not violate a reasonable employer expectation and claimant credibly explained at hearing that she did not send her email as a threat but as an explanation of the effect stress can have on a person. Transcript at 35-36. The record fails to show that the employer discharged claimant because she had engaged in conduct that constituted a willful or wantonly negligent violation of the standards of behavior the employer had the right to expect of her or a disregard of its interests. Accordingly, on March 6, 2020, the employer discharged claimant, but not for misconduct under ORS 657.176(2)(a).

Voluntary leaving. On March 5, 2020, claimant submitted notice of her planned quit on March 19, 2020 because the employer had ignored her past inquiries regarding her work injury and infection and her supervisor had just told her it would do no good to complain about either the supervisor or the injury and infection any further. Order No. 20-UI-156225 concluded that claimant's planned quit was without good cause, reasoning,

> Claimant felt undervalued and disrespected by the way her supervisor minimized her infection and suggested that Employer did not care about her health. While Claimant may have been understandably upset after those comments, Claimant has not shown how they created a situation so grave that she had no reasonable alternative but to leave work. At the very least, Claimant could have sought reassignment to a new supervisor based on the offensive comments, or simply continued to work for Employer until she found alternative employment. The situation Claimant faced was not such that a reasonable and prudent person, exercising ordinary common sense, would have believed she had no reasonable alternative but to quit.

Order No. 20-UI-156225 at 4. However, the record fails to support that conclusion.

The record shows that not only did claimant feel "undervalued and disrespected" by the way the employer and her direct supervisor minimized her work injury and infection, but she was worried about its persisting effect and how necessary treatment for the injury would be paid for. The record shows that claimant sent the employer an email, which included documentation from a physician, notifying it about the injury and infection claimant had contracted "from my customer" in February 2020, with no response from the employer. Transcript at 23-24. It shows that the executive director admitted that he was aware of claimant's infection, but fails to show that he made any inquiries of claimant or directed her supervisor to follow up with claimant about it. Transcript at 23. It shows that when claimant again inquired about the employer's "care plan" for work injuries with her supervisor on March 5, 2020, not only did the supervisor tell her that her injury and infection would not matter unless she was "dead," but that if claimant complained about her supervisor's response to claimant about it, the supervisor would likely retaliate against claimant, which caused claimant to start shaking. The record as a whole shows that claimant's situation was grave.

Claimant had no reasonable alternative but to quit when she did. Requesting reassignment to a new supervisor was not a reasonable alternative available to claimant. Claimant had been told by her supervisor on the day she submitted her quit notice that "if you ever complain about me being your supervisor, you're gonna have to deal with it cause I'm the only one up here." Although the order also suggested that claimant could have "simply continued to work for Employer until she found alternative employment," Oregon appellate courts have clarified that continuing to work until alternative employment is found is not a reasonable alternative to quitting under grave circumstances. *See*, *Hill v. Employment Dep't.*, 238 Or App 330, 243 P3d 78 (2010) (continuing to work until claimant has found other work is not a reasonable alternative to quitting work); *see accord Warkentin v. Employment Dep't.*, 245 Or App 128, 261 P3d 72 (2011); *Campbell v. Employment Dep't.*, 245 Or App 573, 263 P3d 1122 (2011); *Strutz v. Employment Dep't.*, 247 Or App 439, 270 P3d 357 (2011); *Campbell v. Employment Dep't.*, 256 Or App 682, 303 P3d 957 (2013). Viewed objectively, the record as a whole shows that a reasonable and prudent person of normal sensitivity, exercising ordinary common sense, would have quit work when claimant did. 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. Therefore, on this record, the employer discharged claimant, but not for misconduct under ORS 657.176(2)(a). Accordingly, claimant is not disqualified from receiving unemployment insurance benefits on the basis of this work separation.

DECISION: Order No. 20-UI-156225 is modified, as outlined above.

S. Alba and D. P. Hettle.

DATE of Service: December 23, 2020

NOTE: 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.

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.surveygizmo.com/s3/5552642/EAB-Customer-Service-Survey. You can access the survey using a computer, tablet, or smartphone. If you are unable to complete the survey online and need a paper copy of the survey, please contact our office.

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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