EO: 700
BYE: 202206

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

173
DS 005.00

EMPLOYMENT APPEALS BOARD DECISION
2022-EAB-0108

Reversed
Disqualification

PROCEDURAL HISTORY: On December 3, 2021, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant had voluntarily quit work without good cause and was disqualified from receiving unemployment insurance benefits effective November 14, 2021 (decision # 95426). Claimant filed a timely request for hearing. On January 4, 2022, ALJ Mott conducted a hearing, and on January 5, 2022 issued Order No. 22-UI-183295, reversing decision # 95426 by concluding that claimant was discharged, but not for misconduct, and was not disqualified from receiving benefits based on the work separation. On January 13, 2022, the employer filed an application for review with the Employment Appeals Board (EAB).

WRITTEN ARGUMENT: Claimant did not declare that he provided a copy of his written argument, consisting of an email dated January 14, 2022, 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 him from offering the information during the hearing as required by OAR 471-041-0090 (May 13, 2019). Additionally, claimant's January 24, 2022 written argument and the employer's written argument contained information that was not part of the hearing record, and did not show that factors or circumstances beyond the respective parties' reasonable control prevented them from offering the information during the hearing. EAB considered claimant's January 24, 2022 written argument and the employer's written argument to the extent they were based on the record.

FINDINGS OF FACT: (1) Robert Klaver Landscaping, Inc. employed claimant as a commercial pesticide applicator from October 15, 2015 until November 21, 2021.

(2) As part of their work duties, claimant and his coworkers drove trucks owned by the employer. The trucks were securely stored on-site on the employer's premises, and a key was required to access the secure storage area. Most of the employer's employees would check out a key to access the secure storage area when they arrived at work, check out a vehicle for the day, and then return the keys before leaving. However, the employer issued shop keys to a few of his "most trusted employees," which would allow them to bypass the daily checkout procedure and access the secure storage area directly.

Transcript at 36. For approximately the last two and a half years of claimant's tenure with the employer, the employer entrusted claimant with a set of shop keys.

(3) Sometime in or prior to October 2020, the employer became concerned that claimant had been misreporting time on his timesheets. In October 2020 and July 2021, the employer discussed this concern with the claimant.

(4) Around early November 2021, the employer again reviewed claimant's timesheets and, after cross-checking his arrival and departure times on the shop's security camera footage, came to believe that claimant had again been misreporting time on his timesheets. As a result, the employer felt that he could no longer trust claimant, and reduced claimant's rate of pay by $1.00 per hour—from $23.50 to $22.50—until he felt that he could trust claimant again.

(5) At the end of the workday on November 19, 2021, claimant retrieved his paycheck from the employer, and upon doing so noticed that the employer had reduced his rate of pay by $1.00 per hour. Claimant called the employer to inquire about the reason for the reduction in pay. The employer explained to claimant that he did so because claimant had been misreporting his time on his timecards, and that the employer also felt he could have discharged claimant for the same reason. Claimant responded by stating that he might report the matter to the Bureau of Labor and Industries (BOLI), and that "maybe [he] should put in [his] two weeks' notice also." Transcript at 6. Thereafter, the employer told claimant to turn in his keys to the shop. Claimant made two more phone calls to the employer shortly thereafter, during which both parties essentially reiterated their respective positions.

(6) Claimant did not return to work for the employer after November 19, 2021. On November 22, 2021, claimant sent a text message to the employer informing him that claimant had left his keys for the employer, and requesting that the employer mail claimant's final paycheck to a specified address. The employer did not respond to the text message.

(7) On November 29, 2021, claimant sent another text message to the employer, inquiring about his final paycheck. The employer responded, "It's not payday and you gave two weeks' notice I have plenty of work currently[.]" Exhibit 1 at 4. Later that day, after consulting with his administrative staff, the employer directed his staff to disburse claimant's final paycheck and mail it to him.

CONCLUSIONS AND REASONS: Claimant voluntarily quit work without 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) (September 22, 2020). 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).

At hearing, the parties offered differing accounts of the events that led to claimant's separation from work. Claimant testified that, during the first phone call with the employer on November 19, 2021, claimant only suggested that he should "maybe" give the employer his two weeks' notice; that the employer responded that he didn't "want [claimant's] fucking two weeks [notice]," and instructed claimant to "turn in [his] work keys and get off the premises." Transcript at 6–7. Claimant also testified

that he did not want to leave the job, and that the two calls he subsequently made to the employer that day were to "plead [his] case as to the fact that [he] had done nothing wrong," and to try to obtain from the employer an explanation of why his pay was reduced. Transcript at 8. By contrast, the employer testified that claimant told the employer during the first phone call on November 19, 2021 that he was "not coming in on Monday [November 22, 2021], and [was] giving [his] two weeks' notice." Transcript at 19. The employer also testified that he told claimant that he hoped to see claimant at work on the following Tuesday, at which point claimant hung up on him. Transcript at 19.

Both parties offered credible, plausible testimony without any notable internal inconsistencies. Because neither party bears the burden of proof to show whether the separation was a discharge or a voluntary leaving, the record must be examined to determine which party made the first unequivocal act evincing an intent to sever the employment relationship. At hearing, claimant's testimony suggested that he believed that the employer's instruction to turn in his shop keys constituted the first unequivocal act, explaining that such instructions were not "some sort of insignificant, irrelevant thing" because claimant had held those keys for two and a half years and needed them to access the secure storage where his work truck was parked. Transcript at 33–34. However, the record does not support the conclusion that this instruction amounted to an unequivocal act. The employer explained that most of his employees do not keep a set of shop keys to access the vehicle storage, but instead check them out on a daily basis; that the employer only permits his "most trusted employees" to keep shop keys at all times; and that claimant had been, but was no longer, one of his "most trusted employees." Further, claimant's own testimony undercuts his assertion that he needed the keys to perform his work, because he had been performing the work for six years but only had a set of keys for the last two and a half years and because most of the other employees did not have a set of keys. Claimant offered no other evidence to show that circumstances had changed in the last two and a half years of his tenure such that he could not perform his work at all unless he had his own set of keys.

In their respective written arguments, both parties accused the other of offering testimony that misrepresented the facts in order to support their respective positions. Claimant's January 24, 2022 Written Argument at 1; Employer's Written Argument at 1. However, it is not necessary for one or both parties to have testified falsely in order for each to have offered differing accounts of the events that led to claimant's separation from work. In this case, where no evidence clearly casts doubt on the veracity either party's testimony, the better explanation is that each party merely misunderstood the statements made, and actions took, by the other, and as a result came away from their interactions with different understandings of what had transpired. The evidence in the record shows that, more likely than not, neither party either intended to, or did, sever the employment relationship during their interactions on November 19, 2021. Instead, the record shows that claimant incorrectly believed that the employer's instruction to turn in his keys and leave the premises meant that he was discharged, while the employer believed that claimant's statement that he might give his two weeks' notice of quitting meant that claimant *had* given his two weeks' notice and therefore intended to quit in two weeks' time.

However, claimant's text message to the employer on November 22, 2021 requesting his final paycheck *was* an unequivocal act evidencing claimant's desire to discontinue the employment relationship. No employer could reasonably construe an employee's request for a final paycheck to reflect anything other than the employee's unwillingness to continue the employment relationship. This conclusion is further supported by the employer's response to claimant's text message a week later informing claimant that it was "not payday," that claimant had given two weeks' notice, and that the employer had "plenty of

work" at the time. The employer's statement in that last text message, on November 29, 2021, evinced the employer's belief that claimant would continue to be employed until his notice period expired on December 3, 2021—after which the employer would have presumably issued claimant's final paycheck. Despite that belief, however, claimant never returned to work, nor expressed any intention of doing so, after November 19, 2021. Therefore, the record shows that, more likely than not, claimant severed the employment relationship on November 22, 2021, thereby voluntarily quitting that day.

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) (September 22, 2020). "[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.

The record supports the conclusion that claimant voluntarily quit work on November 22, 2021 when he evidenced an unwillingness to continue the employment relationship. To the extent that claimant voluntarily quit because he believed he had been fired on November 19, 2021, claimant did not show that such a mistaken belief was a situation of such gravity that he had no reasonable alternative but to quit, and therefore claimant quit without good cause.

For the above reasons, claimant voluntarily quit work without good cause, and is disqualified from receiving unemployment insurance benefits effective November 21, 2021.

DECISION: Order No. 22-UI-183295 is set aside, as outlined above.

S. Alba and A. Steger-Bentz;
D. Hettle, not participating.

DATE of Service: February 25, 2022

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.

Employment Appeals Board - 875 Union Street NE | Salem, OR 97311
Phone: (503) 378-2077 | 1-800-734-6949 | Fax: (503) 378-2129 | TDD: 711
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