

EMPLOYMENT APPEALS BOARD DECISION
2022-EAB-0408

Reversed
No Disqualification

PROCEDURAL HISTORY: On February 14, 2022, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant quit working for the employer without good cause and was disqualified from receiving unemployment insurance benefits effective January 23, 2022 (decision # 100827). Claimant filed a timely request for hearing. On March 15, 2022, 2022, ALJ Lucas conducted a hearing at which the employer failed to appear, and on March 16, 2022 issued Order No. 22-UI-188839, affirming decision # 100827. On March 25, 2022, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) American Petroleum Environmental employed claimant as a regional environmental health and safety manager from August 26, 2019 until January 24, 2022. Claimant's job responsibilities included creating documents for her manager that the manager would then use during meetings.

(2) In August 2020, claimant overheard one of the employer's truck drivers call claimant derogatory names of a sexual nature to another coworker. Claimant felt sexually harassed by the comments she heard and reported the truck driver's comments to the employer. The employer spoke to the truck driver about the incident, but the truck driver received no further discipline. Claimant was dissatisfied with the employer's resolution of the incident because she was expected to continue working with the truck driver. The truck driver's harassing behavior toward claimant continued after August 2020.

(3) In late November 2021, claimant's manager began to take issue with errors the manager was finding in the documents prepared by claimant. The manager constantly sent claimant emails "nit-picking" about spelling and other errors in the documents and demanded that they be corrected immediately. Transcript at 13. Although claimant had made some documentation errors, claimant found the manager's tone in these emails to be antagonizing, as opposed to being constructively critical, and she began to have difficulty making the required corrections within the required timeframe. Claimant felt "extremely stress[ed]" by her manager's conduct and that his actions had created a "hostile work environment." Transcript at 13. Due to claimant's stress and worry, her ability to sleep became impacted with her frequently only managing three to four hours of sleep per night.

(4) In December 2021, claimant began to look for other work due to the situation she was experiencing with the employer. Claimant intended to quit her job only if she found other work.

(5) Between January 17, 2022 and January 22, 2022, the manager sent claimant 15 emails within a two-hour period raising “anything [they] could possibly find to point out [her] poor performance, in [their] opinion.” Transcript at 11.

(6) On January 22, 2022, the manager emailed claimant to tell her of their intention to discharge her due to her ongoing performance issues. The manager offered claimant three options. The first option allowed claimant to remain in her position for 90 days to six weeks, while the employer searched for her replacement. The first option included certain financial incentives for claimant to remain employed during this period, but the manager warned that those options would be rescinded if claimant’s attitude or work performance became worse. The second option allowed claimant to remain in her position for the same 90 day to six week period, but if she left the employer for other work during this period, she would lose the financial incentives provided in the first option. Finally, the third option allowed claimant to accept immediate termination from the employer.

(7) On January 23, 2022, claimant responded to the employer that she would accept immediate termination. The manager responded that claimant’s last day of work would be January 24, 2022. Claimant chose immediate termination because she no longer wanted to work in the hostile environment created by her manager and because she no longer wanted to deal with the continued harassment from the truck driver.

(8) On January 24, 2022, claimant worked her last day for the employer.

CONCLUSIONS AND REASONS: Claimant quit 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) (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).

The record shows that claimant made the affirmative decision to leave work effective January 24, 2022, despite having the option to remain employed for another 90 days to six weeks in her position. Because continuing work was available to claimant, but claimant was unwilling to perform the available work and instead decided to leave, the work separation is a leaving.

Voluntary leaving. 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. Per OAR 471-030-0038(5)(b)(F), leaving work without good cause includes quitting work to avoid what would otherwise be a discharge for misconduct or a potential discharge for misconduct.

The order under review concluded that claimant quit work without good cause. Order No. 22-UI-188839 at 3. The order reasoned that although claimant believed she had experienced a hostile work environment from her manager and sexual harassment from her coworker, they were “secondary reasons” for her decision to quit, and that the primary reason she quit work was because she was facing an impending discharge. Order No. 22-UI-188839 at 3. Because facing an impending discharge did not create a grave situation for claimant, the order under review concluded that she had not shown good cause for her decision to quit work. Order No. 22-UI-188839 at 3. However, the record does not support that conclusion.

The record shows that claimant affirmatively chose to quit instead of being discharged at a later date. Under OAR 471-030-0038(5)(b)(F), an individual who quits “to avoid what would otherwise be discharge for misconduct or a potential discharge for misconduct,” has left work without good cause. Here, the record shows that claimant’s future discharge, had she remained with the employer, was a certainty and would occur within 90 days to six weeks. However, the record fails to show that claimant’s impending discharge would have been for misconduct.

The employer intended to discharge claimant because of poor performance in the form of her many documentation errors. “Misconduct” is defined as “a willful or wantonly negligent violation of the standards of behavior which an employer has the right to expect of an employee” or “[a]n act or series of actions that amount to a willful or wantonly negligent disregard of an employer's interest.” OAR 471-030-0038(3)(a) (September 22, 2020). The record shows that the manager corrected claimant on her documentation errors on several occasions. Furthermore, claimant acknowledged that some of the corrections that the manager requested did need to be corrected. Transcript at 15. However, the record fails to show that any of claimant’s documentation errors were the result of any willful or wantonly negligent disregard of the employer’s interest. Further, the record suggests that claimant’s documentation preparation difficulties were more likely than not the result of mere inefficiency resulting from a lack of job skills, which is not misconduct. OAR 471-030-0038(3)(b). Therefore to the extent that claimant quit work to avoid a future discharge, the record shows that any such discharge would not have been for misconduct and OAR 471-030-0038(5)(b)(F) therefore does not apply.

Whether quitting in lieu of a future discharge constitutes quitting for good cause depends on whether a reasonable person facing a future discharge would leave work because the future discharge presents them with a situation of such gravity that the individual has no reasonable alternative but to leave work. Here, claimant has met that standard. The record shows that beginning in late November 2021, claimant began receiving “antagonizing” emails from her manager that “nit-picked” errors in her documentation and were not constructively critical. The volume of emails claimant received was constant and culminated with her receipt at one point of 15 emails from her manager within a two-hour period where the manger raised “anything [they] could possibly find to point out [her] poor performance, in [their] opinion.” Coupled with the ongoing harassment claimant continued to receive from one of the employer’s truck drivers, claimant became “extremely stress[ed]” by the negative work environment she was exposed to, and her workplace situation adversely affected her ability to sleep. Under these

circumstances, the record shows that even before the January 22, 2022 date that the manager informed claimant of the employer's intent to discharge her, claimant faced a grave situation at work.

Although the employer's January 22, 2022 discharge notification offered claimant the ability to remain employed for another 90 days to six weeks, the record shows that her eventual discharge was a certainty. Furthermore, although the potential of performing additional work for a limited period of time would have benefited claimant financially, claimant would have had to perform this work for a manager already dissatisfied with her work performance, in an environment where she risked additional harassment from the truck driver, along with the extreme stress and trouble sleeping that went with it. No reasonable and prudent person would have continued to work for their employer under those circumstances. *See McPherson v. Employment Division*, 285 Or 541, 591 P2d 1381 (1979) (claimants need not "sacrifice all other than economic objectives and, for instance, endure racial, ethnic, or sexual slurs or personal abuse, for fear that abandoning an oppressive situation will disqualify the work from unemployment benefits"; the law "does not impose upon the employee the one-dimensional motivation of Adam Smith's 'economic man'").

Nor does the record show that claimant had any reasonable alternatives to quitting. Here, claimant had previously reported the sexual harassment she experienced from the truck driver to the employer, but the employer's response had not resolved the situation, and claimant continued to experience improper treatment from that person. Given this continued improper treatment and the evidence showing that the manager's offer of a limited period of continued work was conditioned on *claimant* maintaining a positive attitude, the record establishes more likely than not that any further attempts to address her negative work environment with the employer would have been futile.

Claimant therefore quit work with good cause and is not disqualified from receiving unemployment insurance benefits based upon the work separation.

DECISION: Order No. 22-UI-188839 is set aside, as outlined above.

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

DATE of Service: June 10, 2022

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 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 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.

Employment Appeals Board - 875 Union Street NE | Salem, OR 97311
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www.Oregon.gov/Employ/eab

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