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

EMPLOYMENT APPEALS BOARD DECISION
2022-EAB-0630

Affirmed
No Disqualification

PROCEDURAL HISTORY: On January 8, 2021, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant was discharged, but not for misconduct, and therefore was not disqualified from receiving unemployment insurance benefits based on the work separation (decision # 92633). The employer filed a timely request for hearing. On July 19, 2021, ALJ Mott conducted a hearing at which claimant failed to appear, and on the same date issued Order No. 21-UI-170606, modifying decision # 92633 by concluding that claimant was discharged, but not for misconduct, within 15 days of the date on which claimant had planned to voluntarily quit work without good cause, and therefore was not disqualified from receiving benefits for the week of June 28, 2020 through July 4, 2020, but *was* disqualified from receiving benefits effective July 5, 2020. On July 26, 2021, claimant filed a timely request to reopen the July 19, 2021 hearing record.

On May 12, 2022, ALJ Mott conducted a hearing at which the employer failed to appear. On May 13, 2022, ALJ Mott issued Order No. 22-UI-193707, allowing claimant's request to reopen the July 19, 2021 hearing record, vacating Order No. 21-UI-170606, and concluding that claimant was discharged, but not for misconduct, and was not disqualified from receiving benefits based on the work separation. On June 1, 2022, the employer filed an application for review[1] of Order No. 22-UI-193707 with the Employment Appeals Board (EAB).

Based on a *de novo* review of the entire record in this case, and pursuant to ORS 657.275(2), the portion of the order under review concluding that claimant had good cause to reopen the July 19, 2021 hearing record is **adopted.** The remainder of this decision addresses the merits of claimant's separation from work.

[1] The employer's application for review did include a written statement setting forth the reason(s) the employer failed to appear at the May 12, 2022 hearing. Therefore, pursuant to OAR 471-041-0060(4) & (5) (May 13, 2019), EAB treated the application for review as an application for review rather than as a request to reopen the hearing under ORS 657.270.

FINDINGS OF FACT: (1) Oregon Beverage Recycling Cooperative employed claimant as a human resources coordinator from August 6, 2019 until June 30, 2020.

(2) From around the age of 15 onwards, claimant suffered from asthma and other related pulmonary conditions, such as "various bouts of pneumonia[.]" May 12, 2022 Transcript at 16. As a result of claimant's chronic respiratory issues, claimant had a heightened risk of complications from COVID-19.

(3) At all times relevant to this decision, claimant's mother and her mother's partner suffered from Type I diabetes. Due to this and "a slew of other health issues," both claimant's mother and her mother's partner had a heightened risk of complications from COVID-19. May 12, 2022 Transcript at 20. Claimant's mother's ability to care for herself was limited. As such, claimant took on a caregiving role with her mother, and assisted her mother with various tasks on a weekly basis.

(4) When the COVID-19 pandemic began, the employer did not put relevant safety protocols, such as social-distancing and face-masking, into place at claimant's office. Claimant was concerned about the lack of safety protocols, and spoke to her supervisor about it on at least two occasions—once in March or April 2020, and again in May or June 2020. However, claimant's supervisor "kind of brushed aside" claimant's concerns, and did not put those safety protocols into place. May 12, 2022 Transcript at 22. Claimant also requested to work remotely full time, as she could have performed her job duties remotely, but her supervisor did not allow her to do so.

(5) On May 11, 2020, claimant's supervisor placed claimant on a performance improvement plan (PIP) due to the supervisor's concerns about claimant's work performance. Claimant did not agree with the concerns that her supervisor had raised in the PIP.

(6) On June 26, 2020, claimant notified the employer via email that she intended to resign effective July 8, 2020. Claimant did not state in the email why she was resigning. Although claimant's disagreement with the PIP "was a bit of a factor" in her decision to quit, she primarily quit because of her concerns about contracting COVID-19 at work. May 12, 2022 Transcript at 21.

(7) On June 30, 2020, claimant met with her supervisor to discuss the items addressed in the PIP. During the meeting, claimant told the supervisor that she did not agree with being on the PIP and did not think that the position was a good fit for her. Later that day, the supervisor "got some feedback from [her] team and another employee. . . that [claimant] had been making some pretty disparaging comments about [the supervisor] and about the company[.]" July 19, 2021 Transcript at 8. As a result, the supervisor decided to pay claimant for the remainder of claimant's notice period and "release her that day so as to avoid any further conflict in the workplace." July 19, 2021 Transcript at 8. Claimant did not work for the employer again after June 30, 2020.

CONCLUSIONS AND REASONS: Claimant was discharged, but not for misconduct.

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).

Both parties testified that claimant voluntarily quit, and was not discharged. *See* July 19, 2021 Transcript at 8; May 12, 2022 Transcript at 13. However, the record also shows that while claimant had given notice of her intent to quit on June 26, 2020, claimant's supervisor decided not to permit claimant to continue working for the employer after June 30, 2020. The supervisor supported her contention that she did not discharge claimant by explaining that she "compensated [claimant] for the remainder" of claimant's notice period, suggesting that claimant remained an employee through July 8, 2020. The fact that the employer paid claimant through July 8, 2020 for time that she otherwise would have worked, however, is not sufficient to show that claimant remained *employed* through that date. Claimant's resignation notice indicated that she planned to work for the employer until July 8, 2020, and the record does not show that claimant's willingness to work through that date changed. By contrast, the supervisor decided not to permit claimant to work through the end of her notice period. Because the record shows that claimant was willing to continue working for the employer for an additional period of time but was not allowed to do so by the employer, claimant's separation from work was a discharge that occurred on June 30, 2020.

Planned 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). Claimant had asthma, 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(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."

Claimant gave the employer notice that she intended to voluntarily quit on July 8, 2020, and the employer discharged her on June 30, 2020. Because the employer discharged claimant within 15 days of the date on which claimant had intended to quit, the separation must be considered in light of ORS 657.176(8). In other words, in order to determine whether claimant is disqualified from receiving benefits as a result of the work separation, it must be determined both whether claimant's planned voluntary quit would have been for good cause *and* whether the employer discharged her for misconduct.

The record shows that claimant voluntarily quit work with good cause. First, while claimant's disagreement with her supervisor over the items raised in the PIP may have been a minor contributing factor in her decision to quit, claimant explained in her testimony that she primarily decided to quit because of her concerns about COVID-19 safety at work. May 12, 2022 Transcript at 21. Claimant had asthma and other chronic respiratory conditions that made her more susceptible to complications from COVID-19, and also frequently spent time with her mother and her mother's partner, both of whom were similarly medically vulnerable. Further, the record does not show that the employer implemented safety measures to mitigate the risk of transmission in the office in which claimant worked. Because of both of these factors—the heightened risk of complications and the employer's failure to implement safety measures—claimant's planned voluntary quit was for a grave reason.

Further, the record shows that claimant had no reasonable alternative but to quit. Claimant raised her concerns about COVID-19 safety with her supervisor on at least two occasions, but the supervisor did not make any changes in response to claimant's concerns. Additionally, while claimant requested to work remotely in order to mitigate her own risk of exposure, the employer did not grant her request. The record does not show that any other alternatives were available that would have mitigated or eliminated claimant's risk of exposure at work. Therefore, claimant intended to voluntarily quit work for a reason of such gravity that she had no reasonable alternative but to quit. Had claimant quit on July 8, 2020 as she had intended, she would have voluntarily quit work with good cause.

Discharge. 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). "'[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).

The employer discharged claimant on June 30, 2020 because other employees told claimant's supervisor that claimant had made disparaging remarks about both the supervisor and the company. The record does not show that the supervisor personally witnessed claimant making any such remarks, nor does it show what claimant allegedly said. At hearing, claimant denied having made disparaging remarks about the employer. May 12, 2022 Transcript at 27. Because claimant's testimony on this point was first-hand and the employer's was hearsay, claimant's testimony is entitled to more weight. Therefore, the record shows that claimant did not disparage the employer as she was alleged to have done.

However, even if the record *did* show that claimant had disparaged the employer, the employer would not have met their burden to show that claimant's having done so would have constituted misconduct. The employer did not describe what claimant allegedly said and did not offer evidence to show that claimant knew or had reason to know the employer expected her *not* to say what she allegedly said. Therefore, the record does not show that claimant's alleged conduct would have amounted to a willful or

wantonly negligent violation of the employer's standards of behavior. For these reasons, the employer discharged claimant, but not for misconduct.

Because the employer discharged claimant for reasons that do not constitute misconduct within 15 days of the date on which claimant had planned to voluntarily quit work with good cause, the provisions of ORS 657.176(8) do not apply. Therefore, claimant is not subject to disqualification due to either the planned voluntary quit or the actual discharge.

DECISION: Order No. 22-UI-193707 is affirmed.

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

DATE of Service: September 7, 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.

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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
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