EO: 700
BYE: 202315

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

639
DS 005.00

EMPLOYMENT APPEALS BOARD DECISION
2022-EAB-0664

Affirmed
Disqualification

PROCEDURAL HISTORY: On May 9, 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 April 17, 2022 (decision # 123410). Claimant filed a timely request for hearing. On June 7, 2022, ALJ Lucas conducted a hearing, and on June 9, 2022 issued Order No. 22-UI-195801, affirming decision # 123410. On June 12, 2022, claimant filed an application for review with the Employment Appeals Board (EAB).

WRITTEN ARGUMENT: Claimant and the employer each submitted written arguments. Both claimant and the employer's arguments contained information that was not part of the hearing record, and did not show that factors or circumstances beyond their 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. EAB considered claimant and the employer's arguments to the extent they were based on the record.

FINDINGS OF FACT: (1) Johnson Brothers Appliances employed claimant from February 7, 2022 until April 20, 2022.

(2) The employer's workplace was a building that contained offices for the employer's sales division on one side and a warehouse on the other side. The employer hired claimant to work as a bookkeeper, a job in which claimant's office would be located on the sales side of the building. However, the employer required claimant to undergo training during the first 90 days of his employment, and during this training period, assigned claimant to a temporary office on the warehouse side of the building.

(3) Trucks and freight moved in and out of the warehouse side of the employer's building, which sent fine dust and irritants into the air. The irritants circulated in the air of claimant's training office and claimant inhaled them while he worked. The poor air quality of claimant's training office hindered his ability to breathe and sleep. Claimant tried to address the poor air quality by using air purifiers and

wearing a mask, but those efforts were ineffective, and claimant's breathing and sleeping difficulties continued. On a few occasions, claimant's direct manager observed claimant's difficulties and told claimant to go home early. However, claimant's breathing and sleeping difficulties persisted.

(4) On March 14, 2022, claimant sent an email to his direct manager requesting a meeting to discuss the air quality problem. The two were unable to agree to a mutually convenient time, and no meeting was held. Thereafter, claimant sent another email request to the manager to discuss the issue. Claimant and the manager agreed to a time to meet but before the meeting occurred, the manager, who had a newborn baby, emailed claimant advising she could not make it to the meeting because of issues with her child. Claimant replied, "Okay, thanks. No worries or hurry on our chat. You do what you need to do. We can talk another day." Transcript at 24. No meeting was ever held between claimant and the manager.

(5) By late March 2022, claimant's breathing and sleeping difficulties had worsened considerably. Claimant's difficulties breathing interfered with his ability to use his C-Pap device while sleeping, and claimant found he would spit up dirt during the day. On March 29, 2022, claimant went to urgent care and received steroids and an inhaler to treat his breathing difficulties. Despite receiving this medical attention, claimant breathing and sleeping difficulties persisted.

(6) After claimant's attempts to meet with his direct manager failed, he concluded that "there was no talk about doing any changing or wanting to do anything to fix" the air quality problem. Transcript at 15. As a result, claimant decided to quit working for the employer. Prior to deciding to quit, claimant did not contact the general manager or either of the employer's co-owners regarding the air quality problem. Claimant did not do so because he "believed in chain of command," felt it was his manager's responsibility to inform the general manager and co-owners, and assumed that because the manager had sent him home early on a few occasions, the manager had been conveying his health difficulties to those individuals. Transcript at 14. In fact, the general manager and co-owners were unaware of claimant's health difficulties.

(7) Had claimant contacted the general manager or co-owners and advised of his health difficulties caused by the air quality of his training office prior to deciding to quit, the employer would have immediately moved claimant to his intended permanent office on the sales side of the employer's building. Claimant's breathing and sleeping difficulties were likely to have improved significantly had he moved offices because there was substantially less fine dust and irritants in the air on the sales side of the employer's building.

(8) On April 12, 2022, claimant notified the employer by email that he intended to quit working for the employer effective April 22, 2022. In the email, claimant cited his health difficulties for why he was quitting, but the employer did not suggest moving claimant's office after receiving claimant's resignation notice because the employer's co-owner thought claimant's decision to quit was "a done deal," and that there would be no point in suggesting he move offices. Transcript at 26. After claimant notified the employer of his intent to quit, the employer decided to terminate claimant's employment effective April 20, 2022 rather than have claimant work through April 22, 2022. The employer terminated claimant's employment on April 20, 2022 because they "were concerned [about] his health" and wished to "accommodate [claimant] and not make him suffer for longer than necessary." Transcript at 20.

(9) Claimant was willing to work through April 22, 2022 but the employer told claimant that April 20, 2022 would be his last day, and claimant complied. Claimant completed his shift on April 20, 2022 and did not work for the employer again.

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

The order under review concluded that claimant voluntarily quit work on April 20, 2022. Order No. 22-UI-195801 at 2. However, the record shows that the employer discharged claimant shortly before claimant's planned quit. On April 12, 2020, claimant gave the employer notice that he planned to quit work effective April 22, 2022. However, the employer did not allow claimant to work through his notice period, deciding instead to terminate claimant's employment on April 20, 2022. Claimant was willing to work through April 22, 2022 but the employer told claimant that April 20, 2022 would be his last day, and claimant complied. Because claimant was willing to continue working for the employer through April 22 2022, but was not allowed to do so by the employer, the work separation was a discharge that occurred on April 20, 2022.

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). 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 April 20, 2022 because they "were concerned [about] his health" and wished to "accommodate [claimant] and not make him suffer for longer than necessary." Transcript at 20. The employer did not discharge claimant because he had engaged in conduct the employer considered a willful or wantonly negligent violation of the standards of behavior the employer had the right to expect of him, or a disregard of the employer's interests. Accordingly, the employer did not discharge claimant for misconduct under ORS 657.176(2)(a).

Planned Voluntary Leaving. That is not the end of the analysis, however, because ORS 657.176(8) applies to this case. 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 employer discharged claimant, but not for misconduct, on April 20, 2022, which was within 15 days of claimant's planned quit on April 22, 2022. The applicability of ORS 657.176(8) therefore turns on whether claimant's planned quit was without good cause. "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.

Claimant decided to quit working for the employer because the air quality of his training office caused him breathing and sleeping difficulties. Claimant faced a grave situation. The record shows that the warehouse irritants in the air of the training office hindered claimant's ability to breath and sleep, and that these difficulties worsened considerably over time, interfering with claimant's use of his C-Pap device and causing him to spit up dirt. The record further shows that claimant pursued some alternatives to quitting to no avail. Claimant tried using air purifiers and masks, but those efforts were ineffective. Claimant sought medical attention by going to urgent care but his breathing and sleeping problems persisted despite the treatments he received. Claimant also contacted his direct manager to discuss the matter several times but due to scheduling conflicts, no meeting was ever held.

Nevertheless, claimant's planned quit was without good cause because he did not pursue the reasonable alternative of contacting the employer's general manager or co-owners to address the air quality problem of his training office. Had he done so, the employer would have immediately moved claimant to his intended permanent office on the sales side of the employer's building. The record shows that claimant's breathing and sleeping difficulties were likely to have improved significantly had he moved offices because the air quality on the sales side was much better. At hearing, claimant candidly testified that moving offices "would have improved [his condition] greatly," and the sales side office would have been a "100 percent improvement over where [he] was at." Transcript 31.

The record shows that claimant did not contact anyone other than his direct manager because he believed it was the manager's responsibility to inform the general manager or co-owners of the situation, and he assumed the manager had mentioned it to them. In fact, the general manager and co-owners were not aware of claimant's health difficulties, and the reasonable alternative of raising the matter with them, which would have resulted in claimant changing offices, remained unpursued. There is no evidence that the direct manager expressed or implied that she informed the general manager and co-owners of claimant's health difficulties. Further, in light of the tone of claimant's response to the manager's meeting cancellation, ("No worries or hurry on our chat."), the record does not show that claimant's desire for a meeting was conveyed with urgency such that a reasonable and prudent person would expect the manager to have informed the general manager and co-owners of claimant's health difficulties. Transcript at 24.

A reasonable and prudent person would not have quit work without first attempting the reasonable alternative of contacting the general manager or co-owners to see if the employer could do anything to

address the air quality problem. Had he done so, the employer would have resolved the issue by moving claimant's office. Accordingly, claimant's planned quit was not for good cause because claimant did not establish that he exhausted all reasonable alternatives before quitting.

Because the employer discharged claimant, but not for misconduct, within 15 days prior to the date claimant planned to voluntarily leave work without good cause, ORS 657.176(8) applies to this case. Claimant's work separation is therefore adjudicated as if the discharge had not occurred and the planned voluntary quit had occurred. As discussed above, claimant's planned voluntary quit was for reasons that do not constitute good cause. Claimant therefore is disqualified from receiving unemployment insurance benefits effective April 17, 2022.

DECISION: Order No. 22-UI-195801 is affirmed.

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

DATE of Service: September 19, 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.

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