

EMPLOYMENT APPEALS BOARD DECISION
2022-EAB-0985

Affirmed
Eligible Weeks 1-22 to 2-22
Disqualification Effective Week 3-22

PROCEDURAL HISTORY: On January 14, 2022, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that the employer discharged claimant, not for misconduct, within 15 days of claimant quitting without good cause, disqualifying claimant from receiving benefits beginning January 9, 2022 (decision # 120107). Claimant filed a timely request for hearing. On September 2, 2022, ALJ Ramey conducted a hearing, and on September 9, 2022 issued Order No. 22-UI-202372, affirming decision # 120107. On September 26, 2022, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Sun Terrace Hermiston employed claimant from May 24, 2019 through December 31, 2021, most recently as a medication aide.

(2) The employer experienced a staff shortage beginning in September 2021 that claimant felt was impacting the care patients were receiving at the facility. Claimant reported her concerns to her supervisor, with whom claimant was frequently engaged in conflict, and other members of management. Though management listened to her concerns, claimant did not provide sufficient details of specific incidents to investigate, so the employer agreed generally to provide additional training to staff. Claimant did not feel change was occurring quickly enough.

(3) On December 29, 2021, claimant notified the employer that she was quitting work after serving a two-week notice period, which would have ended January 12, 2022.

(4) On December 31, 2021, claimant became upset because she believed someone had used her credentials without authorization to administer a medication. The manager called claimant into his office because he was concerned about her potentially engaging in arguments in view of other staff and patients. He discharged claimant and walked her out of the facility. He later offered to pay claimant for the remainder of the notice period, but she refused.

(5) Prior to December 29, 2021, claimant did not report her concerns to the employer's hotline or various state agencies who handled such complaints. She did not request to be transferred to an assignment with a different supervisor, which the employer would have accommodated. She did not request leave, which the employer would have accommodated, to allow additional time for staffing levels to improve.

CONCLUSIONS AND REASONS: Claimant was discharged, but not for misconduct, within 15 days of quitting without 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). "[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).

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.

On December 29, 2021, claimant effectively gave the employer notice that she was quitting work on January 12, 2022. The employer discharged claimant on December 31, 2021, less than 15 days prior to claimant quitting work. It therefore must be determined whether claimant had good cause for quitting, as well as whether claimant was then discharged for misconduct before claimant's planned quit date.

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's manager testified that claimant frequently complained about disagreements with her direct supervisor. Transcript at 25. The manager understood claimant's reason for quitting to be that claimant had given him an ultimatum: the supervisor had to go, or claimant would go. Transcript at 23. The manager was unwilling to remove the supervisor. The manager maintained that he could not address claimant's general complaints about the employer's operations without specific details, which she did not provide. Transcript at 27.

In contrast, claimant testified that she left because she was overworked, adequate care was not being given to patients, and there were a lot of medication errors being made. Transcript at 6. Claimant stated that she was only required to work 80 hours per two-week pay period, but she routinely volunteered for additional shifts such that she worked up to 150 hours per pay period. Transcript at 7. Her claim of being overworked is contradicted by the testimony that much of the work was voluntary overtime. Claimant did not provide specific evidence or testimony as to the care and medication error allegations, except for an incident that occurred after she resigned. This is consistent with the manager's testimony that claimant's complaints about operations were too vague to attempt to remedy, and an indication that the problems were not of sufficient gravity to warrant quitting. Claimant did not rebut the manager's testimony regarding her ultimatum to remove her direct supervisor. More likely than not, this was the central reason why claimant quit work. Persistent inability to get along with a direct supervisor may be of sufficient gravity to warrant quitting, but only if there is no reasonable alternative but to quit.

The manager credibly testified that claimant could have been transferred to a different building or community within the employer's facilities if she requested, which would have ended her contact with the supervisor. Transcript at 27-28. She could have stopped volunteering for extra shifts if she felt overworked, or requested leave, which the employer would have granted. Transcript at 28-29. The employer was willing to investigate any of claimant's allegations of misconduct if she provided sufficient information to allow them to do so. Transcript at 27. Claimant testified she made complaints about the employer with a state agency following her separation, which indicates she could have done so prior to quitting. Transcript at 15. Claimant failed to pursue a number of reasonable alternatives to quitting work, and therefore quit without good cause.

Claimant was discharged on December 31, 2021, prior to the expected end of her notice period on January 12, 2022. The manager testified he discharged claimant because she was very upset and would not commit to refraining from arguing with her supervisor in view of others in the facility. Transcript at 31. While such conduct could potentially constitute willful or wantonly negligent misconduct under some circumstances, the employer has failed to offer sufficient evidence that claimant had engaged in a pattern of this conduct, and did not prove that claimant was about to engage in such conduct on this occasion. Claimant testified that she was upset that another employee had used her credentials to dispense medication without authorization. Transcript at 40. This was an understandable reaction, and without more, is insufficient to establish that claimant would be disruptive to the employer's operations. Further, the manager testified that after discharging claimant, he unconditionally offered to pay claimant for the unworked notice period because she was a "great employee," which claimant refused. Transcript at 36-37. An employer likely would not make such an offer to an employee who they believed they had to discharge for misconduct. Claimant therefore was discharged, not for misconduct.

Claimant was discharged on December 31, 2021, but had intended to quit on January 12, 2022. Because claimant was discharged, not for misconduct, within 15 days of her planned quit without good cause,

ORS 657.176(8) applies to claimant's circumstances. Accordingly, ORS 657.176(8) requires that claimant be disqualified from receiving unemployment insurance benefits effective January 9, 2022 (week 3-22). Claimant is eligible for benefits for the weeks of December 26, 2021 through January 8, 2022 (weeks 1-22 to 2-22).

DECISION: Order No. 22-UI-202372 is affirmed.

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

DATE of Service: December 12, 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 ໄດ້ໂດຍປະຕິບັດຕາມຄໍາແນະນໍາທີ່ບອກໄວ້ຢູ່ຕອນທ້າຍຂອງຄໍາຕັດສິນນີ້.

Arabic

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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.

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