EO: 200
BYE: 202122

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

049
VQ 005.00

EMPLOYMENT APPEALS BOARD DECISION
2023-EAB-0374

Reversed
Disqualification

PROCEDURAL HISTORY: On November 5, 2020, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant voluntarily quit work without good cause and was disqualified from receiving unemployment insurance benefits effective May 10, 2020 (decision # 175055). Claimant filed a timely request for hearing. On May 5, 2021, the Office of Administrative Hearings (OAH) served notice of a hearing on decision # 175055 scheduled for May 19, 2021 at 9:30 a.m. On May 19, 2021, ALJ Hoppe convened a hearing at which claimant failed to appear, and on May 20, 2021 ALJ Hoppe issued Order No. 21-UI-167183, dismissing claimant's request for hearing for failure to appear. On May 25, 2021, claimant filed a timely request to reopen the May 19, 2021 hearing. On March 3, 2023, ALJ Micheletti conducted a hearing. On March 9, 2023, ALJ Micheletti issued Order No. 23-UI-218539, allowing claimant's request to reopen the May 19, 2021 hearing and cancelling Order No. 21-UI-167183 and reversing decision # 175055 by concluding that claimant was discharged, but not for misconduct, and was not disqualified from receiving benefits based on the work separation. On March 29, 2023, the employer filed an application for review with the Employment Appeals Board (EAB).

EVIDENTIARY MATTER: In a March 29, 2023 communication made to OAH, which was conveyed to EAB, the employer demonstrated that on February 11, 2023, they faxed documents to OAH for consideration by the ALJ to admit as evidence at the March 3, 2023 hearing in this matter. The record shows that the employer served these documents on claimant, who received them by mail prior to the hearing on February 13, 2023. Transcript at 19, 54. However, at hearing, the ALJ advised of the case having multiple case files and, perhaps due to some technical error, stated that he did not see any proposed exhibits submitted by the employer. Transcript at 36, 54. OAR 471-041-0090(1) (May 13, 2019) provides that EAB may consider information not received into evidence at the hearing if necessary to complete the record. The documents submitted by the employer were properly served on claimant, and should have been available for the ALJ to rule upon their admissibility at hearing. The documents are relevant and material to the merits of this case, and their admission into evidence is necessary to complete the record. Accordingly, the employer's documents, which EAB has marked as Exhibit 2, are admitted to complete the record. Any party that objects to the admission of Exhibit 2 must submit such objection to this office in writing, setting forth the basis of the objection in writing, within

ten days of our mailing this decision. OAR 471-041-0090(2). Unless such objection is received and sustained, Exhibit 2 will remain in the record.

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 allowing claimant's request to reopen the May 19, 2021 hearing is **adopted.** The remainder of this decision relates to claimant's separation from work.

FINDINGS OF FACT: (1) Strong Integrated Behavioral Health employed claimant as a licensed psychologist from July 2018 until May 15, 2020. The employer was a clinic that provided psychotherapy to clients and employed thirty-five licensed psychologists.

(2) In October 2019, claimant led a group therapy session, filling in for the employer's director who was out of town. While leading the group session, claimant became acquainted with one of the clients participating in the group. Claimant formed a friendship with that client and, thereafter, gave the client her personal cell phone number, visited the client at their home, had lunch with the client, and accompanied the client to a medical appointment.

(3) In late 2019, claimant noticed the employer's billing clerk would sometimes access her client notes to determine the billing code to use for billing the session. Although the clerk had accessed the notes for billing purposes, claimant suspected that the clerk's accessing of the client notes was a violation of the Health Insurance Portability and Accountability Act (HIPPA). In early January 2020, claimant informed the employer that the clerk had accessed the notes and that claimant thought doing so violated HIPPA.

(4) In late January 2020, the employer's director became aware that claimant had befriended the client who had participated in the group therapy session. The director was concerned that by both providing therapy to the client and carrying on a friendship with the client, claimant's conduct violated ethical standards applicable to licensed psychologists.

(5) In February 2020, the director met with claimant and advised that the employer considered claimant to have violated an ethical standard related to having both a personal friendship and a professional relationship with the client. Claimant believed the employer called the February 2020 meeting not due to an ethical violation on her part, but instead in retaliation for claimant having previously raised her belief that the clerk's accessing of her client notes was a HIPPA violation.[1] Claimant did not think her friendship with the client was unethical because claimant did not believe she had formed a professional relationship with the client.[2]

[1] The U.S. Department of Health and Human Services Office for Civil Rights investigated claimant's allegation of retaliation. That entity found no causal connection between claimant's HIPPA complaint and adverse employment actions taken against claimant. It found that the employer had a legitimate, non-retaliatory, and non-pretextual reason for taking adverse actions against claimant. Transcript at 55-56; Exhibit 2 at 10-13.

[2] The Oregon Board of Psychology later determined that claimant had formed a professional relationship with the client and had violated ethical standards related to avoiding harm and multiple relationships regarding the client. The Board of Psychology imposed discipline on claimant. Claimant ultimately turned in her psychology license and retired in 2021. Exhibit 2 at 14-17; Transcript at 45.

(6) The employer determined that it was necessary to place claimant in a supervision plan because of claimant's conduct regarding the client. In April 2020, claimant and the director, who were each represented by their attorneys, met on a teleconferencing platform to discuss the elements of the supervision plan. The employer had drafted one of the terms of the plan as follows:

> Agree not to enter into any personal relationships with any client of Strong Integrated Behavioral Health, including current or former clients[,] for the duration of [your] time at Strong.

Transcript at 12.

(7) Claimant thought the term was too broad because it was not limited to her current or former clients but referred to any current or former client of the employer generally. As a result, claimant believed the term would require her to ask anyone she met whether they had been in therapy with the employer, which claimant thought could make it impossible to function as a psychologist and could violate confidentiality. When claimant raised this in the April 2020 meeting, the director stated that the employer intended the language to refer only to claimant's own clients. However, the director agreed that the language was drafted too broadly and, during the April 2020 meeting in view of claimant and claimant's attorney, instructed her attorney to modify the language.

(8) On May 13, 2020, the employer's attorney emailed claimant's attorney a copy of the supervision plan. The employer's attorney's email stated "Attached is a copy of the employee action. Please have your client review and sign this action no later than Sunday, May 17th. She will not be allowed to return to work until she has agreed to this plan." Transcript at 48. The supervision plan contained the term with the same language as had been circulated during the April 2020 meeting. The director believed her attorney had changed the language and did not realize it remained the same in the May 13, 2020 version.

(9) Claimant's attorney forwarded the email to claimant and the two discussed the fact that the language remained the same. Claimant did not instruct her attorney to negotiate further or send back a copy of the plan with proposed modifications to address the breadth of the term. Claimant did not do so because she believed there was no indication that further negotiation was possible. Had claimant done so, the director would have ensured that the language of the term was explicitly limited to claimant's current or former clients.

(10) On May 15, 2020, claimant sent an all-staff email to the employer. In it, claimant stated "it is with . . . much sadness that I say goodbye" and "Wednesday night, 05/13/2020, . . . I learned from my attorney, that I am being forced to leave my employment" as well as "this is not the way I would have ever wanted my employment to end." Transcript at 59-60. The employer viewed claimant's all-staff email as a notice of her resignation. Claimant completed her work on May 15, 2020 and never worked for the employer again.

CONCLUSIONS AND REASONS: Claimant voluntarily left 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) (December 23, 2018). 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 the employer discharged claimant, but not for misconduct, and as a result claimant was not disqualified from receiving benefits based on the work separation. Order No. 23-UI-218539 at 4-6. The record does not support this conclusion.

The work separation was a voluntary leaving that occurred on May 15, 2020. When claimant sent the all-staff email on May 15, 2020 advising that she was saying "goodbye" and had been "forced to leave her employment," claimant demonstrated an unwillingness to continue to work for an additional period of time. The record shows that if she had agreed to the employer's supervision plan, claimant could have continued working for the employer subject to the terms of the plan. The supervision plan contained a term with broad language that was unacceptable to claimant. Nevertheless, although it was dependent upon claimant's agreement to the plan, the employer made continuing work available to claimant. Thus, the record shows that claimant could have continued to work for the employer for an additional period of time but, on May 15, 2020, demonstrated she was unwilling to do so. Therefore, the work separation was a voluntary leaving that occurred on May 15, 2020.

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). "[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 quit working for the employer because she was not willing to agree to a term of the supervision plan that contained language prohibiting claimant from having personal relationships with the employer's clients. Claimant objected to the term because, as drafted, it barred personal relationships with current or former clients of the employer generally and was not limited to current or former clients of claimant herself. The record supports that the term was overbroad as drafted and had the potential to be onerous. The employer employed 35 psychologists at the time claimant resigned and likely employed numerous others in the past. At hearing, claimant explained that "having to ask each and every person I met whether they were [a] . . . current or former . . . client of [the employer]" would make it impossible to "function[] as a psychologist" and would require her to ask people to disclose confidential information. Transcript at 63, 12. While the potential burdensomeness of the term was diminished somewhat given that the director had stated during the April 2020 meeting that the employer intended the broad language to refer only to claimant's own clients (suggesting the employer possibly would not enforce the overbroad term literally), the director agreed during that meeting that the language was too broad as written. The record further shows that although the director had instructed her attorney to modify the language, it appeared unchanged in the draft circulated to claimant on May 13, 2020. On balance, given the practical difficulties abiding by the overbroad plan term would likely present, the record evidence is sufficient to conclude that being subject to the plan term as drafted would constitute a grave situation.

However, the record shows that claimant failed to pursue reasonable alternatives to quitting work. At hearing, claimant maintained that at the time she received the email on May 13, 2020 with the language of the supervision plan term unchanged, there was no indication that she had any ability to negotiate or modify the language. Transcript at 63-64, 67. The weight of the evidence does not support this contention. As mentioned above, during the April 2020 meeting when claimant and the director considered a draft of the plan, the director had made known that the employer intended the language to refer only to claimant's clients, but acknowledged that the term was drafted too broadly. The director then, during the meeting and in view of claimant, directed her attorney to modify the language. Further, while the employer's attorney's May 13, 2020 email had a tone of finality in some respects, it specifically called for claimant to review the plan (thereby implying that modifications were possible) and stated that claimant had multiple days, from the May 13, 2020 delivery date until May 17, 2020, to agree to the plan. Rather than instruct her attorney to determine whether there was a mistake in the document in light of the director's previous comments and agreement to modify the language, negotiate further, or send back a copy of the plan with proposed modifications made to limit the breadth of the term, claimant waited a day and then sent an email announcing her resignation on May 15, 2020. A reasonable and prudent person afforded ample time to continue negotiating, as claimant was, and made aware of the director's intent to modify the term as the director expressed during the April 2020 meeting, would not have abandoned efforts to modify the language of the term. Asking the director again to modify the language of the term therefore was an option available to claimant. Doing so would not have been futile because the record shows that had claimant done so, the director would have ensured that the language of the term was modified to refer to claimant's current and former clients only. Thus, claimant failed to establish that she had no reasonable alternative but to leave work when she did.

For these reasons, claimant voluntarily quit work without good cause and is disqualified from receiving unemployment insurance benefits effective May 10, 2020.

DECISION: Order No. 23-UI-218539 is set aside, as outlined above.

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

DATE of Service: May 10, 2023

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
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