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

EMPLOYMENT APPEALS BOARD DECISION
2023-EAB-1056

Reversed & Remanded

PROCEDURAL HISTORY: On July 25, 2023, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant voluntarily quit work with good cause and therefore was not disqualified from receiving unemployment insurance benefits based on the work separation (decision # 92814). The employer filed a timely request for hearing. On September 11, 2023, ALJ Fraser conducted a hearing, and on September 12, 2023 issued Order No. 23-UI-235585, affirming decision # 92814. On September 20, 2023, the Department filed an application for review with the Employment Appeals Board (EAB).

WRITTEN ARGUMENT: The Department included a written statement with its application for review, assigning error to the order under review, which EAB has construed as a written argument. EAB did not consider the Department's written argument when reaching this decision because it did not include a statement declaring that it provided a copy of its argument to the opposing parties as required by OAR 471-041-0080(2)(a) (May 13, 2019).

FINDINGS OF FACT: (1) Emeritus Senior Living employed claimant as a resident care coordinator (RCC) from August 19, 2022 until June 26, 2023.

(2) The employer operated a residential care facility with two separate units: an assisted living unit and a memory care unit. As an RCC, claimant was generally expected to perform both caregiving work (AKA working "the floor"), which required more physical exertion, and administrative work relating to the coordination of the facility's caregivers. Audio Record at 11:10. Claimant's position also required her to be on-call 24/7 to coordinate coverage of staff shortages or fill in when no other coverage was available. Claimant generally coordinated for the memory care unit, while the other RCC at the facility generally coordinated for the assisted living unit.

(3) On May 11, 2023, claimant injured her back. Claimant saw a physician and a physical therapist the same day, who restricted claimant to light-duty work. In particular, claimant was restricted from performing actions such as pushing, pulling, or lifting, all of which were required while engaged in caregiving work. These restrictions were intended to continue until claimant completed her course of physical therapy. Claimant provided the employer with a copy of the doctor's note explaining these restrictions.

(4) Despite her doctor's restrictions, the employer repeatedly assigned claimant to work "the floor," which further aggravated claimant's back injury.

(5) On June 2, 2023, claimant requested that her doctor remove her from light-duty restrictions because the employer was not complying with the restrictions.

(6) On June 23, 2023, as a result of the employer's failure to restrict claimant to duties which would not aggravate her injury, claimant notified the employer that she intended to resign effective July 7, 2023. After she gave the employer notice, the employer told claimant that they would be requiring her to cover shifts for both of the facility's units. When claimant told the executive director that she no longer wished to work "the floor," the executive director told claimant that the employer owned many facilities, and that claimant would "never work in this field again" if she did not complete those duties. Audio Record at 29:29. The executive director also told the business office manager that she was not allowed to give claimant a reference.

(7) On June 24, 2023, claimant worked her final shift for the employer. On June 26, 2023, when claimant was on-call but otherwise not scheduled to work, she was called in to work to cover for another employee. At the time, claimant was "busy with [her] family." Audio Record at 10:03. Claimant asked the other RCC if she would cover the shift for claimant, but the other RCC refused. Afterwards, claimant sent the facility's executive director a text message about the matter, who responded, "Hi, it sounds like you aren't willing to help with the schedule during your notice period. If that's not accurate, please let me know." Exhibit 1 at 6. Claimant responded by stating, "Yes. That is accurate[.]" Exhibit 1 at 6. The executive director then responded, in relevant part, "Then unfortunately we will be accepting your notice effective immediately as you aren't willing to complete the essential functions of your job." Exhibit 1 at 6. Claimant accepted the employer's decision and did not work for them again.

CONCLUSIONS AND REASONS: Order No. 23-UI-235585 is set aside and this matter remanded for further development of the record.

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).

At hearing, the parties disagreed on the nature of the work separation. Claimant conceded that she notified the employer of her intent to quit on June 23, 2023, with a planned last day of work of July 7, 2023. However, she testified that she did not agree that she quit her job, because on June 26, 2023,

before she could finish her notice period, the employer "accept[ed] that day as [her] final notice." Audio Record at 8:55; 9:55 to 10:30. By contrast, the employer's witness characterized claimant's work separation as a voluntary quit. Audio Record at 19:49. The actual separation itself took place via a text message exchange between claimant and the executive director of her facility, when the executive director asked claimant if she was "[un]willing to help with the schedule during [claimant's] notice period[.]" Exhibit 1 at 6. When claimant confirmed that she was not willing to offer that help, the executive director told claimant that the employer "will be accepting [claimant's] notice effective immediately[.]" Exhibit 1 at 6. The executive director's statements during that exchange did not state that she was offering claimant a choice between either continuing with specific duties that the employer assigned to her or leaving work. Instead, her statement indicates that she unilaterally made the choice to sever the employment relationship at that point, rather than leaving the choice up to claimant. Therefore, the work separation was a discharge that occurred on June 26, 2023.

Because the employer discharged claimant less than 15 days prior to claimant's planned quit date, ORS 657.176(8) may determine whether claimant is disqualified from receiving benefits as a result of the work separation. 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.

Thus, in order to determine whether claimant's work separation was disqualifying, it must be first determined whether claimant's actual discharge was for misconduct and, if not, whether claimant's planned voluntary quit would have been for good cause.[1] As discussed below, the record as developed is insufficient to make either of these determinations.

Actual 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). "'[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

[1] ORS 657.176(8) only applies in circumstances where the individual was not discharged for misconduct. Therefore, if the record on remand shows that claimant *was* discharged for misconduct, it is not necessary to determine whether her planned voluntary quit would have been for good cause.

1233 (1976). Isolated instances of poor judgment are not misconduct. OAR 471-030-0038(3)(b). The following standards apply to determine whether an "isolated instance of poor judgment" occurred:

> (A) The act must be isolated. The exercise of poor judgment must be a single or infrequent occurrence rather than a repeated act or pattern of other willful or wantonly negligent behavior.
>
> (B) The act must involve judgment. A judgment is an evaluation resulting from discernment and comparison. Every conscious decision to take an action (to act or not to act) in the context of an employment relationship is a judgment for purposes of OAR 471-030-0038(3).
>
> (C) The act must involve poor judgment. A decision to willfully violate an employer's reasonable standard of behavior is poor judgment. A conscious decision to take action that results in a wantonly negligent violation of an employer's reasonable standard of behavior is poor judgment. A conscious decision not to comply with an unreasonable employer policy is not misconduct.
>
> (D) Acts that violate the law, acts that are tantamount to unlawful conduct, acts that create irreparable breaches of trust in the employment relationship or otherwise make a continued employment relationship impossible exceed mere poor judgment and do not fall within the exculpatory provisions of OAR 471-030-0038(3).

OAR 471-030-0038(1)(d).

The employer discharged claimant due to claimant's refusal to "help with the schedule," as stated in the executive director's June 26, 2023 text message. The record suggests that claimant's refusal to help with "the schedule" referred to claimant's unwillingness to fill in for caregiving duties that required her to do work that was not light-duty. However, further inquiry is necessary to show conclusively what "help[ing] with the schedule" entailed; i.e., it is not clear whether claimant's refusal was limited to performing non-light-duty work that might aggravate her back injury, or whether it extended to other duties (such as administrative tasks) that she was capable of performing without further injury.

The record should also be further developed to explain why claimant requested that her doctor release her to full-duty work, as the record otherwise suggests that claimant had not yet healed from her injuries at the time she was discharged and it is not clear what purpose claimant's actions would have served if she was not physically capable of performing full-duty work. Additionally, further inquiry should be made as to whether claimant's refusal to the executive director on June 26, 2023 was intended to be limited to that day only, or whether it was intended as a blanket refusal for the remainder of her notice period; and what other reasons, if any, claimant had for refusing to work on that particular that day.

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). "[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 gave notice of her intent to voluntarily quit on July 7, 2023 because the employer had continued to assign her full-duty work, apparently in contravention of her injury-related restrictions. To the extent that the employer had been requiring claimant to perform work that she was not physically capable of performing without injuring or re-injuring herself, claimant may have planned to quit for a grave reason. However, as noted above, inconsistencies exist in the record as to why claimant requested that her doctor release her to full-duty work on June 2, 2023. On remand, the ALJ should confirm whether claimant's injuries persisted to the extent that she could not safely perform full-duty work at the time that she gave her resignation notice.

Further, even if claimant's injuries persisted through the end of her employment, further inquiry is necessary to determine whether she sought reasonable alternatives to quitting. On remand, the ALJ should develop the record to show when claimant notified the employer of her injuries, to whom she spoke, whether and when she ever specifically told the employer that she was released to full-duty work and, to the extent that the executive director was aware of claimant's injuries but refused to accommodate them, whether claimant could have addressed the concerns elsewhere within the organization (such as the executive director's manager or the employer's human resources department). In considering claimant's reasonable alternatives to quitting, the ALJ should also determine whether the executive director's apparent threats to claimant (such as telling claimant that she would "never work in this field again") would have led a reasonable and prudent person to conclude that seeking further redress with the employer would have been futile.

ORS 657.270 requires the ALJ to give all parties a reasonable opportunity for a fair hearing. That obligation necessarily requires the ALJ to ensure that the record developed at the hearing shows a full and fair inquiry into the facts necessary for consideration of all issues properly before the ALJ in a case. ORS 657.270(3); *see accord Dennis v. Employment Division,* 302 Or 160, 728 P2d 12 (1986). Because further development of the record is necessary for a determination of whether claimant was discharged for misconduct and, if not, whether her planned voluntary quit would have been for good cause, Order No. 23-UI-235585 is reversed, and this matter is remanded.

DECISION: Order No. 23-UI-235585 is set aside, and this matter remanded for further proceedings consistent with this order.

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

DATE of Service: November 3, 2023

NOTE: The failure of any party to appear at the hearing on remand will not reinstate Order No. 23-UI-235585 or return this matter to EAB. Only a timely application for review of the subsequent order will cause this matter to return to EAB.

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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 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 دستورالعمل موجود در پایان آن، از دادگاه تجدید نظر اورگان درخواست تجدید نظر کنید.

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