

EMPLOYMENT APPEALS BOARD DECISION
2023-EAB-1105

Affirmed
Disqualification

PROCEDURAL HISTORY: On August 2, 2023, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant voluntarily quit work without good cause and was therefore disqualified from receiving unemployment insurance benefits effective April 30, 2023 (decision # 65757). Claimant filed a timely request for hearing. On September 12, 2023, ALJ Frank conducted a hearing at which the employer failed to appear, and on September 20, 2023, issued Order No. 23-UI-236362, affirming decision # 65757. On October 9, 2023, claimant filed an application for review with the Employment Appeals Board (EAB).

WRITTEN ARGUMENT: Claimant's argument contained information that was not part of the hearing record, and did not show that factors or circumstances beyond claimant's reasonable control prevented her 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's argument to the extent it was based on the record.

FINDINGS OF FACT: (1) Young's Market Company LLC employed claimant as a director of customer enablement from November 15, 2021, until May 1, 2023.

(2) On March 1, 2023, claimant received an annual review from the employer. The employer found some aspects of claimant's work over the prior year unsatisfactory. Claimant was surprised by the outcome of the review and believed that "a majority" of her work had met or exceeded the employer's stated expectations, and that the review expressed criticism of "small, hairline things." Audio Record at 21:30.

(3) Following the review, the employer told claimant of their intention to place her on a 60-day performance improvement plan (PIP), and informally discussed with claimant some of the areas in which they desired improvement that could be included in the plan. Claimant believed some of the goals discussed for the PIP were not necessarily achievable because they were measured subjectively and were not entirely within her control to accomplish, such as a goal to "gain the trust" of her subordinates.

Audio Record at 12:22. She expressed these concerns to the employer, who had not yet written the PIP. Claimant believed the PIP would ultimately lead to the employer discharging her despite her best efforts to meet their expectations.

(4) As an alternative to being placed on the PIP, the employer offered to allow claimant to negotiate the terms of a separation from employment, which would include a severance payment. After consideration, claimant chose to pursue the separation agreement and the employer therefore did not prepare the PIP.

(5) On April 28, 2023, after a period of negotiation, the employer presented claimant with a proposed written agreement whereby claimant would voluntarily leave work effective May 1, 2023, and the employer would pay claimant severance equal to four weeks' salary, among other terms. Both parties executed the agreement. Claimant did not work for the employer after May 1, 2023.

CONCLUSIONS AND REASONS: Claimant voluntarily quit work without good cause.

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). 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 voluntarily quit work because she was given the option of agreeing to a 60-day PIP, or "in lieu of" agreeing to the PIP, leaving work with a severance payment equal to four weeks' salary. Audio Record at 8:50. While claimant described being dissatisfied with other aspects of the employment relationship, largely involving communication issues and discord with others, claimant testified that she would not have quit work for those reasons at the time she did. Audio Record at 16:18. Claimant quit when she did because she had to choose between accepting either the PIP or the severance agreement, and chose the latter because she believed the PIP would ultimately result in her being discharged despite her best efforts to meet the employer's expectations.

A claimant has good cause to quit work to avoid being discharged, not for misconduct, when the discharge was imminent, inevitable, and would be the "kiss of death" to the claimant's future job prospects. *McDowell v. Employment Dep't.*, 348 Or 605, 236 P3d 722 (2010). A future discharge does not need to be certain for a quit to avoid it to qualify as good cause; likelihood is not dispositive of the issue but it does bear on the gravity of the situation. *Dubrow v. Employment Dep't.*, 242 Or App 1, 252 P3d 857 (2011). While it can reasonably be inferred that a discharge, not for misconduct, could have affected claimant's future employment prospects, claimant has not shown that she faced a discharge that was imminent or inevitable at the time she quit work.

The employer's offer of a severance payment to entice claimant to voluntarily quit work rather than accept the PIP tends to support claimant's belief that the employer desired, at least to some degree, to sever the employment relationship. However, it can reasonably be inferred from the employer's alternate

offer of a 60-day opportunity to correct what claimant described as minor deficiencies in her work, of which she was previously unaware, that the employer had not yet decided to discharge her within the following 60 days. While the employer retained the right to discharge claimant during this period, the record does not suggest that they *intended* to do so if claimant continued to perform her work at least at the same level as she had been performing it. Therefore, more likely than not, a discharge was not imminent at the time claimant quit work.

For similar reasons, the employer's intention to maintain claimant's employment for 60 days, and the fact that claimant was meeting a majority of the employer's expectations and was previously unaware of the more minor expectations she was not meeting, suggest that it was possible for claimant to improve her performance sufficiently to avoid discharge and retain her position. Claimant did not receive a written copy of the PIP, as the employer never prepared one. Therefore, claimant's belief that the employer was using the PIP as a tool to justify an eventual discharge was merely speculative. Claimant did not know with certainty what terms the employer would ultimately include in the PIP after engaging with her in a dialogue and hearing claimant's feedback on some of the proposed terms. The record fails to show that, more likely than not, it was unlikely or impossible for claimant to satisfy the PIP and maintain employment indefinitely. Claimant has therefore not established by a preponderance of the evidence that her discharge was inevitable.

Claimant has not demonstrated that she quit work to avoid a discharge that was imminent, inevitable, and would be the "kiss of death" to her future job prospects. Accordingly, she did not face a situation of such gravity that no reasonable and prudent person would have continued to work for their employer for an additional period of time. She therefore voluntarily quit work without good cause.

For these reasons, claimant voluntarily quit work without good cause and is disqualified from receiving unemployment insurance benefits effective April 30, 2023.

DECISION: Order No. 23-UI-236362 is affirmed.

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

DATE of Service: November 17, 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.

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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 desisyong ito.

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

هذا القرار قد يؤثر على منحة البطالة الخاصة بك، إذا لم تفهم هذا القرار، إتصل بمجلس منازعات العمل فوراً، 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 دستور العمل موجود در پایان آن، از دادگاه تجدید نظر اورگان درخواست تجدید نظر کنید.

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