EO: 990
BYE: 202441

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

484
VQ 005.00

EMPLOYMENT APPEALS BOARD DECISION
2024-EAB-0430

Affirmed
Request to Reopen Allowed
Disqualification

PROCEDURAL HISTORY: On December 22, 2023, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant was discharged, not for misconduct, within 15 days of a planned voluntarily leaving without good cause, and was therefore disqualified from receiving unemployment insurance benefits effective October 15, 2023 (decision # 115916). Claimant filed a timely request for hearing. On January 26, 2024, notice was mailed to the parties that a hearing was scheduled for February 8, 2024. On February 8, 2024, claimant failed to appear for the hearing and ALJ Wardlow issued Order No. 24-UI-247675, dismissing claimant's request for hearing due to her failure to appear. On February 12, 2024, claimant filed a timely request to reopen the February 8, 2024, hearing. On April 15, 2024, ALJ Christon conducted a hearing at which the employer failed to appear, and on April 17, 2024, issued Order No. 24-UI-252462, allowing claimant's request to reopen the February 8, 2024, hearing and affirming decision # 115916 on the merits. On May 7, 2024, 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.

The ALJ stated on the record that she reviewed and was admitting 34 pages of documents submitted by claimant as Exhibit 1, without objection by claimant. Audio Record at 13:36. The ALJ also admitted 32 pages submitted by claimant, some duplicative of Exhibit 1, as Exhibit 3. In her argument, claimant asserted that the ALJ "did not have access to all 98 pages of my documentation." Claimant's Argument at 3. The documents submitted with claimant's argument suggest that the discrepancy involves documents that were not themselves submitted prior to hearing, but accessible only through links to

websites contained in the documents submitted. Claimant could have printed and submitted the website documents prior to the hearing to be considered as evidence, as she did later in her written argument, and therefore was not prevented by circumstances beyond her reasonable control from offering them prior to the hearing. Additionally, these website documents not included in Exhibits 1 and 3, largely slides and screenshots from the July 2023 training and proposed survey questions, are of limited probative value to the issues to be decided. Under ORS 657.275(2) and OAR 471-041-0090 (May 13, 2019), EAB reviewed the hearing record in its entirety, which shows that the ALJ inquired fully into the matters at issue and gave all parties reasonable opportunity for a fair hearing as required by ORS 657.270(3) and (4) and OAR 471-040-0025(1) (August 1, 2004). 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.

EAB considered the entire hearing record. EAB agrees with the portion of Order No. 24-UI-252462 allowing claimant's request to reopen the February 8, 2024, hearing. Pursuant to ORS 657.275(2), that portion of Order No. 24-UI-252462 is **adopted.** The rest of this decision addresses the merits of decision # 115916.

FINDINGS OF FACT: (1) Urban League of Portland employed claimant from February 2022 until October 13, 2023, as an equity and inclusion analyst and, later, as an equity and inclusion specialist.

(2) On January 26, 2022, the employer presented claimant with a written job offer including a salary of $55,000 with the possibility of "$2,500 quarterly bonuses based on DEI [diversity, equity, and inclusion] partnerships that create unrestricted funds, increased utilization of [employer] DEI services, and overall ability to establish [employer] as a DEI expert in the community." Exhibit 3 at 6. Claimant accepted the offer on these terms.

(3) In November 2022, claimant proposed questions to her supervisor to be used in an equity and inclusion survey administered to the employer's staff. The supervisor replied that the questions "seemed too centered on queer and transgender experiences" and that the supervisor would review the proposed questions further with the vice president. Exhibit 3 at 21. Claimant believed that her supervisor's response "was a thought triggered by internalized homophobia and transphobia[.]" Exhibit 3 at 21.

(4) In March 2023, claimant emailed the employer's human resources manager, noting that several aspects of her employment caused her "discontent." Exhibit 3 at 13. These items largely centered around claimant's feeling that she was not supported in performing her job duties or being included in DEI conversations and meetings with the employer's leaders, and concerns regarding pay. *See* Exhibit 3 at 13.

(5) In response to these complaints, the employer's vice president stated, in part, that claimant "should not speak on equity and inclusion topics [with the employer's staff] because [the employer] never intended for [her]" to do so. Exhibit 3 at 13. Claimant disagreed with this directive because she believed that conducting equity and inclusion trainings for the employer's staff was part of her job description at hire. Claimant was also told at this time that the employer had hired an outside company to create the questions for their staff equity and inclusion survey rather than using the questions claimant drafted in November 2022. Claimant reiterated these complaints in a May 2023 meeting, which included the vice president and human resources manager, and the employer's response remained the same.

(6) In July 2023, claimant presented a two-hour online training to the employer's staff entitled "Black, Queer, and Proud." Exhibit 3 at 14. Claimant identifies as a bisexual woman and felt that part of her own history was being discussed in the training. During the training, a staff member typed into the group chat, "I feel this is not educational to me at all[.] [W]ho cares about there [*sic*] history. I treat everyone the same[.] [T]o say we [need] to accept this behavior is wrong." Exhibit 3 at 25. More than ten other staff members expressed similar sentiments in the group chat, while others expressed disagreement. Claimant was "genuinely hurt by the hateful comments [the staff member] made" and reported this to the human resources manager and D.M., the vice president for programs. Exhibit 3 at 15. Claimant expected the employer's "zero tolerance harassment and discrimination policy" to be "applied" to some of the attendees of the training for the opinions they expressed in the group chat. Exhibit 3 at 15.

(7) D.M. responded to claimant's report by questioning who had authorized claimant to give the training, approved its contents, or advised the staff that attendance was mandatory, as she [D.M.] and the employer's vice president previously "clarified [to claimant] that it is not your role to train our agency on DEI, as it will be externally outsource[d]." Exhibit 3 at 16. Further, D.M. reassigned claimant to a new supervisor and modified claimant's job title from "equity and inclusion analyst" to "equity and inclusion specialist." D.M. also provided claimant with a job description for the "specialist" title that excluded some of the responsibilities that had been listed in the "analyst" job description, mostly related to internal DEI work. The employer denied to claimant that she was being demoted. No change was made to claimant's salary, though she was no longer eligible to earn a bonus.

(8) Claimant nonetheless considered these changes to be a demotion and replied to D.M., in part, that she had "not agreed to any of this and nor do I have to. . . It is not insubordination for refusing to be moved from a job that you do well without cause." Exhibit 3 at 28. Claimant further demanded that all her previous and existing complaints be addressed and that she be given a pay increase. Claimant wrote that she would still be "operating. . . as the Equity and Inclusion Analyst" and reporting to her former supervisor until these demands were met. Exhibit 3 at 29.

(9) In August 2023, claimant attended a meeting with the human resources manager and the employer's vice president. They explained to claimant that she lacked the education and experience for the equity and inclusion analyst position that she had originally been hired for and that her only option for continued employment was to accept her revised job title and responsibilities. Claimant agreed to meet with her new supervisor, and did so in September 2023.

(10) After meeting with her new supervisor, claimant was instructed not to work on anything related to her former job title and that she should only work on creating online trainings that the employer could sell to other businesses or entities, which were the duties of the "specialist" position. Claimant engaged in this work, but on October 11, 2023, her supervisor commented that she "seemed very disgruntled" due to her recent interactions with management and suggested claimant meet with human resources to determine her path forward. Audio Record at 21:40.

(11) On October 12, 2023, claimant submitted a letter stating her intent to resign effective October 20, 2023. Claimant mentioned in the letter having an attorney and "propose[d]" a severance payment of $27,692.28 be made to her to avoid her "pursuing a wrongful termination lawsuit based on homophobic discrimination." Exhibit 3 at 15. The employer accepted the resignation, told her she would not be

permitted to work the notice period, and that her resignation would be effective the following day. Claimant did not work for the employer after October 13, 2023.

CONCLUSIONS AND REASONS: Claimant was discharged, not for misconduct, within 15 days of a 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).

ORS 657.176(8) provides that 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;
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> (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 October 12, 2023, claimant submitted a letter to the employer stating that she would resign effective October 20, 2023. However, the employer responded that they considered the resignation to be effective the following day and claimant did not work for the employer after October 13, 2023. Because claimant was willing to continue working until October 20, 2023, but the employer did not permit her to do so, the work separation was a discharge within 15 days of a planned voluntary leaving. For reasons explained in greater detail below, claimant was discharged, but not for misconduct, and did not have good cause to quit work.

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 1233 (1976).

The employer discharged claimant upon receiving her resignation. Claimant testified that the employer gave no reason why they would not allow her to work the notice period. Audio Record at 23:55. While the record shows ongoing tensions between the employer and claimant in the preceding months, the employer took no action, prior to receiving claimant's resignation letter, to sever the employment relationship over these tensions. Instead, it can reasonably be inferred that claimant's resignation was the proximate cause of the employer's decision not to allow claimant to continue working. The employer has not shown that claimant willfully or with wanton negligence violated their reasonable expectations by giving notice of her resignation, even though claimant proposed a severance agreement and threatened legal action. Accordingly, claimant was not discharged for misconduct and is not disqualified from receiving benefits for the week of October 8, 2023, through October 14, 2023 (week 41-23) based on the work separation.

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.

A claimant who leaves work due to a reduction in pay has left work without good cause unless "the newly reduced rate of pay is ten percent or more below the median rate of pay for similar work in the individual's normal labor market area. The median rate of pay in the individual's labor market shall be determined by employees of the Employment Department adjudicating office using available research data compiled by the department." OAR 471-030-0038(5)(d).

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> (A) This section applies only when the employer reduces the rate of pay for the position the individual holds. It does not apply when an employee's earnings are reduced as a result of transfer, demotion or reassignment.
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> (B) An employer does not reduce the rate of pay for an employee by changing or eliminating guaranteed minimum earnings, by reducing the percentage paid on commission, or by altering the calculation method of the commission.
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> * * *

Claimant gave notice that she was quitting work because the employer changed her job title from "analyst" to "specialist" and eliminated a portion of her responsibilities; because this change meant she was no longer eligible to earn a bonus; and, because she believed that the employer made this change in retaliation for her complaints and other advocacy following the July 2023 "Black, Queer, and Proud" training. Though the record suggests that claimant was displeased with other aspects of her work prior to July 2023 and that those complaints remained unresolved, it can be inferred from the timing of

claimant's resignation that it was the job title and duty change, and factors related to that change, that motivated her to quit when she did. Accordingly, these reasons are the proper focus of the good cause analysis.

Claimant did not show that the change in her job title or duties was a grave situation. Claimant testified that with the job title change, "they still wanted me to do the same work for outside organizations, they just didn't want me to do it internally." Audio Record at 31:38. Claimant also testified that the employer "never really said that I was demoted" when the change was explained to her. Audio Record at 21:27. Claimant did not assert that her salary was affected by these changes, except for her ability to earn a bonus. In all, these changes amounted to refocusing claimant's efforts on one part of her existing responsibilities while eliminating the other part, without reducing her rate of pay. This did not constitute a grave situation, as it left claimant only with responsibilities that she was accustomed to performing, and she did not show that she was unable to continue to perform these duties.

Further, though this change to claimant's job title and duties meant that she was no longer eligible for bonus pay, such a change does not constitute a reduction in pay that can be considered good cause pursuant to OAR 471-030-0038(5)(d) because it was the result of a reassignment of duties. Because OAR 471-030-0038(5)(d) is inapplicable, the good cause analysis must consider whether the change in potential compensation constituted a situation of such gravity that no reasonable and prudent person of normal sensitivity, exercising ordinary common sense, would leave work for that reason. Claimant has not demonstrated that receiving her salary without bonuses was a grave situation.

Even though the change in job title, responsibilities, and bonus eligibility did not directly pose a grave situation or constitute good cause for quitting, claimant asserted that the changes were a form of unlawful retaliation. However, more likely than not, the employer's outsourcing of the portion of claimant's responsibilities relating to internal DEI work was to accommodate their business needs and to remove claimant from situations where she was likely to be exposed to comments she found offensive.

In March 2023, the employer told claimant, regarding internal DEI efforts with the employer's staff, that she "should not speak on equity and inclusion topics because [the employer] never intended for [her]" to do so." Exhibit 3 at 13. While claimant disagreed with this directive because this was a responsibility listed in the "analyst" job description when she was hired, it is generally within an employer's discretion to modify job descriptions and titles, to choose what DEI initiatives and trainings, if any, to implement with their staff, and to choose who implements them. Despite the employer's directive not to speak on equity and inclusion topics, the record suggests that without authorization from the employer's leaders, claimant implemented a mandatory two-hour DEI training for the employer's staff in July 2023. Some participants of the training believed they were free to share their opinions relating to the subject of the training, and claimant was "hurt" by some of those opinions which questioned the value the training. This led claimant to seek disciplinary action against one or more staff members who stated or agreed with the opinions. In turn, claimant's complaint alerted the employer's managers that claimant had conducted the training without approval on a subject they had directed claimant not to "speak on" with internal staff.

The employer explained to claimant, in response to learning of the unauthorized training, that she had never met the qualifications to be hired for the analyst role, which required a master's degree and ten years related experience, neither of which claimant possessed. Exhibit 3 at 12. The employer reiterated

that they had therefore forbidden her in March 2023 from speaking on internal DEI issues with the staff despite that being listed as a duty of the "analyst" position, and now further clarified that all internal DEI responsibilities would be outsourced while claimant retained the other responsibilities of the job in the "specialist" position. It is reasonable to infer that this response was designed, at least in part, to prevent claimant from being exposed to further comments like those she complained of during the training, and for the employer's internal DEI needs to be handled by a provider better aligned with their needs and vision. Therefore, claimant has not shown by a preponderance of the evidence that her change in job title and responsibilities was made due to unlawful retaliation rather than to fulfill the employer's business needs. To the extent claimant felt harassed or discriminated against based on opinions discussed during the training, the change in claimant's job responsibilities, more likely than not, resolved this situation, as claimant did not assert that she was exposed to similar opinions or comments from coworkers in the months thereafter. Accordingly, claimant has not shown that she faced a grave situation as a result of harassment, discrimination or retaliation.

For these reasons, claimant was discharged, not for misconduct, within 15 days of a planned voluntarily leaving without good cause. Claimant is therefore disqualified from receiving unemployment insurance benefits effective October 15, 2023.

DECISION: Order No. 24-UI-252462 is affirmed.

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

DATE of Service: June 18, 2024

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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