EO: Intrastate
BYE: 25-Jan-2025

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

864
VQ 005.00

EMPLOYMENT APPEALS BOARD DECISION
2024-EAB-0552

Affirmed
Eligible Week 04-24
Disqualification

PROCEDURAL HISTORY: On April 16, 2024, 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 therefore was eligible to receive unemployment insurance benefits for the week of January 21, 2024 through January 27, 2024 (week 04-24), and disqualified from receiving benefits effective January 28, 2024 (decision # L0003641244). Claimant filed a timely request for hearing. On July 3, 2024, ALJ Christon conducted a hearing, and on July 17, 2024, issued Amended Order No. 24-UI-259273, affirming decision # L0003641244. On July 19, 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 her 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) 888HeyScott Corp. employed claimant as an office manager at their real estate firm from December 2021 until January 26, 2024.

(2) Claimant worked full-time and was paid an hourly wage of $28.85, equivalent to $60,000 per year, plus a bonus based on commissions. In 2022 and 2023, claimant's total yearly compensation exceeded $80,000.

(3) Beginning in the second half of 2023, claimant felt that she was being "frozen out" by the employer due to "little things. . . on a lot of occasions" that she considered "quite passive aggressive." Transcript at 21. These feelings arose after claimant requested a raise and the parties realized that they had a difference in understanding of how claimant's bonus was to be calculated. The employer continued to pay claimant's bonus in accordance with the employer's understanding, despite claimant's objections and the employer did not give claimant a raise. Claimant did not advise the employer or her coworkers of these feelings until January 18, 2024.

(4) On January 18, 2024, the employer presented claimant with a written employment agreement to clarify the terms of employment, and to change claimant's compensation structure due to the employer experiencing financial difficulties. Through the proposed agreement, claimant was informed that the employer intended to pay her only the $28.85 hourly wage that she had been receiving and that she would no longer be eligible to earn a bonus. Additionally, the document clarified that claimant was expected to work "Monday – Sunday, 40 hours per week, flexible hours depending on the needs of the group." Exhibit 2 at 1. The agreement also granted claimant three weeks of paid vacation and one week of paid sick time per year, which had been claimant's allotment since her hire.[1]

(5) Claimant believed the wording of the work schedule provision was a change from previous practice, as she typically worked traditional business days and hours but "[made herself] available as much as possible in the evening and weekends" to meet the employer's needs. Transcript at 11. Claimant was available to work outside of traditional business hours but preferred not to do so, except to perform work that could lead to bonus pay. Upon being presented with the written agreement, claimant brought up her feelings of having been "chilled" by the employer over the past several months, causing the owner to apologize, as he had been unaware that claimant felt that way or was unhappy with the work environment. Transcript at 33.

(6) Claimant was given through January 22, 2024, to read and consider the one-page proposed agreement. The employer's other two employees were presented with similar written agreements. The employer was willing to negotiate the agreement's terms with claimant, if necessary, as he wished to retain claimant as an employee. However, claimant believed that the terms were not negotiable based on the mid-2023 disagreement over bonus calculation having not been resolved to her satisfaction and her request for a raise having been denied. Claimant also believed that she would be discharged if she did not sign the agreement. Claimant would have been discharged if the parties could not ultimately reach a written agreement after negotiation.

(7) On January 22, 2024, claimant gave written notice to the employer that she intended to resign effective February 2, 2024, because she found the terms of the proposed written employment agreement unacceptable, specifically the elimination of the bonus and the phrasing of the expectation regarding

[1] The employer testified that this had been the agreed upon allotment of paid time off since claimant's hire but that he had granted her several additional days off as requested during 2022 and 2023. Transcript at 32. In contrast, claimant maintained that the agreement had always been for "unlimited" time off prior to the written agreement and disputed that she had asked for or been granted as many days off in 2022 and 2023 as the employer's records indicated. Exhibit 1 at 5. To the extent these accounts differed, they are no more than equally balanced, and claimant has therefore not shown by a preponderance of the evidence that this provision of the agreement constituted a proposed change in the terms of her employment, and the facts have been found accordingly. As no change to the terms of claimant's employment was proposed in this regard, the gravity of this provision was not discussed in the good cause analysis below.

working hours. In the letter, claimant also cited feelings of mistreatment in the months following the disagreement over her bonus calculation as a reason for quitting.[2] Claimant did not make any counterproposal to the employer's proffered employment agreement. Claimant also did not allow the employer an opportunity to respond to her allegations of mistreatment before announcing her resignation, which had been unknown to the employer until claimant first alluded to them on January 18, 2024, and then described them with more specificity in the resignation letter.

(8) On January 24, 2024, the employer told claimant that she would no longer be permitted to work in their office and had her escorted from the building after paying her through the end of the February 2, 2024, notice period. Claimant continued to work from home through Friday, January 26, 2024, and the employer did not permit her to perform any work thereafter. The employer's decision not to allow claimant to work at the office, and then to not work at all the remainder of the notice period, was not because they suspected claimant of any policy violation.

CONCLUSIONS AND REASONS: Claimant was discharged, but 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).

On January 22, 2024, claimant gave notice of her intent to resign on February 2, 2024. On January 24, 2024, the employer paid claimant through February 2, 2024, but did not allow her to work after January 26, 2024. Because the record shows that claimant was willing to work for the employer for a period of time after January 26, 2024, but the employer did not allow her to do so, the separation was a discharge that occurred January 26, 2024.

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) (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).

ORS 657.176(8) provides that when a claimant is discharged, not for misconduct, within 15 days of their planned voluntary leaving for reasons that do not amount to good cause, the separation will be

[2] Claimant also took issue with technical aspects of the agreement, such as that it did not contain the employer's address, and that it required adherence to "all company policies and procedures" which apparently were not in written form. Exhibit 1 at 3. However, the record does not show that these were factors in her decision to quit work.

adjudicated as though the discharge had not occurred, but the planned voluntary leaving had. In such cases, the claimant is eligible for benefits only 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. ORS 657.176(8)(c).

The employer discharged claimant because she gave notice of her intent to resign on February 2, 2024, and the employer preferred to pay her for the notice period without requiring her to work until that date. As the employer did not assert that claimant was discharged because she violated a standard of behavior which an employer has the right to expect of an employee, they have not alleged or proven that she was discharged for misconduct.

However, because claimant was discharged within 15 days of a planned voluntary leaving that was, for reasons explained in greater detail below, without good cause, claimant is eligible to receive benefits based on the work separation only for the week in which the discharge occurred—the week of January 21, 2024, through January 27, 2024 (week 04-24)—which was also the week prior to the week of claimant's February 2, 2024, planned voluntary leaving.

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) (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.

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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> (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 submitted her resignation letter on January 22, 2024, because she disagreed with the elimination of her bonus, which was calculated on a commission basis, and because she believed that the employer was changing her work schedule. To the extent claimant asserted in her resignation letter that she faced a "hostile environment," the record shows that claimant felt that the work environment was "hostile" since mid-2023 but that she chose to continue working despite that feeling. Exhibit 1 at 5. The

evidence does not suggest that there was any increase in what claimant perceived as hostility in the days leading up to her January 22, 2024, resignation letter, other than the employer proffering the written employment agreement. Therefore, it was claimant's displeasure with some terms of the proposed agreement rather than the perceived workplace hostility that caused claimant to plan her voluntary leaving when she did. The agreement's terms that claimant found unacceptable are therefore the proper subject of the good cause analysis.

The employer's proposed elimination of claimant's bonus pay is not considered a pay reduction for purposes of the good cause analysis under OAR 471-030-0038(5)(d)(B) because it constituted a reduction in the commission rate to zero percent.[3] Therefore, the standard good cause analysis set forth in OAR 471-030-0038(4) applies. Exclusive of bonuses, claimant earned an hourly wage equivalent to $60,000 per year for full-time work as an office manager, with ancillary duties as a real estate broker, since her date of hire. This hourly wage was to continue under the terms of the proposed written agreement. Claimant did not assert or show the elimination of the bonus pay placed her in financial distress such that her decision to quit and forego the reduced pay would benefit her, since quitting work necessarily meant that claimant would receive no pay at all. *See Oregon Public Utility Commission v. Employment Dep't.*, 267 Or App 68, 340 P3d 136 (2014) (for a claimant to have good cause to voluntarily leave work, the claimant must derive some benefit for leaving work). While claimant was dissatisfied with the proposal's effect on her overall compensation, she has not shown by a preponderance of the evidence that this wage was such that it would cause a reasonable and prudent person of normal sensitivity, exercising ordinary common sense, to leave work.

Further, claimant argued that some of the tasks she had been performing, and would likely be expected to continue performing under the written agreement, were more consistent with the role of a real estate broker rather than an office manager. Claimant's Argument at 9. Claimant further contended, "[The] employer did not and does not have a right to require that [claimant] act on his behalf as a real estate broker, without providing an industry standard commission-based percentage commensurate for that work, over and above her $60,000 salary as an office manager." Claimant's Argument at 9. However, claimant cited no legal authority for this contention. Absent a legal requirement to the contrary, an employer may generally assign their employees any lawful task and compensate them at an hourly rate for performing it, even if other employers typically use other methods of determining compensation for such a task. Claimant has not shown that an hourly rate of $28.85 to assist the employer with "open houses, showings, etc." was so inadequate that it would cause a reasonable and prudent person of normal sensitivity, exercising ordinary common sense, to leave work. Transcript at 11. Accordingly, claimant has not shown that she faced a grave situation in being paid only her hourly wage for whatever tasks the employer assigned.

The other proximate cause of claimant's planned voluntary leaving was that the proposed written agreement called for 40 hours of work per week, potentially to be performed on any days of the week, with "flexible hours depending on the needs of the group." Exhibit 2 at 1. Claimant understood this to be a departure from her typical schedule of working business days and hours and being "available as much as possible in the evenings and in weekends" for what she considered to be real estate broker tasks. Transcript at 11. Claimant did not assert that she had personal obligations that would pose a grave

[3] In her written argument, claimant asserted that elimination of commission entirely does not constitute "reducing the percentage paid on commission," and therefore the reduction in pay analysis set forth in OAR 471-030-0038(5)(d) should apply. Claimant's Argument at 9. However, claimant has cited no legal authority that supports this assertion.

situation if she were required to continue working at times outside of traditional business hours. Instead, claimant testified simply that she "did not prefer to work weekends or evenings," despite having done so until that point in time for tasks that could lead to bonus pay. Transcript at 11.

It can be inferred from claimant's testimony that she was willing to continue working outside of traditional business hours as needed to perform what she considered real estate broker tasks despite her preference not to work at those times. Claimant was just not willing to do so for a wage of $28.85 per hour instead of a five percent commission bonus. Therefore, claimant's rejection of this term of the agreement was not because it constituted a substantial change to her work schedule. Instead, claimant rejected it because the bonus compensation that she believed she should receive for work done beyond the scope of an office manager role, and outside of traditional business hours, was being reduced to zero in favor of hourly compensation. As discussed above, this proposed change in compensation structure did not constitute a grave situation, and claimant's dissatisfaction with the employer's rephrasing of their expectations regarding claimant's work schedule is derivative of that complaint, and therefore similarly did not present a grave situation.

Claimant's feeling that the employer had been responsible for a hostile working environment since mid-2023 was, more likely than not, not a proximate cause of her decision to quit work, as previously discussed. However, even if it was part of claimant's decision to quit, she has not shown that she faced a grave situation as a result. When asked to describe at hearing why she felt that the workplace was hostile, she explained that it was "little things like being frozen out of meetings . . . just small, subtle things[.]"[4] Transcript at 21. The example of this she cited at hearing was a video that the employer made for an award presentation to another employee, wherein the employer "[went] through the whole office" with his camera and captured images of his own desk and another employee's desk, but "basically passed over [claimant's] desk entirely." Transcript at 24-25. The employer's testimony in rebuttal suggested that he had no idea that claimant felt slighted by this and had not intended to exclude her or her desk from the video. The employer testified, "The hostile environment was abrupt news [when] first revealed. Now during our meeting [on January 18, 2024,] she made a comment that she felt 'chilled'. . . but I was shocked to see just [ ] the intensity of. . . her allegation in [the resignation letter.]" Transcript at 33. The employer further testified that after reading the letter he consulted the other employees in their "very small office" who all told him that claimant "never approached them or ever mentioned any issue." Transcript at 33. That claimant did not find the employer's conduct sufficiently objectionable to bring it to the attention of the employer or her coworkers until resigning for other reasons suggests that it was not a grave matter. Accordingly, claimant has not shown that the "hostile" conduct about which she testified would cause a reasonable and prudent person of normal sensitivity, exercising ordinary common sense, to leave work.

Moreover, even if claimant faced a grave situation as a result of being presented with the written agreement, claimant had the reasonable alternative to quitting work of attempting to negotiate the portions of the agreement she found unacceptable. The employer testified that he had been willing to negotiate the terms of the agreement if asked, but neither party raised this possibility with the other.

[4] In her written argument, claimant alleged that the employer made inappropriate comments about her physical attributes and was an "almost daily" source of unwelcome sexual innuendos and jokes that embarrassed her. Claimant's Argument at 2, 4. While such conduct could certainly constitute a hostile work environment and grave situation, claimant did not offer evidence at hearing that this type of conduct was occurring, though she was given the opportunity to describe the alleged hostilities she experienced. *See* Transcript at 21. As previously stated, EAB's decision can be based only on evidence in the hearing record.

Transcript at 30-31. Claimant asserted in her resignation letter that attempting to negotiate would have been futile because the mid-2023 dispute over how her bonus commission was calculated had not been resolved to her satisfaction, and because the employer had denied her a raise that year. Exhibit 1 at 4-5. Claimant has not shown that simply because the employer did not accede to her demands regarding the bonus calculation and raise several months earlier that the employer would not have seriously entertained her request on this occasion to compromise regarding her compensation or work schedule. Accordingly, although we find claimant did not face a grave situation, even had claimant had faced a grave situation she had a reasonable alternative to quitting, and therefore her planned voluntarily leaving was without good cause.

For these reasons, claimant was discharged, but not for misconduct, within 15 days of a planned voluntary leaving without good cause. She is therefore eligible to receive unemployment insurance benefits for the week of January 21, 2024, through January 27, 2024 (week 04-24) and disqualified from receiving benefits effective January 28, 2024.

DECISION: Order No. 24-UI-259273 is affirmed.

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

DATE of Service: August 9, 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.

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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 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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