EO: Intrastate
BYE: 25-Jan-2025

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

114
VQ 005.00

EMPLOYMENT APPEALS BOARD DECISION
2024-EAB-0785

Modified
Request to Reopen Allowed
Eligible Week 05-24
Disqualification Effective Week 06-24

PROCEDURAL HISTORY: On May 9, 2024, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant quit working for the employer without good cause and was disqualified from receiving benefits effective February 11, 2024 (decision # L0004026962). Claimant filed a timely request for hearing. On July 16, 2024, notice was mailed to the parties that a hearing had been scheduled for July 30, 2024. On July 30, 2024, claimant failed to appear for the hearing, and on July 31, 2024, ALJ Rackstraw issued Order No. 24-UI-261035, dismissing claimant's request for hearing due to her failure to appear. On August 7, 2024, claimant filed a timely request to reopen the hearing. On October 25, 2024, ALJ Chiller conducted a hearing at which the employer failed to appear, and on November 6, 2024, issued Order No. 24-UI-272394, allowing claimant's request to reopen and modifying decision # L0004026962 by concluding that claimant quit work without good cause and was disqualified from receiving benefits effective January 28, 2024. On November 8, 2024, claimant filed an application for review of Order No. 24-UI-272394 with the Employment Appeals Board (EAB).

WRITTEN ARGUMENT: Claimant did not declare that she provided a copy of her argument to the opposing party or parties as required by OAR 471-041-0080(2)(a) (May 13, 2019). The argument also 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 as required by OAR 471-041-0090 (May 13, 2019).[1] EAB considered only information received into evidence at the hearing when reaching this decision. *See* ORS 657.275(2).

[1] The hearing record was left open for a period following the hearing for claimant to submit additional evidence because claimant testified that she had not received the notice of hearing containing instructions for timely submitting hearing evidence. Transcript at 48-49. Claimant has not demonstrated that she was prevented by reasons beyond her reasonable control from offering the new information submitted with her written argument during this period.

EAB considered the entire hearing record, including witness testimony and any exhibits admitted as evidence. EAB agrees with the part of Order No. 24-UI-272394 allowing claimant's request to reopen. That part of Order No. 24-UI-272394 is **adopted.** *See* ORS 657.275(2). The rest of this decision addresses whether claimant's work separation from the employer disqualified her from receiving benefits.

FINDINGS OF FACT: (1) Hotel Management Services, LLC employed claimant as a hotel front desk supervisor from approximately November 2022 until January 28, 2024.

(2) In December 2023, a new management company began operating the hotel. The manager in charge of the transition suggested to claimant that she would be promoted to general manager or assistant general manager after the transition. Other personnel were brought in for claimant to train in the operation of the hotel.

(3) At some point in December 2023, claimant was allowed to stay in one of the hotel's rooms. Claimant used the room as her primary residence thereafter.

(4) In early January 2024, claimant began to doubt that she would be promoted as promised, and gave written notice of her intent to resign in two weeks. The transition manager discussed this with claimant and assured her of the promotion. Claimant and the employer agreed to rescind claimant's notice of resignation.

(5) On January 24, 2024, claimant again came to believe that the promotion would not be forthcoming because she saw the position posted on a website listing job advertisements. Claimant again notified the transition manager of her intent to resign, effective two weeks later on February 7, 2024. The transition manager asked claimant to reconsider, but during a January 26, 2024, telephone call, after the transition manager learned that claimant had been living in one of the hotel's rooms, both parties agreed that claimant would proceed with her planned resignation at the end of the two-week period, despite claimant desiring to again rescind her resignation. The employer also asked claimant to vacate the hotel room she had been staying in by January 28, 2024.

(6) On January 27, 2024, claimant texted the transition manager, "Just wanted to reiterate that I will be leaving tomorrow and no longer working at [the hotel] per our conversation on Friday [January 26, 2024]." Exhibit 6 at 1. Claimant meant by this that she would be vacating the hotel room on the following day as planned, and working the remainder of her two-week notice as planned.

(7) On January 28, 2024, the transition manager responded to claimant's text, in relevant part, "You can pick up your items tomorrow. We will however move forward with your last day as today from our previous conversation and text message." Exhibit 10 at 1. Claimant replied by asking if she was "being terminated," to which the transition manager responded, "No, I have your resignation in writing for today." Exhibit 10 at 1. The employer did not permit claimant to work that day or thereafter.

(8) As of January 28, 2024, claimant had rented a room within commuting distance of the hotel and owned or had access to a vehicle with which she could have commuted to the hotel. Claimant reached an agreement with the employer to vacate the hotel room and relinquish any rights as a tenant several days after the work separation.

CONCLUSIONS AND REASONS: Claimant was discharged, not for misconduct, within 15 days of her planned voluntary leaving without good cause.

Nature of the work separation. If an 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 an 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 work separation was a voluntary leaving rather than a discharge, largely due to claimant's insistence on January 27, 2024, that she work the remainder of the two-week notice period. Order No. 24-UI-272394 at 5. However, the record shows that claimant was discharged.

Claimant testified that in early January 2024, she gave notice of her intent to resign, effective two weeks later, but rescinded the resignation at the employer's request before it took effect. Transcript at 36. Claimant additionally testified that on January 24, 2024, she gave a second notice of her intent to resign, effective two weeks later. Transcript at 36. Claimant's resignation therefore was to become effective on February 7, 2024. Claimant testified that later on January 24, 2024, the transition manager asked her to reconsider the resignation. Transcript at 38-39. However, the record does not show that claimant successfully rescinded this resignation. Instead, on January 26, 2024, claimant and the transition manager spoke on the telephone and agreed that claimant would work for the remainder of the two-week notice period. Transcript at 41-42. Claimant therefore planned, at that point, to voluntarily leave work on February 7, 2024.

On January 27, 2024, claimant texted the transition manager, "Just wanted to reiterate that I will be leaving tomorrow and no longer working at [the hotel] per our conversation on Friday [January 26, 2024]." Exhibit 6 at 1. Claimant testified that she sent this message "to reiterate to him that I'm being terminated." Transcript at 44. It is reasonable to infer from this evidence and claimant's statement the following day that she "can finish out the two weeks," that claimant meant that she would vacate the hotel room the following day but work the remainder of the two-week notice period. It can further be inferred that claimant had agreed during the January 26, 2024, conversation to quit work on February 7, 2024, as planned because the employer would not allow her to rescind the resignation, which claimant felt was tantamount to "being terminated." Exhibit 6 at 1. Claimant's planned voluntary leaving on February 7, 2024, therefore remained in effect.[2]

On January 28, 2024, in response to claimant's text that she had transportation and housing arranged and "can finish out the 2 weeks," the transition manager wrote that the employer would "move forward with your last day as today from our previous conversation and text message." Exhibit 10 at 1. It is possible that the employer misinterpreted claimant's January 27, 2024, text message as an indication that claimant intended to both vacate the hotel room and quit working on January 28, 2024, but as explained above, the record shows that this was not claimant's intent, and should not have been so interpreted given the conversation that had taken place on January 26, 2024. Claimant objected to the employer

[2] *See Schmelzer v. Employment Division*, 57 Or App 759, 646 P2d 650 (1982) (a work separation remains a voluntary leaving even if the employer did not formally accept or reject claimant's initial resignation because rejection of the attempted rescission is effectively an acceptance of the original resignation).

refusing to allow her to continue working and requested to work the rest of the notice period through February 7, 2024. Exhibit 6 at 2. Because claimant was willing to continue working through the day of her planned voluntary leaving but was not permitted to do so by the employer, the work separation was a discharge.

However, for reasons that are explained in greater detail below, claimant's planned voluntary leaving was without good cause, and the discharge was not for misconduct and occurred within 15 days of the planned voluntary leaving. Accordingly, the work separation analysis falls under ORS 657.176(8), which 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.

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 did not participate in the hearing and their reason for discharging claimant is unclear from the record. At hearing, claimant testified that as of January 24, 2024, the transition manager did not want claimant to resign, but on January 26, 2024, he would not allow her to rescind her resignation. The timing of the transition manager's change in attitude toward claimant coincided with his discovery that claimant had been living in one of the hotel's rooms for approximately a month, apparently beginning under the authority of the previous management. As discussed above, the transition manager may have misinterpreted claimant's January 27, 2024, text message to mean that she intended to both vacate the hotel room and quit working the following day, and relied on this interpretation to assert to claimant that she had agreed to shorten the notice period to end on January 28, 2024. To the extent either or both of these circumstances caused the employer to discharge claimant rather than allowing her to work through February 7, 2024, the record does not show that they involved willful or wantonly negligent violations of a reasonable expectation. On this record, claimant was discharged, but not for misconduct.

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.

On January 24, 2024, claimant gave notice of her planned voluntary leaving, effective two weeks later on February 7, 2024, because she felt that the transition manager had been falsely promising her a promotion. Claimant testified that she felt her work experience and knowledge of the hotel's procedures and personnel made her the most qualified candidate to be a general manager or assistant general manager, and that the transition manager had assured her that she was a "shoo-in" to get the general manager job by mid-February 2024. Transcript at 30. However, claimant testified that she discovered that the employer had advertised the general manager position on January 20, 2024, and when confronted, the transition manager "put [her] off," saying that the hiring process would not begin until March 2024. Transcript at 34-35. While claimant's disappointment at the status of her potential promotion and at being misled about the decision process and timeline is understandable, a reasonable and prudent person of normal sensitivity, exercising ordinary common sense, would not leave work for this reason. Moreover, even if this had constituted a grave situation, claimant had the reasonable alternative to quitting of waiting to see whether the employer actually selected other candidates for those positions. Therefore, claimant has not shown good cause for her planned voluntary leaving.

For these reasons, claimant was discharged, not for misconduct, within 15 days of her planned voluntary leaving without good cause. Pursuant to ORS 657.176(8), claimant is not disqualified from receiving benefits based on the work separation for the week of January 28 through February 3, 2024 (week 05-24). However, claimant is disqualified from receiving benefits effective February 4, 2024 (week 06-24), the week of the planned voluntary leaving.

DECISION: Order No. 24-UI-272394 is modified, as outlined above.

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

DATE of Service: <u>December 13, 2024</u>

NOTE: This decision modifies the ALJ's order denying claimant benefits. Please note that in most cases, payment of benefits owed, if any, will take about a week for the Department to complete.

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 stated above**. *See* ORS 657.282. For forms and information, visit https://www.courts.oregon.gov/courts/appellate/forms/Pages/appeal.aspx and choose the appropriate form under "File a Petition for Judicial Review." You may also contact the Court of

Appeals by telephone at (503) 986-5555, by fax at (503) 986-5560, or by mail at 1163 State Street, Salem, Oregon 97301.

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. If you are unable to complete the survey online and wish to have 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.

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