EO: Intrastate
BYE: 20-Dec-2025

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

179
VQ 005.00

EMPLOYMENT APPEALS BOARD DECISION
2025-EAB-0178

Reversed & Remanded

PROCEDURAL HISTORY: On January 15, 2025, 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 from December 1, 2024, through December 20, 2025 (decision # L0008721134). Claimant filed a timely request for hearing. On February 24, 2025, ALJ Contreras conducted a hearing, and on February 28, 2025, issued Order No. 25-UI-284569, modifying decision # L0008721134 by concluding that claimant quit without good cause and therefore was disqualified from receiving benefits effective December 1, 2024, and until requalified under Department law. On March 20, 2025, claimant filed an application for review with the Employment Appeals Board (EAB).

WRITTEN ARGUMENT: EAB considered claimant's argument in reaching this decision.

In addition to presenting arguments, claimant requested that EAB consider additional evidence under OAR 471-041-0090(1)(b) (May 13, 2019). Specifically, claimant requested that a three-page declaration of himself and an email statement from his union representative be considered by EAB. Claimant's Argument at 6-9.

Under OAR 471-041-0090(1)(b), "Any party may request that EAB consider additional evidence, and EAB may allow such a request when the party offering the additional evidence establishes that: (A) The additional evidence is relevant and material to EAB's determination, and (B) Factors or circumstances beyond the party's reasonable control prevented the party from offering the additional evidence into the hearing record." In his argument, claimant contended that his failure to present the information at hearing was due to his anxiety condition, which he asserted was a factor beyond his reasonable control that prevented him from offering the evidence into the hearing record. Claimant's Argument at 5.

Claimant's request is denied. The record shows that claimant suffered from anxiety that can cause him to "clam up," which he stated at one point during the hearing was "happening to [him]" then. Transcript at 14. However, claimant may seek to offer the additional evidence into the hearing record on remand. It therefore is unnecessary to rule on the request at this juncture. Should the matter return to EAB, claimant is free to renew the request.[1]

The parties may offer new information into evidence at the remand hearing. Such offered information may include: the declaration and email statement that are the subject of claimant's additional evidence request; any report produced following the employer's investigation; and any written recommendations produced following claimant's due process hearing. At the time of the remand hearing, it will be determined if the new information will be admitted into the record. The parties must follow the instructions on the notice of the remand hearing regarding documents they wish to have considered at the hearing. These instructions will direct the parties to provide copies of such documents to the ALJ and the other parties in advance of the hearing at their addresses as shown on the certificate of mailing for the notice of hearing.

FINDINGS OF FACT: (1) The City of Wilsonville employed claimant as a lead road and storm maintenance specialist from December 19, 2022, until December 6, 2024.

(2) From a young age, claimant suffered from anxiety, which could cause him to "clam up" or his thoughts to race. Transcript at 14. Claimant also suffered from alcoholism and, in July 2023, underwent an inpatient treatment program for the condition. At that time, claimant began taking medication to address his anxiety.

(3) The employer had an employee handbook that outlined basic expectations governing employee conduct. An expectation contained in the handbook generally required employees to be truthful.

(4) At an unspecified time during claimant's employment, possibly in response to claimant's behavior in meetings in which claimant was "trying to be helpful," claimant's supervisor began "snapping" at claimant and criticizing his performance. Transcript at 8. The supervisor's criticisms included that claimant told road maintenance crew members "to do things" that they were not supposed to do. Transcript at 8. At some point thereafter, the employer began an investigation of claimant's conduct.

(5) During the investigation, the employer uncovered information leading them to allege that claimant had acted inappropriately in meetings, mistreated employees, and used foul language at work. The employer also alleged that claimant had acted unethically by going to lunch with a sales representative, who paid for claimant's $11 meal. While conducting the investigation, the employer discovered claimant had sent the following text message to a coworker:

> Hey, [the supervisor] has reported me to HR again for another incident today alleging inappropriate and unprofessional behavior. I understand you didn't witness today's incident, but you may be asked about me and/or [the supervisor], so I'd appreciate it if

[1] With respect to the additional evidence, claimant is informed that unduly repetitious evidence is barred in unemployment insurance hearings. *See* OAR 471-040-0025(5) (August 1, 2004). Further, if claimant or the union representative is available to testify at the remand hearing, the ALJ may consider that fact when considering the admissibility or appropriate weight to give to the additional evidence.

> you have my back or if you feel it's deserved, let's get me fired because I'm tired of this shit. Remember, anything negative you say about me will be used against me to the highest degree, and anything negative regarding [the supervisor] will be overlooked. HR is part of the management team and not an independent or neutral party. Could be you in the seat one day if I don't stand up against [the supervisor's] discriminatory behavior.

Transcript at 25.

(6) The employer asked the coworker about the text. The coworker "very much . . . took" the text as "trying to sway his . . . statements to HR." Transcript at 24. The employer considered the text to be evidence that claimant had attempted to interfere with their investigation. When the employer asked claimant about the text, claimant maintained that he did not intend to sway any statement the coworker might give, which the employer determined to be an act of dishonesty on claimant's part.

(7) Being subject to the investigation caused claimant's anxiety symptoms to go "through the roof." Transcript at 14. The symptoms caused claimant to suffer from shortness of breath, shaking, and trouble communicating his thoughts. When the employer's investigation started, claimant's counselor expressed concern that claimant might resume drinking alcohol and told claimant to look for new employment, which claimant started doing.

(8) In or around early November 2024, the employer completed their investigation. From that time onward, claimant was "in essence" on leave. Transcript at 21. In early November 2024, after the investigation's end, the employer provided claimant with a due process notice stating that the employer was considering discharging claimant. A due process hearing was held on the matter on November 13, 2024.

(9) After the employer issued the due process notice, the employer's human resources (HR) manager and claimant's union representative had at least one discussion in which the HR manager informed the representative that the employer was considering discharging claimant, and discussed "an opportunity for claimant to resign in lieu of that[.]" Transcript at 22.

(10) During the discussion between claimant's union representative and the HR manager, the employer had not made a firm decision to discharge claimant, but it was "fairly likely" that discharge would be the outcome. Transcript at 23. While the union representative and the HR manager discussed the prospect of claimant resigning, the employer held off taking action on whether to discharge claimant. It was the employer's city manager's responsibility to decide whether to discharge claimant.

(11) On November 18, 2024, claimant received an email from his union representative that caused him to decide to resign. The union representative stated that "it was looking like, they would be looking towards termination of [claimant's] employment." Transcript at 7. The union representative also told claimant that if he was discharged and contested the discharge in arbitration, the arbitrator would likely view his case unfavorably because arbitrators give weight to length of employment, and claimant had worked for the employer for only about two years.

(12) On December 6, 2024, claimant quit working for the employer. On that date, he entered into a separation agreement with the employer in which he agreed to resign, and waived his right to sue the

employer. In return, the employer provided claimant a small amount of additional compensation and continued his health insurance coverage for a slightly longer period than normal.

(13) The employer's HR manager believed that if claimant "had not resigned, he would've been terminated." Transcript at 26. The employer viewed claimant's alleged interference (by sending the text) and alleged dishonesty (in maintaining that he did not intend to sway any statement of the coworker) as "pretty serious allegations." Transcript at 24. However, the employer did not regard claimant's alleged inappropriate behavior in meetings or use of foul language as sufficient alone to warrant discharging him.

(14) Apart from the alleged conduct uncovered during the employer's investigation, claimant had no disciplinary history with the employer.

CONCLUSIONS AND REASONS: Order No. 25-UI-284569 is set aside, and this matter remanded for further proceedings consistent with this order.

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). Claimant had anxiety, a permanent or long-term "physical or mental impairment" as defined at 29 CFR §1630.2(h). A claimant with an impairment who quits work must show that no reasonable and prudent person with the characteristics and qualities of an individual with such an impairment would have continued to work for their employer for an additional period of time.

Per OAR 471-030-0038(5)(b), leaving work without good cause includes:

> * * *
>
> (F) Resignation to avoid what would otherwise be a discharge for misconduct or potential discharge for misconduct;
> * * *

The order under review concluded that claimant voluntarily quit work without good cause. Order No. 25-UI-284569 at 4-5. Specifically, the order concluded that claimant resigned to avoid a discharge that would negatively affect his future employment prospects, and that the discharge would have been for misconduct. Order No. 25-UI-284569 at 2-4. The order further concluded that since the discharge would have been for misconduct, OAR 471-030-0038(5)(b)(F) applied, and claimant's voluntary leaving therefore was without good cause. Order No. 25-UI-284569 at 4. The record as developed does not support the conclusion that claimant quit work without good cause.

Additional development of the record is necessary to determine whether claimant voluntarily quit work without good cause. This case presents the issue of whether OAR 471-030-0038(5)(b)(F) applies or

whether, instead, the case is governed by case law holding that a person may quit work with good cause where the impending discharge would not be for misconduct and other criteria are met. *See McDowell v. Employment Dep't*., 348 Or 605, 236 P3d 722 (2010) (claimant had 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 claimant's future job prospects); *Dubrow v. Employment Dep't.*, 242 Or App 1, 252 P3d 857 (2011) (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).

First, record development is needed regarding the timing of key events and related matters. The ALJ should ask questions to develop the following:

- When the employer's investigation began, what specifically caused the employer to begin investigating claimant, and any relevant details from the investigatory meetings that occurred.

- When claimant sent the text message to his coworker that the employer considered to be interference and when the employer became aware of the text, on what date the employer asked claimant about the text for which he gave an answer they considered dishonest.

- Precisely when the investigation ended; whether the investigation concluded with a report, and, if so, the report's conclusions; when precisely the employer gave claimant his due process notice and what the notice stated; whether the person or body who presided over claimant's due process hearing issued a written order or recommendations, and, if so, what those recommendations were.

Next, the existing record shows that claimant likely would have been discharged if he had not quit. In his written argument, claimant appears to contest this, asserting that "the city had not decided definitively to terminate his employment[.]" Claimant's Argument at 1. Contrary to claimant's assertion, the preponderance of the evidence shows that claimant would have been discharged. The HR manager testified that she believed that if claimant "had not resigned, he would've been terminated." Transcript at 26. The HR manager also testified that from the end of their investigation onward, claimant was "in essence" on leave, presumably meaning he was suspended from work pending the city manager's decision whether to discharge. Transcript at 21. Claimant had a due process hearing on November 13, 2024, but the employer held off taking action on whether to discharge while the union representative and HR manager discussed claimant resigning in lieu of discharge. During the discussion, though the employer had not made a firm decision to discharge claimant, the HR manager testified that it was "fairly likely" that discharge would be the outcome. Transcript at 23. For his part, claimant testified that his union representative told him by email on November 18, 2024, that, based on the representative's "conversation" with the HR manager, the employer "would be looking towards termination of [claimant's] employment." Transcript at 7, 10. Based on these facts, the weight of the evidence shows that claimant was certain to be discharged if he had not quit.

The weight of the evidence also show that claimant quit work to avoid being discharged and any negative repercussions a discharge would have on his work history. Claimant testified that his union representative "led [him] in the direction of resigning" to avoid a discharge being "put on [his] record" because he "wanted a clean work history[.]" Transcript at 6. Claimant further testified that, "It was important for [him] to have a clean work history so [he] could . . . get another job[.]" Transcript at 9.

Claimant also testified that in the email that led him to decide to resign, the union representative "mentioned resignation as a solution to be able to just keep [claimant's] record clean[.]" Transcript at 6. After having described the union representative's email this way, claimant also answered "yes" to the question, "[I]n terms of why you left when you did, if sounds like it was because of what your union representative recommended. Is that a correct statement or am I misunderstanding?" Transcript at 18-19.

In his written argument, claimant asserts that he quit work to avoid the heightened anxiety he experienced from being under investigation. Claimant's Argument at 1-3. However, the existing hearing record does not support claimant's assertion. First, as discussed in the preceding paragraph, claimant repeatedly testified that he resigned to avoid being discharged and any negative repercussions a discharge would have on his work history. Next, it is correct that, at hearing, claimant testified that the investigation "challenged" his anxiety and that when the investigation started, his counselor suggested he start looking for other employment. Transcript at 6, 15. Claimant also stated that "within this investigation" his anxiety was "through the roof" and caused him shortness of breath, shaking, and troubles communicating his thoughts. Transcript at 17. However, by early November 2024, the investigation had concluded. It is not evident how claimant, quitting when he did in December 2024, would be spared from worsened symptoms caused by the investigation *as such*, since the investigation was no longer ongoing. While claimant was subject to post-investigation matters not well developed in the existing hearing record, such as the due process notice and the hearing, it is not clear how quitting to avoid these matters would have benefited claimant. These points, coupled with claimant's repeated testimony, chronicled above, that keeping a clean record and work history was why he quit, are highly suggestive that claimant quit to avoid being discharged.[2]

Given that the weight of the existing record favors that claimant quit work to avoid being discharged and any negative repercussions a discharge would have on his work history, the ALJ should ask questions to develop the record to determine whether the conduct for which claimant was being investigated constituted misconduct. This is necessary to determine the applicability of OAR 471-030-0038(5)(b)(F), by enabling an evaluation of whether claimant quit to avoid what would otherwise be a discharge for misconduct or potential discharge for misconduct. To this end, the ALJ should inquire into claimant's text message that the employer considered to be interference, by asking claimant why he sent the text and what he thought it would accomplish, asking the employer why they considered the text to be interference and how claimant knew or should have known that sending the text was prohibited, and any other questions necessary to determine whether sending the text was a willful or wantonly negligent violation of the employer's expectations. The ALJ should also ask questions to determine whether claimant's statement to the employer that he did not intend to sway any statement the coworker might give about the investigation was a dishonest statement that amounted to a willful or wantonly negligent violation of the employer's expectations. In assessing this, the ALJ may wish to question the parties regarding the HR manager's testimony that, "it's quite possible that [claimant] interpreted it a different way" regarding whether claimant was dishonest in maintaining that he did not intend to sway any statement the coworker might give. Transcript at 24.

From there, a determination of whether the discharge would have been for misconduct or potential misconduct requires the ALJ to inquire as to alleged misconduct other than that involving the text

[2] Nevertheless, on remand, the ALJ may wish to develop the record, if necessary and appropriate, regarding the extent to which claimant's desire to avoid anxiety from the investigation influenced his decision to quit.

message, because it will be necessary to assess the applicability of whether the text message incident was an isolated instance of poor judgment under OAR 471-030-0038(3)(b). To this end, the ALJ should ask questions to develop whether claimant's alleged inappropriate behavior in meetings, mistreatment of employees, use of foul language, or having his lunch paid for by a sales representative were willful or wantonly negligent violations of the employer's expectations. When inquiring into claimant's behavior at meetings, the ALJ should take note of, and may wish to ask questions about, claimant's testimony that his anxiety medication made him prone to speak up in meetings and that this behavior was "taken the wrong way" by his supervisor. Transcript at 17.

Following these inquiries, the ALJ should ask any questions necessary to assess the applicability of the holdings of *McDowell* and *Dubrow*, in case claimant's discharge would not have been for misconduct. To this end, claimant should be asked to explain why being discharged would have impaired his ability to find a new job, compared to resigning.[3]

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 quit without good cause, Order No. 25-UI-284569 is reversed, and this matter is remanded.

DECISION: Order No. 25-UI-284569 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: <u>April 24, 2025</u>

NOTE: The failure of any party to appear at the hearing on remand will not reinstate Order No. 25-UI-284569 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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[3] In *McDowell*, the claimant, a teacher, had served on hiring committees and had observed instances in which the deciding factor in declining to hire an applicant was a past discharge on the applicant's record. 348 Or. at 615. Similar evidence would be sufficient, but may not be necessary, to show that claimant's future job prospects would have been impaired more significantly by being discharged than by resigning.

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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