

EMPLOYMENT APPEALS BOARD DECISION
2019-EAB-0139

Affirmed
Disqualification
Overpayment, No Penalties

PROCEDURAL HISTORY: On December 5, 2018, the Oregon Employment Department (the Department) served notice of an administrative decision assessing a \$730 overpayment that claimant was liable to repay, a \$109.50 monetary penalty, and 5 penalty weeks (decision # 194324). On December 6, 2018, the Department served notice of an administrative decision concluding claimant voluntarily left work without good cause (decision # 170526). Claimant filed timely requests for hearing on both decisions. On January 16, 2019, ALJ R. Frank conducted two hearings, and on January 18, 2019 issued Order No. 19-UI-123039, affirming decision # 170526, and Order No. 19-UI-123041, concluding that claimant was liable to repay the \$730 overpayment but was not liable for any penalty weeks. On February 7, 2019, claimant filed applications for review of both decisions with the Employment Appeals Board (EAB).

Pursuant to OAR 471-041-0095 (October 29, 2006), EAB consolidated its review of Orders No. 19-UI-123039 and 19-UI-123041. For case-tracking purposes, this decision is being issued in duplicate (EAB Decisions 2019-EAB-0138 and 2019-EAB-0139).

EAB considered claimant's written argument when reaching these decisions. With respect to claimant's request that EAB ask the Department's Director to exercise continuous jurisdiction under ORS 657.290 to release her from her obligation to repay the \$730 overpayment, EAB does not have jurisdiction to do so. Claimant must submit such a request directly to the Department.

With respect to claimant's idea that the employer's failure to appear at the hearing is grounds to dismiss the case, there is no default judgment in Oregon unemployment insurance cases. The fact that the employer is not the employer that laid claimant off in the first place is also not material to the outcome of this case, as the Department is statutorily obligated to investigate every work separation, and any work separation during a benefit year has the potential to affect an individual's eligibility or qualification to receive benefits.

Claimant argued that under ORS 657.100 she should have been considered “unemployed” and the \$11 she received from the employer could have been deducted from her benefits. Given the minimal hours and earnings, we agree it is likely that claimant’s work for the employer would not have affected her eligibility to receive benefits had she been working for the employer and claiming benefits at the time. However, the issue in these cases is not whether claimant’s earnings might have affected her receipt of benefits under different circumstances. Claimant quit a job, and the issues are whether that voluntary leaving disqualifies her under ORS 657.176 from receiving benefits, and whether she erroneously received benefits during weeks in which she was disqualified from benefits.

Claimant’s remaining arguments will be addressed below.

FINDINGS OF FACT: (1) Work for Progress, Inc. employed claimant on October 4, 2018.

(2) On October 2, 2018, claimant interviewed for the job and was informed that the job involved door-to-door canvassing in neighborhoods. Because of claimant’s prior experience she was told that she would likely canvas for a small amount of time and mostly work indoors.

(3) The employer hired claimant to work a mostly unpaid “Observation Day” on October 4, 2018 to assess whether she could be successful at the job. Exhibit 1. The employer notified claimant she would only be paid after completing “rap testing” around 4:30 p.m. The employer required claimant to complete pre-employment paperwork online prior to the observation day.

(4) On October 4, 2018, claimant participated in an observation day. Claimant quickly concluded that the job was not going to work out for her. She shadowed another person canvassing until 4:00 p.m., but was then expected to canvass alone until 9:00 p.m. Claimant had not anticipated working until 9:00 p.m. that day and was not prepared to work for such an extended period. She preferred not to canvass for more than three hours at a time, although she did not speak to the employer about her preference.

(5) Claimant was also concerned that she was unfamiliar with the neighborhoods in which she was expected to canvass alone, and that she would be canvassing after dark. The employer provided canvassers with a tablet loaded with their canvassing route, but she was not familiar with the tablet or comfortable using it. Claimant was familiar with her personal smartphone, but the phone did not have the data and canvassing route the employer established for her so it was not helpful for her to use.

(6) Claimant felt confused about the company and what they were assigning her to do. She decided to quit work rather than trying to canvass alone. She did not discuss whether the employer would allow her to limit her canvassing activities to three hours each day. She had been told on October 2nd that she would likely be assigned more office work than canvassing, but had not discussed with the employer what her assignments would be like after October 4th, and how much canvassing she would regularly be required to do.

(7) On October 4, 2018, claimant returned to the office and spent just over an hour there, after which she quit work for the employer. The time claimant spent in the office was paid time, and the employer paid claimant \$11.39.

(8) On October 9, 2018, claimant filed an initial claim for unemployment insurance benefits. At the time of her initial claim filing, she did not report to the Department that she had worked for the employer or quit a job with the employer. Had claimant reported her employment or separation, the Department would have investigated whether that work separation affected claimant's eligibility for unemployment insurance benefits. The Department subsequently paid claimant \$730 in benefits based in part upon claimant's failure to disclose the October 4th work separation from the employer.

CONCLUSIONS AND REASONS: We agree with the ALJ that claimant voluntarily left work without good cause and is therefore disqualified from receiving benefits. We also agree with the ALJ that claimant was overpaid and must repay \$730 to the Department, but is not liable for a monetary penalty or any penalty weeks.

Employment. The Department and the ALJ concluded that claimant was employed by the employer, but claimant disputed that an employment relationship existed. However, ORS 657.030(1) defines "employment" as service for an employer performed for remuneration. The uncontested evidence in this record, provided by claimant, is that she performed services for the employer that included remuneration for just over one hour of work. The record therefore shows there was an employment relationship between claimant and the employer, which ended when claimant chose to end the relationship.

Voluntary Leaving. The next question is whether claimant left with or without good cause. A claimant who leaves work voluntarily is disqualified from the receipt of benefits unless she proves, by a preponderance of the evidence, that she had good cause for leaving work when she did. ORS 657.176(2)(c); *Young v. Employment Department*, 170 Or App 752, 13 P3d 1027 (2000). "Good cause" is defined, in relevant part, as a reason of such gravity that a reasonable and prudent person of normal sensitivity, exercising ordinary common sense, would have no reasonable alternative but to leave work. OAR 471-030-0038(4) (January 11, 2018). 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 her employer for an additional period.

Claimant quit work because she disliked the working conditions, which she thought would include canvassing alone for extended periods of time, in neighborhoods she was not familiar with, and sometimes at night. The circumstances claimant described would concern any reasonable and prudent person starting a new job in a new area. However, claimant testified generally that she did not discuss or resolve her concerns with the employer prior to quitting, specifically, that she did not ask if the employer could restrict her canvassing to no more than three hours per day. The employer had notified claimant during the first interview that her canvassing time might be limited in favor of having her work more hours indoors, but claimant did not discuss that with anyone after the October 4th observation day. She did not know at the time she quit what the employer would assign her to do during any subsequent shifts, or what portion of her future assignments would involve canvassing alone, at night, and in unfamiliar areas. A reasonable and prudent person of normal sensitivity, exercising ordinary common sense, even one with reasonable concerns about the job, would likely have raised those issues with the employer prior to leaving work. As such, doing so was a reasonable alternative to quitting work, and the record fails to show that claimant quit work with good cause.

Claimant argued that the work was not suitable for her under ORS 657.195(1)(b), which states, in pertinent part, "no work is deemed suitable and benefits shall not be denied under this chapter to any

otherwise eligible individual for refusing to accept new work” if “the remuneration, hours or other conditions of the work offered are substantially less favorable to the individual than those prevailing for similar work in the locality.” This record does not include any evidence of what the remuneration, hours, or other conditions of work were for individuals performing similar canvassing work in the locality in which claimant’s job was located. In the absence of such evidence the record does not show that the work claimant quit was substantially less favorable, and, therefore, unsuitable under ORS 657.195(1)(b).

Claimant argued that she should not be disqualified from receiving benefits because her work separation was the result of her conscious decision not to comply with the employer’s unreasonable policy that required her to canvass alone. Claimant cited to OAR 471-030-0038(1)(d)(C) in support of her theory. That rule provision only applies to discharge cases. Claimant’s case is not a discharge, it is a voluntary leaving, and a different set of rules (referenced above) apply to it. For the reasons previously explained, the employer’s expectation that claimant canvass alone did not amount to good cause for quitting work.

Finally, claimant argued that she should not be disqualified from receiving benefits under ORS 657.176(12)(b) because she reasonably believed if she continued working she would be a victim of violence. ORS 657.176(12)(b) states that an individual may not be disqualified from benefits for leaving work “to protect the individual [] from domestic violence, stalking or sexual assault that the individual reasonably believes will occur as a result of the individual’s continued employment or acceptance of work.” Although claimant had concerns about canvassing alone, claimant did not establish on the hearing record that it was more likely than not that she had a reasonable basis for believing that domestic violence, stalking, or sexual assault would occur if she continued to work for the employer. Claimant’s unfamiliarity with neighborhoods, without evidence, for example, suggesting that assaults were common, other canvassers were routinely assaulted, or that police advised canvassers to avoid those neighborhoods, is insufficient to establish that ORS 657.176(12)(b) should apply.

For the reasons stated herein, claimant did not establish good cause to quit her job with the employer. She is therefore disqualified from receiving unemployment insurance benefits, effective September 30, 2018, because of her work separation until she has requalified for benefits under Employment Department law.

Overpayment. ORS 657.310(1) provides that an individual who received benefits to which the individual was not entitled is liable to either repay the benefits or have the amount of the benefits deducted from any future benefits otherwise payable to the individual under ORS chapter 657. That provision applies if the benefits were received because the individual made or caused to be made a false statement or misrepresentation of a material fact, or failed to disclose a material fact, regardless of the individual’s knowledge or intent. *Id.*

Claimant was disqualified from benefits effective September 30, 2018. However, she received \$730 in unemployment insurance benefits while disqualified. She was, therefore, overpaid. The overpayment occurred because claimant failed to disclose her work or work separation from the employer, which was a fact material to whether benefits should be payable. Because claimant was overpaid because of her failure to disclose a material fact, and regardless of her knowledge and intent at the time, she is liable to repay the \$730 overpayment to the Department.

Penalties. No adversely affected party contested the ALJ's decision that claimant did not make any willful misrepresentations in these cases and that she should not be liable for a \$109.50 monetary penalty or subject to 5 penalty weeks. Based on a *de novo* review of the entire record in this case, and pursuant to ORS 657.275(2), the ALJ's findings and analysis with respect to the conclusion that claimant is not liable for the monetary penalty or penalty weeks are therefore **adopted**.

DECISION: Order Nos. 19-UI-123039 and 19-UI-123041 are affirmed.

J. S. Cromwell and S. Alba;
D. P. Hettle, not participating.

DATE of Service: March 7, 2019

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。

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 Asuntos Laborales. Si no está de acuerdo con esta decisión, puede presentar una Petición 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 ໂດຍປະຕິບັດຕາມຄໍາແນະນໍາທີ່ບອກໄວ້ຢູ່ຕອນຫ້າຍຂອງຄໍາຕັດສິນນີ້.

Arabic

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Farsi

توجه - این حکم بر مزایای بیکاری شما تاثیر می گذارد. اگر با این تصمیم موافق نیستید، بلافاصله با هیأت فرجام خواهی استخدام تماس بگیرید. اگر از این حکم رضایت ندارید، می‌توانید با استفاده از دستور العمل موجود در پایان آن، از دادگاه تجدید نظر اورگان درخواست تجدید نظر کنید.

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