

EMPLOYMENT APPEALS BOARD DECISION
2019-EAB-0277

Reversed
No Disqualification

PROCEDURAL HISTORY: On November 30, 2018, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant voluntarily left work without good cause (decision # 103158). Claimant filed a timely request for hearing. On January 10, 2019, ALJ Seideman convened a hearing at which claimant failed to appear, and issued Order No. 19-UI-122449, dismissing claimant's request for hearing due to failing to appear. On January 28, 2019, claimant filed a request to reopen the hearing. On February 21, 2018, ALJ Shoemake conducted a hearing, and on February 26, 2019 issued Order No. 19-UI-125334, allowing claimant's request to reopen the hearing and affirming decision # 103158. On March 18, 2019, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant submitted a written argument that contained information that was not presented during the hearing. However, claimant failed to show as required by OAR 471-041-0090(2) (October 29, 2006) that factors or circumstances beyond his reasonable control prevented him from offering this new information at the hearing. Claimant also failed to certify that he provided a copy of his argument to the employer as required by OAR 471-041-0080(2)(a) (October 29, 2006). Therefore, EAB did not consider the argument when reaching this decision.

Based on a *de novo* review of the entire record in this case, and pursuant to ORS 657.275(2), the findings and analysis in Order No. 19-UI-125334 allowing claimant's request to reopen are **adopted**.

FINDINGS OF FACT: (1) UniFirst Corporation employed claimant from May 2018 until September 3, 2018. Claimant collected dirty uniforms and towels from customers and delivered clean ones.

(2) At hire, the employer informed claimant he would be paid at the rate of \$850 per week gross income, or approximately \$170 per day, for five workdays per week. Claimant understood that the employer expected him to work 8 hours per day and 40 hours per week. The employer told claimant that after three months of work, he would begin receiving commissions.

(3) During his employment, claimant regularly worked at least 54 hours per week. Regardless of the hours he worked, claimant was never paid more than \$850 per week and never received overtime pay for the hours he worked in excess of forty per week.

(4) After claimant had worked three months, in June 2018, claimant did not start receiving commissions. Claimant spoke to his supervisor and the supervisor told claimant he would not qualify to receive commissions until he had passed a test and been certified. After claimant was told of the need to have a certification, claimant arranged to take the necessary test on three or four occasions. Each time, claimant's manager told claimant that the employer needed claimant to run his delivery route because there was no coverage for him, and claimant was not allowed time off to take the test.

(5) Before late August 2018, claimant spoke with his manager and the manager's manager and informed them that he was working long hours and struggling to pay his bills. Claimant told the managers that he needed to be paid commissions in addition to his regular pay, or he needed to be paid overtime in order to sustain himself financially. The manner in which the employer paid claimant did not change and he did not receive overtime pay or commissions. On one occasion, claimant spoke to the employer's human resources representative about his financial difficulties, his need to obtain commissions and his inability to take the test for certification due to his manager's refusal to give him the necessary time off.

(6) On Friday, August 31, 2018, claimant's manager told claimant that the production crew was no longer going to separate the towels that claimant bought in for cleaning and that claimant had to perform that task. Claimant realized that if he were responsible to separate the towels it would add more hours to the uncompensated overtime that he worked. Claimant told his manager that he wanted to receive overtime pay or earn commissions due to the long hours he worked. The manager did not offer either to claimant.

(7) Claimant had previously worked for Amazon. On August 31st, claimant contacted Amazon about getting his job back. An Amazon representative told claimant that Amazon would hire him back at \$16.50 per hour. The representative told claimant that he probably could start the job with Amazon in sometime in the upcoming week. Claimant thought the job with Amazon was assured, but was still required to pass a background check before he could resume working for Amazon.

(8) Over the weekend, claimant decided to leave work with the employer because he was not receiving overtime pay when he regularly worked over forty hours in a week, and was not earning commissions, which he felt would be an adequate substitute for overtime pay. Claimant also quit because he thought the job at Amazon was certain. On September 3, 2018, claimant voluntarily left work.

CONCLUSIONS AND REASONS: Claimant voluntarily left work for good cause.

A claimant who leaves work voluntarily is disqualified from the receipt of benefits unless he proves, by a preponderance of the evidence, that he had good cause for leaving work when he 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). If an individual leaves work to accept an offer of other work, good cause exists only if, among other things, the offer is definite. OAR 471-030-0038(5)(a). 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 his employer for an additional period of time.

Order No. 19-UI-125334 held that claimant voluntarily left work without good cause. The order stated that if claimant left work to accept the Amazon job, the leaving was without good cause because the Amazon job offer was not definite at the time he quit since he had not yet formally applied for that job. Order No. 19-UI-125334 at 4. The order also stated that if claimant left work because the employer was not paying the commissions it had promised to him, the leaving was without good cause because claimant failed to show that it created grave circumstances. Order No. 19-UI-125334 at 4.

As implied in Order No. 19-UI-125334, claimant left work for two reasons, either of which, if they constituted grave circumstances for which there was no reasonable alternative, would be sufficient to show good cause for leaving work. However, the order overlooked claimant's testimony that he would not have left work if the employer had paid him for his overtime even if it did not pay him any commissions. Transcript at 12, 15, 22, 23, 24, 25, 26, 28. The order therefore should have, but did not, address whether the employer's failure to pay claimant for the overtime hours he worked each week in excess of forty were good cause for him to leave work.

Although claimant was paid by salary, and not by the hour, his status as a salaried employee did not render him exempt from receiving overtime pay. All salaried employees in Oregon must be paid overtime unless they meet the tests for exempt status as defined under federal and state laws.¹ Salaried employees may be misclassified as exempt from overtime pay. It is the employer's burden to prove that a salaried employee has exempt status.² Claimant's job, as described at hearing, does not appear to fall within the types exempt from overtime regulations.³ Absent evidence to the contrary, claimant was not an exempt employee and the employer was required to pay him at overtime rates when he worked over 40 hours in a week. By not doing so throughout claimant's employment, it is more likely than not that the employer was engaging in an unlawful employment practice. Claimant therefore left work because he was unwilling to continue to work under these illegal conditions, which was a grave situation.

Claimant tried to resolve the situation by speaking with his managers and human resources, to no avail. No reasonable and prudent person of normal sensitivity, exercising ordinary common sense, would continue working indefinitely for an employer who failed to pay him in accordance with state law on an ongoing basis. No reasonable alternatives existed for claimant other than leaving work since pursuing such alternatives would have required him to continue working under unlawful conditions.

¹ See ORS 653.020 (identifies employees excluded from overtime protections); ORS 653.261 (Bureau of Labor may adopt rules prescribing the payment of overtime to all non-excluded employees); OAR 839-020-0030(1) (except as otherwise provided, all work performed by an employee in excess of 40 hours per week must be paid for at the rate of not less than one and one half times the regular rate of pay); OAR 839-020-0030(3)(c) (method for calculating overtime payment when employee's compensation is based on a weekly salary agreement for a regular work week of 40 hours); see also Technical Assistance for Employers, Overtime: Questions and Answers, at https://www.oregon.gov/boli/TA/pages/t_faqt_aovrtim.aspx.

² *Id.*; Technical Assistance for Employers, Classifying Exempt Employees, at https://www.oregon.gov/boli/TA/pages/t_faqt_aoclass.aspx.

³ See State Laws Regulating Minimum Wage and the Payment of Wages, Overtime at https://www.oregon.gov/boli/whd/docs/statelaws_wages_english.pdf (listing types of exempt employees, including salaried employees).

Claimant had good cause to leave work when he did. Claimant is not disqualified from receiving unemployment insurance benefits.

DECISION: Order No. 19-UI-125334 is set aside, as outlined above.

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

DATE of Service: April 19, 2019

NOTE: This decision reverses an order that denied benefits. Please note that payment of any benefits owed may take from several days to two weeks 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 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 ໄດ້ໂດຍປະຕິບັດຕາມຄໍາແນະນໍາທີ່ບອກໄວ້ຢູ່ຕອນທ້າຍຂອງຄໍາຕັດສິນນີ້.

Arabic

هذا القرار قد يؤثر على منحة البطالة الخاصة بك، إذا لم تفهم هذا القرار، إتصل بمجلس منازعات العمل فوراً، 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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