

EMPLOYMENT APPEALS BOARD DECISION
2019-EAB-0640

Reversed
No Disqualification

PROCEDURAL HISTORY: On May 24, 2019, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant voluntarily left work without good cause (decision # 70149). Claimant filed a timely request for hearing. On June 25, 2019, ALJ Monroe conducted a hearing, and on July 3, 2019 issued Order No. 19-UI-132736, affirming the Department's decision. On July 11, 2019, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant did not declare that they provided a copy of their 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 them from offering the information during the hearing as required by OAR 471-041-0090 (May 13, 2019). EAB considered only information received into evidence at the hearing when reaching this decision. *See* ORS 657.275(2).

FINDINGS OF FACT: (1) Lifeworks NW employed claimant as an on-call childcare provider beginning September 21, 2016. Claimant last worked for the employer on March 12, 2019.

(2) Claimant's job involved caring for children at various locations while their parents attended classes run by her supervisor. In early March, claimant asked her supervisor about getting more hours and more pay. The supervisor told claimant at that time, "I will not have any classes for the entire summer" and "may have something start up around the Fall or the Winter." Transcript at 10. The supervisor suggested that claimant check with the employer's human resources department about other positions.

(3) Claimant contacted several people in human resources and a program director for another of the employer's sites and asked if there was any work available. The people with whom claimant spoke expressed a desire for claimant to work for them, but told her that the employer's hiring system would require that claimant quit her on-call job in order to apply for any of those positions. The people also told claimant that even if she did that, there was not going to be any work for her "until roughly June or

July.” Transcript at 11. The people told claimant they were going to “hold on to your resume” but did not hire her or tell her that they would put her to work. *Id.*

(4) On March 12, 2019, claimant’s supervisor’s last class ended and the employer had no more work for claimant after that date. Claimant did not return to work for the employer thereafter.

(5) Claimant began seeking work elsewhere. With the lack of work, she “wasn’t really getting anything back” from the employer. Transcript at 9. She had other concerns about her ability to continue working as an on-call childcare provider because of personal matters including transportation, finances, and her and her husband’s disabilities.

(6) On approximately April 18, 2019, claimant communicated to the employer that she wanted to be taken off the employer’s on-call list. On April 18, 2019, the employer responded to claimant with a text message that stated, “[Claimant] I will take you off the list. Do you mean for this class or for all classes?” Exhibit 2. On April 19, 2019, claimant responded, “Yes for all classes thank you.” *Id.*

(7) On April 19, 2019, First Student made a contingent offer of bus driver work to claimant. The work paid more than her work with the employer, but as a condition of employment she was required to pass pre-employment background screening, drug test, physical, and obtain a commercial driver’s license, among other things.

(8) On April 20, 2019, the employer responded to claimant’s April 19th text message, “Ok thank you. I will use this as your resignation date.” *Id.*

CONCLUSIONS AND REASONS: Claimant’s work separation is not disqualifying.

Nature of the work separation. The Department concluded that claimant quit work on April 19, 2019 because she wanted higher pay, a better location and more hours. Decision # 70149. The order under review also concluded that claimant quit work on April 19, 2019, but concluded that the reason she quit work was to accept an offer of work. *See* Order No. 19-UI-132736. The record shows, however, that claimant’s text message asking to be taken off the work schedule was sent on April 18, 2019, not April 19, 2019, and that by that time claimant the employer had not assigned claimant to work for well over a month. The first issue is therefore the 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) (December 23, 2018). 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).

It appears that as of March 12, 2019, claimant’s last day performing services for the employer, she was in fact willing to continue working for the employer but the employer did not have available work for her, suggesting that claimant’s work separation was a discharge that occurred on approximately March 12, 2019. However, the record also shows that claimant’s employment was as an on-call worker. As such, she would not necessarily have had a regular schedule and could foreseeably expect to have gaps between on-call assignments. During one of those gaps, when claimant knew her prospects for returning to work would not occur until possibly the Fall or Winter of 2019, claimant asked her supervisor to take

her off the work schedule. Claimant's text message suggests the possibility that claimant might have quit work, by becoming unwilling to continue to work for the employer on April 18, 2019 even though there was a possible prospect that the employer would have additional on-call assignments for her, albeit six or more months into the future.

Given those factors, the record in this matter does not clearly establish whether claimant quit or was discharged. Ordinarily that might require remand. However, it is not necessary in this case to determine whether claimant quit work or was discharged, because either way the work separation is not disqualifying.

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).

If this was a discharge, the discharge would not be for misconduct. It is unrefuted in this record that the employer lacked work for claimant in the on-call position between March 12, 2019 and possibly the Fall or Winter of 2019 or later, a period of six months or more. The fact that the employer lacked work for claimant to perform is not attributable to claimant as misconduct. Therefore, claimant may not be disqualified from receiving unemployment insurance benefits for that reason.

Voluntary quit. 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). 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.

The order under review concluded that claimant quit work without good cause to accept a contingent offer of other work. Order No. 19-UI-132736 at 2-3. The order is correct, insofar as the conclusion that quitting work to accept an offer of other work is not good cause under OAR 471-030-0038(5)(a). The record does not support the conclusion that claimant had actually received any offer of work at the time she quit work, however, much less that the contingent offer was the only reason claimant quit work.

Claimant sent a text message to her supervisor asking to be taken off the on-call list on April 18, 2019. She did not receive the offer letter from First Student until April 19, 2019, the next day. The record does not show that claimant quit work because of or after receiving First Student's offer of work, or therefore establish that claimant quit work to accept the contingent offer of work from First Student. Claimant therefore is not disqualified on that basis.

Even if claimant had some prior knowledge of the First Student offer prior to quitting, and factored that offer into her decision to quit work, she had other reasons for quitting that show good cause. The employer had no work for claimant to perform, and she therefore "wasn't really getting anything back"

from her continued employment with the employer. Receiving no work assignments and getting no pay from the employer, with little prospect of future work, is a situation of gravity.

At the time claimant left her job, the employer had not had any work for her to perform for well over a month, did not have any definitive plans to return her to work, and did not even envision returning her to work until possibly six months or more after her last day worked. She sought other work with the employer with other supervisors, but none was available unless she first quit her job. The prospect of a transfer or other employment with the employer therefore cannot be considered a reasonable alternative to quitting work, since pursuing those options would actually have *required* her to quit work.

Nor would remaining employed be a reasonable alternative under the circumstances. “Work” is a continuing relationship between the employer and employee. OAR 471-030-0038(1)(a). This case is akin to those in which the Oregon Court of Appeals has held that remaining employed is not a reasonable alternative to quitting work. For example, in *Taylor v. Employment Division*, 66 Or App 313, 674 P2d 64 (1984), the court held that the claimant had good cause to leave work when he had been suspended without pay for over a month, and there was no end in sight to the suspension. Emphasizing the fact that the claimant’s suspension was without pay and that he therefore had no possibility of work-related income as long as it lasted, the court wrote, “It is difficult to understand how the referee could require claimant to continue “working” at a job where he was doing no work, for which he was receiving no pay, and for which he would receive no pay until a lengthy appeals process, possibly including judicial review, was over.” *Taylor*, 66 Or App at 316.

Likewise, in *Sothras v. Employment Division*, 48 Or App 69, 616 P2d 524 (1980), the court held that the claimant had good cause to leave work. The claimant in that case had been attacked in her home, and was unable to return to work or reside in the town where the assault and attempted murder had occurred thereafter. After being on an unpaid leave of absence for more than a month, claimant quit her job. The court concluded that claimant had good cause to quit her job, noting that at the time of the hearing, more than four months after the attack, claimant still could not return to work or stay in the town where the attack had occurred. The court held, “In this situation, a protracted, unpaid leave of absence is not a ‘reasonable alternative’ to leaving work and being unemployed; indeed it is not an alternative at all.” *Sothras*, 48 Or App at 77.

In the present case, claimant had been without work for over a month, with no end in sight. She was receiving no pay or benefit of working or continuing the employment relationship. She was, in all but name, unemployed. Continuing to “work” for the employer in a job where she received no work, received no pay or benefit from working, and had no prospect of receiving pay, was indeed no alternative at all to quitting work. To the extent claimant quit her job with the employer, she therefore quit work with good cause and is not disqualified from receiving unemployment insurance benefits.

DECISION: Order No. 19-UI-132736 is set aside, as outlined above.

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

DATE of Service: August 8, 2019

NOTE: This decision reverses an order that denied benefits. Please note that payment of benefits, if any are owed, may take approximately 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 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 desisyong ito.

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 ໂດຍປະຕິບັດຕາມຄໍາແນະນໍາທີ່ບອກໄວ້ຢູ່ຕອນຫ້າຍຂອງຄໍາຕັດສິນນີ້.

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 دستور العمل موجود در پایان آن، از دادگاه تجدید نظر اورگان درخواست تجدید نظر کنید.

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