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

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EMPLOYMENT APPEALS BOARD DECISION
2019-EAB-0730

Order No. 19-UI-133596 Reversed – Request to Reopen Allowed
Order No. 19-UI-131394 Reversed – Disqualification

PROCEDURAL HISTORY: On May 14, 2019, the Oregon Employment Department (the Department) issued notice of an administrative decision concluding that claimant voluntarily left work without good cause (decision # 132421). Claimant filed a timely request for hearing. On June 3, 2019, the Office of Administrative Hearings (OAH) mailed notice of a hearing scheduled for June 10, 2019 at 8:15 a.m. On June 10, 2019, ALJ Murray-Roberts conducted a hearing at which the employer failed to appear, and on June 11, 2019, issued Order No. 19-UI-131394 concluding claimant voluntarily left work with good cause.

On July 1, 2019, the employer filed a timely request to reopen the June 10th hearing. On July 3, 2019, OAH mailed notice of a hearing scheduled for July 17, 2019. On July 17, 2019, ALJ Murray-Roberts conducted a hearing on the employer's request to reopen and the merits of decision # 132421, at which the employer and claimant appeared. On July 18, 2019, the ALJ issued Order No. 19-UI-133596, which stated it denied the employer's request to reopen. On August 6, 2019, the employer filed a timely application for review with the Employment Appeals Board (EAB).

Pursuant to OAR 471-041-0095 (May 13, 2019), EAB consolidated its review of Orders No. 19-UI-133596 and 19-UI-131394.

FINDINGS OF FACT: (1) On Track, Inc. employed claimant as a licensed counselor from April 2014 to April 16, 2019. Claimant provided counseling services to 25-30 clients.

(2) The employer obtained a new electronic recordkeeping system, and planned to implement it effective April 9, 2019. On April 8, 2019, claimant received three hours of training on the new system. Claimant had difficulty keeping up with the trainer's pace during the training and repeatedly asked the trainer to slow down, but the trainer did not. Claimant did not think she had adequate training on the new system.

(3) On April 9, 2019, the employer implemented the new system. Claimant had difficulty using it. She was concerned that she would not able to input client data into the new system, and made handwritten

notes. She was also concerned she would forget important information about each session because she was making handwritten notes instead of using a recordkeeping system; under some circumstances, failing to keep adequate records could affect claimant's licensure.

(4) During the five work days after April 9th, claimant repeatedly asked for help using the new system. She felt increasingly frustrated. Claimant mentioned that she was so frustrated she was considering quitting her job. Claimant knew at the time she quit that additional trainings were being held, but she had client appointments that conflicted with the scheduled training and she did not consult with supervisors about trying to block or clear her calendar so she could attend.

(5) On the morning of April 16, 2019, claimant tried to call a supervisor for help, but the supervisor was not available. Claimant tried to contact the trainer, but she was too busy to help claimant, too. During claimant's 4:00 p.m. counseling session, claimant began crying during the session because she was so frustrated, and overwhelmed by her difficulties with the new system and the lack of available help.

(6) After the session, while still emotional, claimant went to a supervisor's office. The supervisor was with another person. Claimant did not want to wait around because she disliked crying in front of people, and decided to leave work with the intent of quitting her job.

(7) After leaving, claimant drove home and called the supervisor from her driveway. Claimant was tearful and said she could not take the lack of support and miscommunication. The supervisor told claimant that she would try to get someone else out to claimant's location to help. She encouraged claimant to rest and think before quitting, and to get back to her and another manager in the morning.

(8) People company-wide were struggling with the new system and needed extra help, and it was taking time for the employer to respond to employees' needs. The supervisor was aware that people at claimant's location were having difficulty with the new system and needed additional training. She contacted an alternate trainer and scheduled her to go to claimant's location that week.

(9) Claimant did not return to work after April 16th. On the morning of April 17, 2019, she sent a text message to the supervisor stating that she was not going to return to work for the employer. On April 17 or 18, 2019, the trainer the supervisor had scheduled to help went to claimant's location.

(10) On June 3, 2019, OAH mailed notice of the June 10th 8:15 a.m. hearing to the employer's designated representative at the employer's address of record. On Saturday, June 8, 2019, an entity called Cannon Business Center, which was affiliated with the employer's representative to receive and process mail, received the notice of hearing. Cannon opened the envelope, scanned the notice of hearing, and sent it electronically to the employee designated to handle matters related to this claim.

(11) The employee designated to handle this matter was not scheduled to begin work until 8:30 or 9:00 a.m. on Monday June 10th. The employer's business did not operate on Saturdays and Sundays, and no one was in the office on either day. *See* Transcript at 5. Employees were not allowed to access work data while off duty because their work involved confidential information such as social security numbers.

(12) On June 10th, the employee assigned to this matter arrived to work. At 8:45 a.m., she read the notice of hearing the mailroom had scanned and sent her on June 8th, and realized the employer had missed the

hearing. At 10:21 a.m., the employer faxed a letter to OAH asking to submit exhibits into the hearing record and for the case to be reopened so the employer could submit testimony. On July 1, 2019, after Order No. 19-UI-133596 was issued, the employer re-requested reopening.

CONCLUSIONS AND REASONS: Order No. 19-UI-133596 is reversed; the employer's request to reopen the June 10th hearing is allowed. Order No. 19-UI-131394 is reversed; claimant voluntarily left work with the employer without good cause.

Reopen. In Order No. 19-UI-133596, the ALJ denied the employer's request to reopen the June 10th hearing on decision # 132421. The ALJ decided to do so, however, only after she conducted a hearing on the merits of decision # 132421. Thus, in actual fact, the ALJ allowed the employer's request to reopen. The conclusion in Order No. 19-UI-133596 – that the employer's request to reopen the June 10th hearing was denied – is therefore inconsistent with the record. EAB has repeatedly held that it is plain error to dismiss a request for hearing or a request to reopen the hearing after a hearing on the merits has been conducted. In such cases, EAB has concluded that the requirements of due process can only be met if EAB considers the merits of the administrative decision at issue. *See e.g.* Employment Appeals Board Decision 10-AB-3722 (December 3, 2010) and Employment Appeals Board Decision 2014-EAB-1665 (October 31, 2014). Consistent with our reasoning in that line of cases, the employer's request to reopen is allowed, and the issue remaining in this case is whether or not claimant voluntarily left work for the employer with or without good cause.

In so deciding, we note that even if Order No. 19-UI-133596 was not inconsistent with and unsupported by the record developed at the hearing, this matter would still be subject to reversal on the merits of the reopen decision. ORS 657.270(5) provides that any party who failed to appear at a hearing may request to reopen the hearing, and the request will be allowed if it was filed within 20 days of the date the hearing decision was issued and shows good cause for failing to appear. "Good cause" exists when the requesting party's failure to appear at the hearing arose from an excusable mistake or from factors beyond the party's reasonable control. OAR 471-040-0040(2) (February 10, 2012).

Order No. 19-UI-133596 concluded that the employer did not have good cause to reopen the hearing, reasoning, "It was within [the employer's representative company's] reasonable control to alert its representative over the weekend that the hearing was scheduled for the upcoming Monday morning. It was also within [their] reasonable control to assign the hearing to a representative who was available to appear for the hearing." Order No. 19-UI-133596 at 3.

The order holds parties to an unreasonably high standard. There is nothing in law, rule, or precedent suggesting that businesses must be monitored 24/7, or face the risk of forfeiting their right to contest potentially adverse agency action if notice of such action is received on the weekend or after hours. Nor is it reasonable to expect that any business do more than exercise ordinary due diligence in the course of its normal operations, particularly where, as here, there is no evidence to suggest that the employer's representative's business had ever missed a hearing because the notice of hearing had arrived over a weekend. *See* Transcript at 7.

In this case, the notice was received after business hours, on a weekend, when the business was closed and reasonable security policies dictated that employees not access potentially confidential data while off work. It therefore was not within the company's reasonable control to alert the representative about

the hearing over the weekend. Nor, given that the business was closed, was it within the company's control to assign an alternate representative. Assuming that the employer's customary weekday business hours began at 8:00 a.m., and assuming ideal circumstances, no representative assigned to this matter would have had any more than 15 minutes after the start of business hours to receive and read this notice of hearing culled from among any other mail or messages received over the weekend, access records pertaining to the case, contact a hearing representative, contact the employer to secure witnesses to the hearing, and have all those individuals ready to call in to the hearing ready to participate. It is not feasible or reasonably possible for all of those tasks to be accomplished within a span of 15 minutes. The notice of hearing duly directed to the employer's address of record did not arrive in time for this employer, or any reasonable employer, to participate in the June 10th 8:15 a.m. hearing, and the employer therefore established good cause to reopen the hearing.

For both of those reasons, considered independently or together – because Order No. 19-UI-133596 was inconsistent with the record, or because the record requires that the employer's request to reopen be allowed – the employer's request to reopen must be allowed. Ordinarily, reversing an order denying a request to reopen would require that the case be remanded to OAH for a hearing on the merits of the administrative decision. In this case, however, the record was fully developed at the June 10th and July 17th hearings, and remand is unnecessary. We therefore proceed to review the record associated with Order No. 19-UI-131394, as expanded at the July 17th hearing, to determine whether or not claimant established good cause to quit work.

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) (December 23, 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 their employer for an additional period of time.

Order No. 19-UI-131394 concluded that claimant voluntarily left work with good cause. The order reasoned that claimant had no reasonable alternative but to quit work after her repeated requests for help and training on the employer's new electronic recordkeeping system went unanswered, leaving her concerned that critical client information required for her licensure could be lost. Order No. 19-UI-131394 at 5. The record developed at the June 10th and July 17th hearings does not support that conclusion, however.

The record establishes that the employer implemented a new electronic recordkeeping system after having provided claimant and others at her location with an inadequate amount of training, causing claimant to feel concerned about her clients and their data, frustrated with the lack of support and training, and emotionally distraught at times, to the extent that she cried in front of a client and remained tearful after the client left. The employer also testified that individuals at claimant's location should have been providing claimant with support; however, claimant's testimony suggests that they were too busy with other tasks to do so, leaving claimant and her colleagues with less support than they should have had during the transition. The situation was undoubtedly difficult. However, the fact that the working

conditions were difficult does not make the station grave, nor does it suggest that there were no reasonable alternatives to quitting.

Transitioning any business from one electronic recordkeeping system, which employees are familiar with, to a new system that few are familiar with, would be foreseeably and reasonably difficult, and it would take some period of time after the transition for employees to become used to and comfortable with the new system. At the time claimant quit work, the new system had only been in place for five working days. The employer was working to identify problems and provide employees with additional support. The situation claimant faced – feeling unsupported, frustrated, and emotional because of the circumstances under which she was being called upon to use the new electronic recordkeeping system – was not grave in that context, particularly given that only five working days had lapsed since the system was implemented. Nor is there evidence on this record sufficient to establish that client care or records were being harmed during the transition such that claimant reasonably would have felt that her licensure was threatened.

In addition to the lack of gravity shown on this record, claimant also had reasonable alternatives to quitting work. The employer had offered additional training, of which claimant had been aware, but she did not attend or attempt to get permission to attend. Claimant knew of a clinical supervisor and human resources employee, both of whom she could have asked for help, but she chose not to do so prior to quitting. Even after claimant initially quit her job, the employer asked her to take time to think about whether she wanted to do that, and indicated that additional help or training resources would be made available to claimant. Thus, while the employer was not as responsive to claimant as she wanted or even needed at the time, the employer was not ignoring claimant's complaints or concerns and wanted to help resolve them short of claimant quitting work. Nevertheless, claimant decided to quit work. Within a day of quitting, the employer provided additional help for the people at claimant's location.

On this record, while claimant's working conditions were difficult at the time she quit, the record fails to show that she quit work for a grave situation that would have caused any reasonable and prudent person to feel they had no reasonable alternative but to quit. Claimant did not establish good cause for quitting work, and she must therefore be disqualified from receiving unemployment insurance benefits because of this work separation.

DECISION: Order Nos. 19-UI-131394 and 19-UI-133596 are set aside, as outlined above.

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

DATE of Service: <u>September 11, 2019</u>

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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