EO: 200
BYE: 201943

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

215
VQ 005.00
MC 010.05

EMPLOYMENT APPEALS BOARD DECISION
2019-EAB-0908

Order No. 19-UI-135903 – Reversed & Remanded

Order No. 19-UI-135904 – Modified
Weeks 24-19 to 31-19 Overpayment Reversed & Remanded
No Misrepresentation Penalties

PROCEDURAL HISTORY: On August 9, 2019, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant voluntarily left work without good cause, and was disqualified from benefits effective June 9, 2019 (decision # 65206). On August 12, 2019, the Department served notice of another administrative decision assessing a $4,043 overpayment, $606.45 monetary penalty, and 26 penalty weeks (decision # 194950). On August 15, 2019, the Department served notice of a new administrative decision that canceled decision # 194950, and assessed a $4,667 overpayment, $700.05 monetary penalty, and 30 penalty weeks (decision # 194058). On August 16, 2019, claimant filed a timely request for hearing on decisions # 65206 and # 194058. On August 29, 2019, ALJ M. Davis conducted a consolidated hearing, and on August 30, 2019 issued Order No. 19-UI-135903, affirming decision # 65206, and Order No. 19-UI-135904, affirming the Department's assessment of a $4,667 overpayment that claimant was required to repay, but concluding that claimant was not liable for any misrepresentation penalties. On September 18, 2019, claimant filed an application for review of both orders with the Employment Appeals Board (EAB).

Pursuant to OAR 471-041-0095 (May 13, 2019), EAB consolidated its review of Orders No. 19-UI-135903 and 19-UI-135904. For case-tracking purposes, this decision is being issued in duplicate (EAB Decisions 2019-EAB-0906 and 2019-EAB-0908).

EAB considered claimant's written argument when reaching this decision, but only to the extent it was based upon the hearing record.

CONCLUSIONS AND REASONS: This matter must be reversed and remanded with respect to the voluntary leaving issue. Because the existence of an overpayment depends on whether or not claimant voluntarily left work with good cause, and that issue is yet to be determined, the overpayment issue is also remanded. However, claimant is not liable for misrepresentation penalties.

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 with a permanent or long-term "physical or mental impairment" as defined at 29 CFR §1630.2(h) 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.

OAR 471-030-0038(4) sets forth two separate standards that may apply in cases involving a voluntary leaving: one standard applies in cases in which the claimant does not have a permanent or long-term physical or mental impairment; the other standard applies in cases where the claimant does have such an impairment. In this case, Order No. 19-UI-135903 applied the standard for claimants without an impairment, and concluded that claimant did not have good cause for quitting work because although the yelling incident was "very upsetting" and "emotionally triggering" for claimant, it was not so grave that claimant could not have "spoken to the office manager about her concerns" rather than quitting.[1]

At the hearing, however, claimant alluded to having been in counseling due to her history of domestic violence.[2] She further testified that the incident with the coworker caused her to feel unsafe, that the environment was not emotionally healthy, and that she needed to "separate myself from" an emotionally triggering environment.[3] Claimant's testimony suggested that she might have a physical or mental impairment that affected her decision to leave her job when she did, and suggested that the proper standard to apply to this case might have been that of a reasonable and prudent person with the characteristics and qualities of an individual with such an impairment. No inquiry into those matters occurred at the hearing.

On remand, the record must be developed as to claimant's mental health, whether her mental health amounted to a long-term or permanent physical or mental impairment, and how her mental health affected her ability to work for the employer under the circumstances she described at the hearing. Claimant should be provided with the opportunity to describe why working around an attorney who yelled was a grave situation. Claimant should also be provided with the opportunity to describe why, if things were so bad at the workplace that she had to quit, she offered to return for any additional shifts. Finally, the record must also be developed as to whether speaking with the office manager – after claimant had already discussed the situation with one of the law firm's partners – was a reasonable alternative to quitting work, or, since she had already spoken with the partner, whether discussing her concerns with the office manager would have been futile.

Claimant submitted some additional information about her mental health history and course of treatment with her application for review. If claimant would like those materials considered as exhibits at the remand hearing, claimant should submit those documents directly to the Office of Administrative Hearings (OAH) and the other party in accordance with the instructions that will be included with the notice OAH mails scheduling the remand hearing.

[1] Order No. 19-UI-135903 at 1-3.
[2] Transcript at 26.
[3] Transcript at 26-27.

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 what "good cause" standard to apply to this case, whether claimant quit work because of a grave situation, and whether she had reasonable alternatives to quitting work, Order No. 19-UI-135903 is reversed, and this matter is remanded.

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.

Order No. 19-UI-135904 concluded that claimant was overpaid in the amount of $4,667. However, that determination was based entirely on the determination in Order No. 19-UI-135903 that claimant voluntarily left work without good cause.[4] Because we have concluded that there is insufficient evidence from which to conclude whether or not claimant had good cause, and depending on the outcome of that hearing claimant may or may not have been overpaid, we also conclude that there is an insufficient basis upon which to conclude that claimant was overpaid benefits. Order No. 19-UI-135904 must therefore be reversed and remanded pending a determination as to whether or not claimant is disqualified from benefits based upon her voluntary leaving.

Misrepresentation. An individual who willfully made a false statement or misrepresentation, or willfully failed to report a material fact to obtain benefits, may be disqualified for benefits for a period not to exceed 52 weeks. ORS 657.215. In addition, an individual who has been disqualified for benefits under ORS 657.215 for making a willful misrepresentation is liable for a penalty in an amount of at least 15, but not greater than 30, percent of the amount of the overpayment. ORS 657.310(2).

Order No. 19-UI-135904 concluded that claimant was not liable for misrepresentation penalties, concluding, "The evidence is not persuasive that claimant engaged in willful misrepresentation or willfully omitted facts in order to obtain unemployment insurance benefits."[5] Based on a *de novo* review of the entire record in this case, and pursuant to ORS 657.275(2), the portion of the order under review concluding that claimant was not liable for misrepresentation penalties is **adopted.**

DECISION: Order No. 19-UI-135903 is set aside, and this matter remanded for further proceedings consistent with this order. Order No. 19-UI-135904 is affirmed only with respect to the misrepresentation issue, and reversed and remanded only as to the overpayment issue.

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

DATE of Service: <u>October 23, 2019</u>

[4] Order No. 19-UI-135904 at 4.
[5] Order No. 19-UI-135904 at 5.

NOTE: The failure of any party to appear at the hearing on remand will not reinstate Orders No. 19-UI-135903 or 19-UI-135904, or return this matter to EAB. Only a timely application for review of the subsequent orders will cause this matter to return to EAB.

Please help us improve our service by completing an online customer service survey. To complete the survey, please go to https://www.surveymonkey.com/s/5WQXNJH. If you are unable to complete the survey online and wish to have a paper copy of the survey, please contact our office.

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.

Employment Appeals Board - 875 Union Street NE | Salem, OR 97311
Phone: (503) 378-2077 | 1-800-734-6949 | Fax: (503) 378-2129 | TDD: 711
www.Oregon.gov/Employ/eab

The Oregon Employment Department is an equal opportunity employer/program. Auxiliary aids and services are available upon request to individuals with disabilities. Language assistance is available to persons with limited English proficiency at no cost.

El Departamento de Empleo de Oregon es un programa que respeta la igualdad de oportunidades. Disponemos de servicios o ayudas auxiliares, formatos alternos y asistencia de idiomas para personas con discapacidades o conocimiento limitado del inglés, a pedido y sin costo.