

EMPLOYMENT APPEALS BOARD DECISION
2019-EAB-0984

Modified
Late Request for Hearing Allowed
Remanded for another Hearing on Merits

PROCEDURAL HISTORY: On July 18, 2019, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant quit work without good cause (decision # 152605). On August 7, 2019, decision #152605 became final without claimant having filed a request for hearing. On August 14, 2019, claimant filed a late request for hearing. On August 21, 2019, ALJ Kangas issued Order No. 19-UI-135389, dismissing claimant's late request for hearing subject to her right to renew the request by responding to an appellant questionnaire by September 4, 2019. On August 28, 2019, claimant responded to the questionnaire. On September 19, 2019, the Office of Administrative Hearings (OAH) mailed a notice of hearing scheduled for October 1, 2019. On October 1, 2019, ALJ Janzen conducted a hearing at which the employer failed to appear, and on October 2, 2019 issued Order No. 19-UI-137392, allowing claimant's late request for hearing and concluding that claimant voluntarily quit work without good cause. On October 15, 2019, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant submitted written argument with their application for review. However, 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).

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 allowing claimant's late request for hearing on decision # 152605 is **adopted**.

FINDINGS OF FACT: (1) Hyatt Corporation employed claimant as a housekeeper from October 2018 until about May 1, 2019.

- (2) Claimant did not have a car and relied on coworkers to transport her to and from work. Claimant's employer was aware of her transportation issues.
- (3) The co-worker who had been transporting claimant to and from work stopped working for the employer the week before claimant's work separation from the employer.
- (4) On May 1, 2019, claimant received an offer to obtain a vehicle according to terms claimant believed she could afford. Claimant would have to leave work before the end of her scheduled shift to accept the offer and obtain the vehicle.
- (5) On May 1, 2019, after receiving the offer, claimant approached her supervisor and stated that she had an opportunity to get a car that required her to leave work immediately. Claimant's supervisor advised claimant that she would be fired if she left work early.
- (6) On May 1, 2019 claimant left work early to accept the offer to obtain a car.

CONCLUSIONS AND REASONS: The portion of Order No. 19-UI-137392 concluding that claimant voluntarily left work without good cause is reversed, and this matter remanded for further proceedings.

The first issue in this case is the nature of claimant's work separation. If the employee could have continued to work for the 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). "Work" means "the continuing relationship between an employer and an employee." OAR 471-030-0038(1)(a). The date an individual is separated from work is the date the employer-employee relationship is severed.

Order No. 19-UI-137392 concluded that claimant's work separation was a voluntary leaving, and that claimant voluntarily left work without good cause.¹ However, additional information is needed to determine the nature of the work separation. The record shows that claimant left work early on May 1, 2019 and did not return. However, claimant testified that she did not want to quit work, and the record does not include sufficient information about claimant's conversation with her employer on May 1, or what occurred after that conversation, to determine the nature of the work separation. The record does not show if claimant spoke with the employer after she left work on May 1, and, if so, what was stated between the parties. The record does not show if claimant merely assumed she could not return to work after she left work on May 1, or if she attempted to do so and the employer refused to allow her to return. Further inquiry is needed into the facts necessary for a determination of whether claimant quit work or was discharged for leaving work early on May 1.

If claimant quit work, OAR 471-030-0038(4) provides that good cause for voluntarily leaving work under ORS 657.176(2)(c) is such that a reasonable and prudent person of normal sensitivity, exercising ordinary common sense, would leave work. In cases involving a claimant who quits work, the burden is on the claimant to establish, by the preponderance of the evidence that good cause exists. *Young v.*

¹ Order No. 19-UI-137392 at 3-4.

Employment Department, 170 Or App 752 (2000); *Cook v. Employment Division*, 47 Or App 437 (1980).

If the employer discharged claimant, ORS 657.176(2)(a) requires a disqualification from unemployment insurance benefits if the discharge was 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) (December 23, 2018). “[W]antonly negligent’ means indifference to the consequences of an act or series of actions, or a failure to act or a series of failures to act, where the individual acting or failing to act is conscious of his or her conduct and knew or should have known that his or her conduct would probably result in a violation of the standards of behavior which an employer has the right to expect of an employee.” OAR 471-030-0038(1)(c). Isolated instances of poor judgment and good faith errors are not misconduct. OAR 471-030-0038(3)(b).

If the employer discharged claimant, an inquiry is needed into the facts necessary for a determination of whether claimant’s discharge was for misconduct, including, whether it can be excused as an isolated instance of poor judgment. If claimant quit work, further inquiry is needed into the facts necessary for a determination of whether she quit with good cause.

For example, claimant’s transportation issue needs further development. The record shows that the person who commonly gave claimant rides to work in the past had recently quit, and claimant testified that she would not be able to report to work on May 2, 2019 without a car. Transcript at 25. Transcript at 22, 30. However, the record does not show how often claimant worked, or how often she lacked a ride to work. The record shows claimant had gotten rides in the past “here and there” from coworkers other than the one who quit. Transcript at 30. There was no testimony from the claimant on whether rides to work from coworkers, which had worked in the past, were no longer an option for claimant. The record is unclear if the employer had a ride-sharing program, or if and how it assisted claimant if claimant called the employer needing a ride to work. *See* Transcript at 27. However, claimant testified that getting a ride from coworkers was not guaranteed. Transcript at 29. Based on claimant’s testimony, the record must be developed as to whether claimant had ever missed a day of work due to lack of transportation to ascertain the reliability of claimant’s current ride situation. The record does not show why claimant apparently believed her ride options suddenly ended on May 1, 2019. The record does not show whether claimant had alternative means to commute to work, such as public transportation, Uber, Lyft, or bicycling.

In addition to developing claimant’s transportation issue further, the record does not show if claimant explained the importance of her obtaining a vehicle to the employer. Claimant testified that her supervisor knew of her transportation issues, and that she talked to her supervisor in her office about an opportunity to get a car. Transcript at 25. Claimant testified that she reminded her supervisor during that conversation that the supervisor offered to help claimant out in some way, but the nature of the help was not disclosed. Transcript at 26. Further inquiry is necessary about that discussion. Without such inquiry the record does not show what information the employer was acting on when it issued its ultimatum, or what form of help it allegedly offered claimant.

The particulars about the vehicle offer also need to be further developed, as well as why claimant considered it urgent that she leave work immediately on May 1. The record does not show how much time was left on claimant's work shift when the car offer was received, or why claimant felt she was not able to obtain the vehicle after her shift ended. Claimant testified that her supervisor told her that she would be fired if she left her shift early, and the record does not show how claimant planned to make car payments, if any, without a job. Transcript at 25.

Based on the aforementioned reasons, we find that the record was not sufficiently developed to determine the nature of the work separation, or whether claimant's work separation was disqualifying for purposes of unemployment insurance benefits. The intent of this decision is not to constrain the ALJ to asking only questions related to the specified subject matter. In addition to asking the questions suggested, the ALJ should ask any follow-up questions the ALJ deems necessary or relevant to the nature of the work separation and whether it should be disqualifying. The ALJ should also allow the parties to provide any additional relevant information about the work separation, and to cross-examine each other as necessary if both parties are present during the remand hearing.

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 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 *Dennis v. Employment Division*, 302 Or 160, 728 P2d 12 (1986). Because further development of the record is necessary for a determination of whether claimant should be disqualified from receiving benefits based on her work separation from the employer, the portion of Order No. 19-UI-137392 concluding that claimant quit work without good cause is reversed, and this matter remanded for development of the record.

DECISION: Order No. 19-UI-137392 is modified, as outlined above.

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

DATE of Service: November 22, 2019

NOTE: The failure of any party to appear at the hearing on remand will not reinstate Order No. 19-UI-137392 or return this matter to EAB. Only a timely application for review of the subsequent order will cause this matter to return to EAB.

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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 ໄດ້ໂດຍປະຕິບັດຕາມຄຳແນະນຳທີ່ບອກໄວ້ຢູ່ຕອນທ້າຍຂອງຄຳຕັດສິນນີ້.

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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