

EMPLOYMENT APPEALS BOARD DECISION
2019-EAB-1118-R

Application for Review Allowed on Reconsideration
Order No. 19-UI-139029 Reversed & Remanded

PROCEDURAL HISTORY: On October 9, 2019, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant quit working for the employer without good cause (decision # 112837). On October 15, 2019, claimant filed a timely request for hearing. On October 16, 2019, the Office of Administrative Hearings (OAH) served notice of a hearing scheduled for October 30, 2019. On October 30, 2019, ALJ Janzen conducted a hearing, and on October 31, 2019 issued Order No. 19-UI-139029, affirming the Department's decision. On November 4, 2019, claimant filed a timely application for review with the Employment Appeals Board (EAB) by filing it in person at the Department's WorkSource office in The Dalles, Oregon. However, claimant's application for review was not forwarded to EAB. On November 25, 2019, claimant filed a revised application for review and written argument with EAB. Not having received claimant's November 4 application for review, on December 4, 2019 EAB issued EAB Decision 2019-EAB-1118, dismissing claimant's application for review as late without good cause. On December 12, 2019, claimant submitted to EAB a copy of the timely application for review she filed on November 4, 2019.

RECONSIDERATION: EAB did not receive claimant's November 4, 2019 application for review until claimant submitted a copy on December 12, 2019. However, claimant's application for review filed on November 4 at the WorkSource office in The Dalles was a timely application for review.¹ EAB therefore erred in EAB Decision 2019-EAB-1118 by dismissing claimant's application for review as late without good cause. Claimant's application for review therefore is allowed pursuant to EAB's authority under ORS 657.290(3) to reconsider a previous EAB decision upon EAB's own motion.²

¹ OAR 471-041-0060(2) (May 13, 2019) provides that "an application for review may be filed in person, or by mail, fax, or electronic means to EAB, or any office of the Employment Department, including OAH, or any Employment Security Agency in any other state or jurisdiction where the applicant is claiming benefits."

² ORS 657.290(3) provides that EAB has the discretion to reconsider any previous EAB decision upon its own motion at any time.

WRITTEN ARGUMENT: Claimant submitted written argument to EAB on November 25, 2019. 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) Veteran's Care Center of Oregon employed claimant from August 5, 2019 until September 9, 2019 in a nursing assistant training program.

(2) In September 2019, claimant was a single mother of two children, ages 5 and 11. Claimant's children attended school. Claimant did not have a partner who shared childcare responsibilities with her.

(3) Claimant's employment began as a student with a five-week nursing assistant training course. Claimant completed the five-week training course on September 9, 2019.

(4) As part of the nursing assistant training program, the employer had an orientation process that began on September 10, 2019. Students who continued the program after the training course began by working evening shifts for the employer. They could work night or day shifts if those became available. Shift preference was granted based on seniority.

(5) Claimant felt that she "would never see [her] kids and it would be really difficult," to work evening shifts. Transcript at 7.

(6) On September 9, 2019, claimant told her instructor that she would not report for orientation.

CONCLUSIONS AND REASONS: Order No. 19-UI-139029 is reversed, and this matter remanded for further proceedings.

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). "Work" means "the continuing relationship between an employer and an employee." OAR 471-030-0038(1)(a) (December 23, 2018).

The facts show that the work separation was a quit. The employer had not yet offered claimant a permanent position when claimant quit. However, claimant did not dispute that she could have continued to work for the employer in some capacity after September 9, 2019 as part of its orientation program. Regardless of whether participation in the orientation program for claimant would have been as a temporary or permanent employee, it was continuing work for an additional period of time after September 9, 2019. Therefore, based on OAR 471-030-0038(2)(a), claimant voluntarily left work. The work separation was a quit when claimant ended the continuing relationship between her and the employer on September 9, 2019.

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) (December 23, 2018). “[T]he reason must be of such gravity that the individual has no reasonable alternative but to 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.

Claimant quit work because she did not want to continue with the orientation program when working swing shifts for the employer would be “difficult” for her family, and she would not “see her kids.” The order under review does not contain sufficient information to show whether claimant’s circumstances were grave and, if so, whether claimant had a reasonable alternative to quitting work on September 9, 2019.

Order No. 19-UI-139029 does not contain sufficient information about the orientation process, and the obligations of its participants. Claimant testified that “working five days a week . . . at a swing shift position like I just would never see my kids and it would be really difficult.” Transcript at 7. The record does not show whether claimant could have participated in the orientation process without working shifts for the employer, how long the orientation process lasted, and if there were other phases to the training program. The record does not show what, if any, claimant’s obligation to work shifts was during the orientation process and other phases of the training program. The record does not show whether the remuneration was different during different phases of the training program. The record also does not show whether claimant could have limited her number of shifts to fewer than five days per week.

Claimant participated in the training course from August 5 to September 9, presumably during the day. The record does not show how swing shifts would interfere more with claimant’s family time than day shifts, or how working swing shifts would affect claimant’s family. Claimant expressed apparent concern about childcare, testifying that she was parenting “100 percent on [her] own.” Transcript at 8. The record does not show what, if any, childcare options claimant might have had for swing shifts. Claimant presumably had some form of childcare during the day for her children, ages 5 and 11, during August 5 through September 9, 2019, before the children began the 2019-2020 school year. The record does not show whether working swing shifts would pose a grave situation for claimant as opposed to working day shifts from August 5 to September 9. The record does not show whether claimant’s children had any special needs.

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 whether claimant had good cause to quit work when she did, Order No. 19-UI-139029 is reversed, and this matter is remanded.

DECISION: EAB Decision 2019-EAB-1118 is vacated and Order No. 19-UI-139029 is set aside, and this matter remanded for further proceedings consistent with this order.

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

DATE of Service: January 13, 2020

NOTE: The failure of any party to appear at the hearing on remand will not reinstate Order No. 19-UI-139029 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 ໄດ້ ໂດຍປະຕິບັດຕາມຄຳແນະນຳທີ່ບອກໄວ້ຢູ່ຕອນທ້າຍຂອງຄຳຕັດສິນນີ້.

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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