

EMPLOYMENT APPEALS BOARD DECISION
2020-EAB-0128

Order No. 20-UI-143179 Affirmed – Late Request for Hearing Allowed, Disqualification
Order No. 20-UI-143188 Affirmed – Late Request for Hearing Allowed, Overpayment but No Penalties

PROCEDURAL HISTORY: On October 2, 2019, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant voluntarily quit work without good cause, and disqualifying her from unemployment insurance benefits effective May 12, 2019 (decision # 125515). On October 3, 2019, the Department served notice of an administrative decision assessing a \$1133 overpayment, a \$169.95 monetary penalty, and 8 penalty weeks (decision # 194548). On October 22, 2019, decision # 125515 became final without claimant having filed a timely request for hearing. On October 23, 2019, decision # 194548 became final without claimant having filed a timely request for hearing. On December 10, 2019, claimant filed untimely hearing requests regarding both decisions.

On January 21, 2020, ALJ Scott conducted a consolidated hearing on decisions # 125515 and # 194548. On January 23, 2020, ALJ Scott issued Order No. 20-UI-143179, allowing claimant's late request for hearing on decision # 125515 and affirming the Department's decision that claimant quit work without good cause and was disqualified from benefits. On January 23, 2020, ALJ Scott issued Order No. 20-UI-143188, allowing claimant's late request for hearing on decision # 194548 and modifying decision # 194548 by affirming the overpayment of \$1,133, but setting aside the \$169.95 monetary penalty and 8 penalty weeks. On February 10, 2020, claimant filed timely applications for review of Order Nos. 20-UI-143179 and 20-UI-143188 with the Employment Appeals Board (EAB).

Pursuant to OAR 471-041-0095 (October 29, 2006), EAB consolidated its review of Order Nos. 20-UI-143179 and 20-UI-143188. For case tracking purposes, this decision is being issued in duplicate (EAB Decisions 2020-EAB-0127 and 2020-EAB-0128, respectively).

FINDINGS OF FACT: (1) On November 14, 2018, claimant was involved in an automobile accident. She injured her spine in the accident, and was prevented from doing any heavy or repetitive lifting. In December 2018 claimant sought medical care for her injury.

(2) COR Management, Inc. employed claimant as an Entry Level Client Representative from May 7, 2019 to May 11, 2019. The employer was engaged in direct marketing and sales and it hosted

promotional events at three different retailers: Costco, Fred Meyer, and Wal-Mart. Upon hire claimant did not notify the employer of the accident or her injury, or notify the employer that her injury prevented her from repetitive and heavy lifting.

(3) Claimant accepted the position with the employer believing that it was an office job in marketing with minimal physical requirements. Claimant lived in Vancouver, Washington at the time of her employment and she understood that her employment would entail morning office hours and shift work, and possibly hours working at one of the retail sites in either Camas, Washington or Vancouver, Washington. Claimant was not aware that the job would be physically demanding, require her to work late hours, or require her to travel outside the Camas and Vancouver, Washington area. The employer believed that claimant had been made aware of each of these aspects of the employment and that everyone was “on the same page.” Transcript at 39.

(4) On May 9 and/or May 10, 2019, claimant reported for office work between 7:40 a.m. and 9:15 a.m. Later, between 8:30 p.m. and 11:00 p.m., claimant reported for work at a Costco in Aloha, Oregon. The work at the Costco included unpacking crates, setting up furniture, and moving it around. The evening work included repetitive lifting and caused claimant pain. When claimant informed the site supervisor of her physical discomfort, the site supervisor told claimant “there was just a little bit more, just a little bit more and could you grab this or that.” Transcript at 28. Claimant had a hard time saying “no” to the site supervisor’s directives, and she continued to work without requesting any accommodation for her discomfort. The physical nature of the work made claimant “extremely sore.” Transcript at 27. It took claimant an hour to get from the Aloha Costco to her home and claimant was “unable to drive late at night.” Transcript at 27.

(5) On the morning of May 11, 2019, claimant drove to the Aloha Costco for her shift but concluded that she could no longer handle the physical nature of the work, nor the distance of her commute. Claimant told the site supervisor she would not be able to continue the work, and quit her job.

(6) At all relevant times, claimant did not notify the employer that she had a spinal injury and was under a doctor’s care for that injury. She also had not notified the employer that she was unable to do heavy or repetitive lifting because of the injury. Had claimant made the employer aware of claimant’s physical limitations and injuries, the employer would have reassigned claimant to less demanding duties, as it had done with similarly situated past employees.

(7) Between January 1, 2019 and December 10, 2019, claimant moved five times due to domestic violence. Each time she moved, claimant had her mail forwarded; however, even as of December 10, 2019, claimant was still collecting old mail at her most recent address.

(8) On or about October 2, 2019, the Department mailed a copy of decision # 125515 to claimant’s address of record, a post office box in Portland, Oregon. Claimant did not file a timely request for hearing on or before October 22, 2019, and the post office did not return the Department’s mailing as undeliverable.

(9) On November 6, 2019, claimant telephoned the Department and became aware of the Department’s two decisions. At that time, claimant updated her mailing address with the Department. The Department informed claimant it would mail her a copy of the Department’s administrative decisions as well as

information regarding how to request a late hearing for both decisions. Claimant received copies of decision # 194548 and decision # 125515 at some point in November 2019.

(10) In December 2019, claimant moved again. On December 3, 2019, claimant and the Department made telephonic contact. At that time, the Department explained the overpayment decision in # 194548, and again mailed claimant copies of decision #125515 and decision # 194548.

(11) Between late November 2019 and December 10, 2019, claimant was still in the process of moving and looking for a job. December 10, 2019 was claimant's first opportunity to address the administrative decisions at issue. That day, claimant contacted the Department to verify the address to send her requests for hearing, and filed late requests for hearing on both decisions.

CONCLUSIONS AND REASONS: Claimant's late requests for hearing are allowed. Claimant voluntarily left work without good cause and should be disqualified from receiving benefits. The Department overpaid claimant \$1,133 that she is liable to repay; however, she is not liable for a monetary penalty or penalty weeks.

Late request for hearing. Claimant's late requests for hearing should be allowed.

ORS 657.269 provides that parties have 20 days after the date an administrative decision is issued to request a hearing. In this case, the 20-day period expired on October 22, 2019, with respect to decision # 125515, and on October 23, 2019, with respect to decision # 194548, without claimant having requested a hearing in either case. Her requests for hearing were, therefore, late.

ORS 657.875 provides that the 20-day period in which parties may request a hearing may be extended "a reasonable time" upon a showing of "good cause." OAR 471-040-0010 (February 10, 2012) defines "good cause" to include an excusable mistake or circumstances beyond the individual's reasonable control; "a reasonable time" is defined as seven days after the circumstances that prevented a timely filing ceased to exist.

It is undisputed that claimant failed to file a timely request for hearing with respect to either decision #125515 or decision #194548. The record reflects, however, that claimant spent the vast majority of calendar year 2019 moving from residence to residence as she dealt with a personal domestic violence issue and that her constant movement likely had an adverse impact on her ability to receive mail in a timely fashion. On both November 6, 2019 and December 3, 2019, claimant established contact with the Department and, in both instances, updated her mailing address in the Department's records. As a result of these efforts, claimant does not dispute that she received copies of the Department's decisions at some point in November 2019. Nevertheless, claimant's need to change her residence five different times in calendar year 2019 in order to ensure her own personal safety was a circumstance that was beyond her reasonable control.

Furthermore, despite her best efforts to ensure the forwarding of her mail each time she changed a residence, claimant was still collecting old mail at her most recent address as late as December 10, 2019. Claimant remained in the process of moving until December 10, 2019, when the Department's decisions "came up in her paperwork" and she was able to mail her requests for hearing directed at both decisions. Transcript at 20. In light of the extraordinary circumstances involved in claimant's case, and considering

the totality of the circumstances, it is reasonable to conclude that the circumstances preventing claimant from filing a timely request for hearing did not cease to exist until December 10, 2019. Claimant's request for hearing was therefore filed within seven days of the date that the circumstances previously preventing her from timely filing had ceased to exist. She had good cause for the late requests for hearing, and the late requests are, therefore, allowed.

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). "[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). Claimant had a spinal injury, a permanent or long-term "physical or mental impairment" as defined at 29 CFR §1630.2(h). A claimant with an impairment who quits work 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.

Claimant did not show good cause for quitting her job. The record shows that there was confusion between the employer and claimant regarding the physical requirements of claimant's work. Claimant had a spinal injury resulting from a traffic accident six months earlier that reasonably should have precluded her from taking part in duties such as the Costco furniture setup. However, claimant never notified the employer that she had physical limitations. She never requested that her employer adjust her duties so she could perform less strenuous work or avoid heavy or repetitive lifting, or otherwise provide reasonable accommodations that would take into account her spinal injury. Providing this information is the type of action that a reasonable and prudent person with a similar spinal injury would have done prior to leaving employment under these circumstances, particularly given that the employer had less physically demanding work available on a retail site crew, and given that the employer had a history of accommodating the reasonable needs of prior employees. The preponderance of the evidence demonstrates that claimant did not have good cause to quit work under the circumstances. She is therefore subject to disqualification from benefits until she requalifies under Employment Department law.

Overpayment, Misrepresentation, and Penalties. 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 overpaid and must repay the Department \$1,133 in benefits she erroneously received for weeks 21-19 through 29-19, but is not liable for misrepresentation penalties, is **adopted**.

DECISION: Orders No. 20-UI-143179 and 20-UI-143188 are affirmed.

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

DATE of Service: March 19, 2020

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 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 ໂດຍປະຕິບັດຕາມຄຳແນະນຳທີ່ບອກໄວ້ຢູ່ຕອນຫ້າຍຂອງຄຳຕັດສິນນີ້.

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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