

EMPLOYMENT APPEALS BOARD DECISION
2020-EAB-0208

Reversed & Remanded

PROCEDURAL HISTORY: On December 13, 2019, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant committed a disqualifying act by quitting work when asked to take a drug test by the employer and was disqualified from receiving benefits effective November 10, 2019 (decision # 93558). Claimant filed a timely request for hearing. On February 18, 2020, ALJ Frank conducted a hearing, and on February 24, 2020 issued Order No. 20-UI-144967, concluding claimant did not commit a disqualifying act and was not disqualified from receiving benefits. On, March 6, 2020, the employer filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Werner Gourmet Meat Snacks Inc. employed claimant as a processing supervisor from January 2010 to November 13, 2019.

(2) The employer had a written policy that prohibited the use or effects of drugs and alcohol in the workplace. The employer's policy provided for "reasonable suspicion" drug testing. Transcript at 27. The policy defined "reasonable suspicion" to include a determination by the company that "drugs or alcohol could reasonably be considered as a contributing factor" to a "serious incident" caused by an employee. Transcript at 27.

(3) During 2019, claimant had "health issues," including "fairly serious kidney issues" that required hospitalization, followed by a "relapse" and was "ongoing," causing him to miss substantial work time. Transcript at 32-33. Claimant also had "family issues" involving his wife's mental health and substance abuse problems that caused him to miss work. Transcript at 5-8. Claimant and his wife had children. His wife's mental health and substance abuse problems became serious enough that by early November 2019, the state of Oregon intervened regarding claimant's family.

(4) Also during 2019, the employer's plant manager noticed an overall decline in claimant's job performance and attendance, which caused him to wonder if "there was something not right" with claimant. Transcript at 26. The employer had made claimant aware that the owner and plant manager expected claimant to notify the plant manager immediately when a processing mistake had been made so they could be involved in resolving the issue. In September 2019, claimant became aware of a

processing mistake, but failed to notify the plant manager. On September 18, 2019, the employer gave claimant a written warning for failing to notify the plant manager as required.

(5) On November 12, 2019, during his daytime shift, claimant modified a cooking program on ovens cooking jerky. That evening, claimant returned to check on the ovens, noticed a programming mistake he had made regarding one of the ovens, and corrected it. Claimant did not immediately notify the plant manager of the mistake and instead waited until the next morning to do so. Later on November 13, the plant manager asked claimant to take a drug test “to rule out drug use” because he thought “maybe . . . that’s why he didn’t call me the night before.” Transcript at 25, 29. When asked to take the test, claimant told the plant manager, “It would be best at this time if I quit,” due to “personal issues . . . he needed to deal with.” Transcript at 29.

(6) In addition to his “personal issues” involving his wife and children which claimant believed might require him to be off work for as long as six months, claimant’s decision to quit on November 13 was caused, in part, by what he considered “a worsening of his relationship” with the employer and his belief that he “was being targeted for termination.” Exhibit 1 at 1. Claimant considered the employer’s criticism of him to be increasingly “volatile” because, at times, he was “swore at or yelled at” and told to “shut up.” Exhibit 1 at 1. He believed the employer’s behavior was caused by its frustration with his job performance due to missed work. He also believed the employer was trying to set him up for termination evidenced by what he considered the employer’s unreasonable request on November 13, 2019 that he take a drug test although claimant had never had a drug problem in the past and had never failed a drug test.

(7) Claimant did not quit work to avoid taking the November 13, 2019 drug test.

CONCLUSIONS AND REASONS: Order No. 20-UI-144967 is reversed and this matter is remanded for further development of the record.

ORS 657.176(2)(h) requires a disqualification from unemployment insurance benefits if the individual has committed a disqualifying act. ORS 657.176(10)(c) provides that an individual is considered to have committed a disqualifying act when the individual voluntarily leaves work to avoid taking a drug, cannabis or alcohol test under a reasonable written policy * * *.

657.176(2)(c) provides that 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. However, a claimant with a permanent or long-term “physical or mental impairment” as defined at 29 CFR §1630.2(h) 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.

Order No. 20-UI-144967 found that claimant quit work on November 13, 2019 to avoid taking the employer directed drug test. Order No. 20-UI-144967 at 2. The order then concluded that claimant's conduct was not a disqualifying act because the employer did not have the required "reasonable suspicion" under its own policy and OAR 471-030-0125(4) to request that claimant take a drug test. Order No. 20-UI-144967 at 7-8. However, the record shows that although claimant quit when asked to take the drug test, he did not quit to "avoid" taking the test, but for other reasons, including his need to take as much as six months off work to resolve his family issues, and the employer's worsening treatment of him, evidenced by its unreasonable request to take the drug test. Transcript at 8-11 and 13-14; Exhibit 1 at 1-2. Accordingly, because there was insufficient inquiry into the facts necessary for a determination of whether claimant quit work for good cause under OAR 471-030-0038(4), this matter is being remanded for further development of the record.

Claimant testified that claimant had various "health issues," including "serious kidney issues" that required hospitalization, was followed by a "relapse" and was "ongoing," causing him to miss substantial work time. Transcript at 32-33. However, the record fails to show the nature of the kidney condition for which claimant had been treated and hospitalized, and how long claimant had received treatment for that condition, sufficient to determine whether claimant's kidney condition constituted a permanent or long-term "physical or mental impairment" as defined at 29 CFR §1630.2(h). The record also fails to show when, and how often, claimant had been off work due to that condition and whether his leave from work for that reason had been granted and protected under the Family and Medical Leave Act (FMLA), the Oregon Family Leave Act (OFLA), or both. It also fails to show whether his absences from work had been paid and whether and how much paid leave remained available to him when he quit. Finally, the record fails to show the nature of the "other health issues" claimant attempted to testify about at hearing, without success, and whether those issues had required treatment and had caused him to miss work, and if so, when and how many work days. Transcript at 33.

Claimant testified that his wife's second substance abuse relapse near the time he quit was "a lot more serious than the first," and that "the state kind of became involved." Transcript at 8. He also stated that he quit when he did "to take care of my wife and children during a time of great turmoil," did not know how long that would take, but "thought [he] may have been off for as much as six months." Exhibit 1 at 2. However, the record fails to show the nature of the state's involvement in his family situation, or why claimant believed it may have been necessary for him to remain at home and off work for as much as six months as a result. On this issue, the record also fails to show why, if he believed an extended leave was necessary for that purpose, he did not request such leave from the employer, or if the employer would have been willing to grant such leave. Finally, the record fails to show that if protected leave was, in fact, available to claimant for this purpose, whether the leave would have been paid or unpaid.

Claimant stated that he believed he "was being targeted for termination" by the employer, based on a worsening relationship with the plant manager, including instances of being "swore at" and "yelled at" and being told to "shut up," which caused him anxiety. Exhibit 1 at 1. However, the record fails to show that any inquiry was made regarding those circumstances sufficient to show whether claimant's allegations were factually true and to what extent they may have created a grave situation for claimant sufficient to cause him to quit. Although the record shows claimant denied that he was ever diagnosed with a permanent or long-term impairment regarding his anxiety, it fails to show if and when claimant ever sought or received treatment, and if so, the outcome of the treatment. Finally, an inquiry should be

made as to whether claimant's missed work due to his health and family issues contributed to the employer's alleged mistreatment of him.

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 quit work for good cause under OAR 471-030-0038(4), Order No. 20-UI-144967 is reversed, and this matter is remanded for development of the record.

NOTE: The failure of any party to appear at the hearing on remand will not reinstate Order No. 20-UI-144967 or return this matter to EAB. Only a timely application for review of the subsequent order will cause this matter to return to EAB.

DECISION: Order No. 20-UI-144967 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: April 10, 2020

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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 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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