

EMPLOYMENT APPEALS BOARD DECISION
2020-EAB-0442

Reversed
No Disqualification
No Overpayment

PROCEDURAL HISTORY: On March 9, 2020, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant voluntarily left work without good cause, was disqualified from receiving unemployment insurance benefits effective March 17, 2019, and was overpaid benefits in the amount of \$6,864 which claimant is liable to repay to the Department (decision # 174238). Claimant filed a timely request for hearing. On May 6, 2020, ALJ Shoemake conducted a hearing at which the employer failed to appear, and on May 14, 2020 issued Order No. 20-UI-149759, affirming the Department's decision. On June 3, 2020, claimant filed an application for review with the Employment Appeals Board (EAB).

EAB considered the entire hearing record and claimant's written argument to the extent it was based on the hearing record.

FINDINGS OF FACT: (1) On November 19, 2018, claimant filed an initial claim for unemployment insurance benefits. The Department established that the claim was valid with a weekly benefit amount of \$624.

(2) Integrity Capital LLC (Integrity) employed claimant as a prospective sales agent from March 10, 2019 through March 18, 2019.

(3) On February 26, 2019, claimant signed a non-binding letter of intent with Integrity to explore the opportunity to work for it as an independent contractor on the condition that no contract for any

employment relationship would be deemed to exist “unless and until a final, definitive agreement” between the parties had been executed. Transcript at 21.

(4) From March 10, 2019 through March 16, 2019, at the request of Integrity, claimant was present at Integrity’s Arizona offices for 22.5 hours to observe how it conducted business and determine if claimant was interested in working for Integrity as an independent contractor.

(5) On or about March 18, 2019, Integrity presented claimant for his signature a “final, definitive agreement” for an independent contractor relationship with Integrity. The agreement required claimant to bring the commercial real estate contacts he had established over 25 years to Integrity for its use, “with [claimant retaining] no further right to them” in the event their relationship ended, and with Integrity retaining the right to use the contacts to originate loans. Transcript at 29. The proposed agreement also contained a “non-compete clause . . . with any of [Integrity’s] contacts.” Transcript at 29-30. Claimant concluded the proposed agreement was unreasonable, and on March 18, 2019, refused to sign it, ending the possibility of an independent contractor relationship with Integrity.

(6) Integrity paid claimant \$247.50 for the time he spent at its offices and reported that sum to the state of Arizona as wages from employment subject to unemployment insurance.

(7) Claimant claimed and was paid \$624 in benefits for each of the weeks from March 17 through May 25 and June 2 through June 8, 2019 (weeks 12-19 through 21-19 and week 23-19) for a total of \$6,864 in benefits. These are the weeks at issue. When claimant claimed benefits for week 12-19, he did not report that a work separation occurred during that week.

CONCLUSION AND REASONS: Claimant voluntarily quit work with good cause. Accordingly, claimant was not overpaid benefits for the weeks at issue and is not liable for an overpayment.

Independent Contractor. Claimant asserted that he was present at Integrity’s offices in March 2019 to explore a potential relationship with Integrity as an independent contractor, and that he should not be disqualified from receiving benefits because he was never an employee, and refused to sign the proposed independent contractor agreement presented to him by Integrity. Transcript at 9-13.

However, “[s]ervices performed by an individual for remuneration are deemed to be employment subject to this chapter unless and until it is shown to the satisfaction of the Director of the Employment Department that the individual is an independent contractor as that term is defined in ORS 670.600.” ORS 657.040(1). ORS 670.600(2) provides, in pertinent part:

(2) As used in ORS [chapter 657], “independent contractor” means a person who provides services for remuneration and who, in the provision of the services:

(a) Is free from direction and control over the means and manner of providing the services, subject only to the right of the person for whom the services are provided to specify the desired results;

(b) Except as provided in subsection (4) of this section [regarding the provision of farm labor or farm services], is customarily engaged in an independently established business; and

* * *

(d) Is responsible for obtaining other licenses or certificates necessary to provide the services.

ORS 670.600(3) provides that a person is customarily engaged in an “independently established business” if any three of the following requirements are met:

- (a) The person maintains a business location:
 - (A) That is separate from the business or work location of the person for whom the services are provided; or
 - (B) That is in a portion of the person’s residence and that portion is used primarily for the business.
- (b) The person bears the risk of loss related to the business or the provision of services as shown by factors such as:
 - (A) The person enters into fixed-price contracts;
 - (B) The person is required to correct defective work;
 - (C) The person warrants the services provided; or
 - (D) The person negotiates indemnification agreements or purchases liability insurance, performance bonds or errors and omissions insurance.
- (c) The person provides contracted services for two or more different persons within a 12-month period, or the person routinely engages in business advertising, solicitation or other marketing efforts reasonably calculated to obtain new contracts to provide similar services.
- (d) The person makes a significant investment in the business, through means such as:
 - (A) Purchasing tools or equipment necessary to provide the services;
 - (B) Paying for the premises or facilities where the services are provided; or
 - (C) Paying for licenses, certificates or specialized training required to provide the services.

- (e) The person has the authority to hire other persons to provide or to assist in providing the services and has the authority to fire those persons.

The record fails to show that claimant maintained a “business location separate from the business or work location” of Integrity, performed the described work for any employer other than Integrity during a 12-month period, or had the authority to hire anyone to provide the services he was to perform for Integrity. In addition, the record fails to show that claimant made a significant investment in the equipment needed to perform his potential job. Because the record fails to show that claimant met at least three of the requirements for an “independently established business” under ORS 657.040(1), the services claimant performed for Integrity between March 10 and March 18, 2019 for remuneration were not performed as an independent contractor, and are deemed to be employment subject to ORS chapter 657.

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). On March 18, 2019, claimant refused to sign the “final, definitive agreement” for work proposed by the employer, which ended their work relationship. Because claimant could have continued to work for the employer for an additional period of time on and after March 18, 2019, the work separation was a voluntary leaving on that date.

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). 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.

On March 18, 2019, claimant quit work because he concluded that the “final, definitive agreement” for work proposed by the employer was unreasonable. Order No. 20-UI-149759 concluded that claimant quit work without good cause, reasoning that claimant’s dissatisfaction with the proposed agreement “did not amount to a situation so grave as to leave the claimant no reasonable alternatives but to quit work.”¹ However, the record does not support the order’s conclusion.

Claimant asserted that he “passed” on the agreement because the agreement required claimant to bring the commercial real estate contacts he had established over 25 years to Integrity, “with no further right to them” in the event their relationship ended, and also contained a “non-compete clause...with any of [Integrity’s] contacts.” Transcript at 29-30. Claimant explained that “never in a million years” would he have signed such an agreement. Transcript at 30. Viewed objectively, it was unreasonable for the employer to expect claimant to sign an agreement that required him to turn over all of his business

¹ Order No. 20-UI-149759 at 3.

contacts, with no further right to them in the event of a separation, and which also contained a non-compete clause regarding all of the employer's contacts in the event of such a separation, essentially eliminating claimant's future ability to work independently from the employer. Under those circumstances, no reasonable and prudent person would have continued to work for the employer for an additional period of time.

Claimant voluntarily quit work with good cause and is not disqualified from receiving unemployment insurance benefits on the basis of his work separation.

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. That provision applies if the benefits were received because the individual made or caused to be made a false statement or misrepresentation of a material fact, or failed to disclose a material fact, regardless of the individual's knowledge or intent. *Id.*

The Department determined, and Order No. 20-UI-149759 agreed, that claimant was disqualified from receiving the \$6,864 in regular benefits paid to him for weeks 12-19 through 21-19 and 23-19, and that because he received those benefits based upon a false certification to the Department that he had not quit a job during week 12-19, he was liable to repay those benefits to the Department.² However, having concluded in this decision that claimant quit work with good cause, claimant was not disqualified from receiving benefits for the weeks at issue, and, as such, was entitled to the \$6,864 in benefits he received, and is not liable to repay those benefits to the Department.

DECISION: Order No. 20-UI-149759 is set aside, as outlined above.

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

DATE of Service: July 10, 2020

NOTE: This decision reverses an order that denied benefits. Please note that payment of benefits, if any are owed, may take approximately a week for the Department to complete.

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.

Please help us improve our service by completing an online customer service survey. To complete the survey, please go to <https://www.surveygizmo.com/s3/5552642/EAB-Customer-Service-Survey>.

² Order No. 20-UI-149759 at 3.

You can access the survey using a computer, tablet, or smartphone. If you are unable to complete the survey online and need 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 ໂດຍປະຕິບັດຕາມຄໍາແນະນໍາທີ່ບອກໄວ້ຢູ່ຕອນທ້າຍຂອງຄໍາຕັດສິນນີ້.

Arabic

هذا القرار قد يؤثر على منحة البطالة الخاصة بك، إذا لم تفهم هذا القرار، إتصل بمجلس منازعات العمل فوراً، و إذا كنت لا توافق على هذا القرار، يمكنك رفع شكوى للمراجعة القانونية بمحكمة الاستئناف 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 دستور العمل موجود در پایان آن، از دادگاه تجدید نظر اورگان درخواست تجدید نظر کنید.

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www.Oregon.gov/Employ/eab

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