

EMPLOYMENT APPEALS BOARD DECISION
2020-EAB-0477

Reversed
No Disqualification

PROCEDURAL HISTORY: On April 28, 2020, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant quit work without good cause, and was disqualified from receiving unemployment insurance benefits effective February 23, 2020 (decision # 55705). Claimant filed a timely request for hearing. On June 10, 2020, ALJ L. Lee conducted a hearing, and on June 12, 2020, issued Order No. 20-UI-150976, modifying the Department's decision and concluding that claimant quit work without good cause, and was disqualified from receiving benefits effective March 8, 2020. On June 16, 2020, claimant filed an application for review with the Employment Appeals Board (EAB).

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) Elmer's employed claimant as a part-time restaurant server and bartender from May 20, 2015 to March 10, 2020.

(2) From 2018 through the end of her employment, claimant was a full-time student at Portland Community College (PCC). While a student there, claimant worked part-time for the employer, 25-30 hours per week. Claimant worked two weeknights per week, and Saturdays and Sundays, which her school schedule permitted. The employer typically scheduled claimant to work the same shifts each week.

(3) In November 2018, the employer employed a dishwasher who often behaved oddly and stared at female servers, which resulted in the employer disciplining him for sexual harassment. In the

disciplinary write-up for the dishwasher, the manager included claimant's full name. This upset claimant because it identified her to the person being disciplined.

(4) Not long thereafter, the dishwasher came into the employer's bar while off-duty. Claimant was working as the bartender at that time and after serving him a beer, the dishwasher started talking about "wanting to kill people and how it's natural to want to kill people." Transcript at 17. Claimant became very nervous because she believed the dishwasher might harm her due to the disciplinary report that had named her as a complainant, and had what she believed was a panic attack. She started to shake and sweat, her heart began to race, and she had difficulty swallowing, so she went to the employer's office to calm down. She told the manager what had occurred and asked him to watch the bar while the dishwasher remained there, but the manager refused. The dishwasher did not appear intoxicated, so when claimant returned to the bar and the dishwasher requested another beer, claimant served it to him before returning to the office. After the dishwasher left, claimant returned to the bar area to work.

(5) After that incident, claimant complained to the employer's corporate office about the dishwasher's behavior. Soon thereafter, the employer discharged the dishwasher from his employment. However, the employer also disciplined claimant for serving the dishwasher two beers within one hour. Claimant believed her discipline was unfair under the circumstances because the dishwasher was not visibly intoxicated when she served him, and it was not against state liquor-control regulations or the employer's rules to serve a customer two beers within an hour unless they were visibly intoxicated. The employer's actions in those incidents caused claimant to believe that the employer would not protect or support her in the future.

(6) In late January 2020, when the employer posted the weekly work schedule, claimant observed that she was scheduled to work only five hours. Claimant became upset because her normal shifts had been assigned to new hires, and because she was struggling financially and needed her regular hours to pay for school and her other expenses. She also was upset because she believed she had "bent over backwards for the company" for five years by working on her days off when needed. Transcript at 22. When claimant complained to the scheduling manager, he told her that she "didn't have the availability that he needed," which resulted in her limited hours under the new schedule. Transcript at 22. After she complained to her supervisor, the supervisor felt bad for claimant and assigned her three shifts for that week, causing the shifts to be "overstaffed." Transcript at 25. Claimant concluded she was "done" with the employer, and on February 11, 2020, gave the employer notice that she was quitting, effective March 10, 2020. Transcript at 23.

(7) On or about February 27, 2020, claimant received and accepted an offer of other work as a server at a different restaurant at the same wage rate for 25-30 hours per week, working two weeknights and on Saturdays and Sundays each week.

(8) Claimant's last day of work with the employer was March 10, 2020. Claimant quit because claimant needed to work 25-30 hours per week for financial reasons, and the employer had reduced her work schedule to minimal hours because the employer believed claimant "didn't have the availability [the employer] needed."

CONCLUSIONS AND REASONS: Claimant voluntarily quit work with good cause.

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.

Order No.20-UI-150976 concluded that claimant quit work without good cause. The order reasoned that to the extent claimant quit work to accept an offer of other work, under OAR 471-030-0038(5)(a),¹ she quit work without good cause because claimant’s new job did not pay an amount greater than the work left and her pay at the new job did not meet or exceed her weekly benefit amount.² However, OAR 471-030-0038(5)(a) does not apply to this case. Claimant did not quit work to accept an offer of other work. She quit work because the employer had reduced her hours. Additionally, claimant resigned before she had obtained her new job, and began working in her new job prior to the effective date of her resignation from the employer. Therefore, claimant neither resigned to accept an offer of other work, nor quit because she had obtained new work. Claimant obtaining a new job was unrelated to her decision to quit her job with the employer, or the timing of claimant’s decision to quit her job with the employer.

The order under review also concluded that to the extent claimant quit work due to her working conditions, under OAR 471-030-0038(4), she quit work without good cause, reasoning that the circumstances that caused her to quit did not constitute “a grave situation.”³ However, OAR 471-030-0038(4) does not directly apply to this case. OAR 471-030-0038(5) states that for purposes of applying OAR 471-030-0038(4), “If an individual leaves work due to a reduction in hours, the individual has left work without good cause unless continuing to work substantially interferes with return to full time work or unless the cost of working exceeds the amount of remuneration received.” See OAR 471-030-0038(5)(e).

In this case, claimant had good cause to quit her job because continuing to work for the employer would have substantially interfered with claimant’s return to full time work. Prior to claimant’s reduction in hours, she usually worked two weeknights and both weekend days for the employer. Claimant’s new employer also wanted claimant to work two weekend nights and both weekend days. More likely than

¹ OAR 471-030-0038 (5)(a) provides, in relevant part:

(a) If an individual leaves work to accept an offer of other work good cause exists only if the offer is definite and the work is to begin in the shortest length of time as can be deemed reasonable under the individual circumstances. Furthermore, the offered work must reasonably be expected to continue, and must pay:

(A) An amount equal to or in excess of the weekly benefit amount; or

(B) An amount greater than the work left.

² Order No.20-UI-150976 at 3.

³ Order No.20-UI-150976 at 4.

not, continuing to work an unpredictable reduced schedule for the employer would have substantially interfered with claimant's return to work with other restaurant employers, regardless whether she was returning to full-time or part-time work. Claimant therefore had good cause to quit work under OAR 471-030-0038(5)(e).

Even if OAR 471-030-0038(4) was directly applicable to this case, as the Order under review concluded, the outcome of this case would remain the same. Claimant required 25-30 hours of work per week to earn enough in wages to meet her expenses. The employer told claimant her hours were reduced because claimant "didn't have the availability [the employer] needed." Although one supervisor gave claimant extra shifts during one week because that supervisor felt bad for claimant, giving claimant extra shifts caused the employer to be overstaffed for those shifts. As a matter of common sense, it is implausible that the employer would continue to overstaff shifts on an ongoing basis just to give claimant the work she needed to meet her expenses, when doing so would be detrimental to the employer's business interests.

The employer's witness alleged at the hearing that claimant's reduction in hours was merely the result of a problem with the employer's scheduling app. That testimony was based upon the witness's understanding, however, and was the result of hearsay. At all relevant times, the employer's scheduling manager had told claimant her hours were reduced because she "didn't have the availability that he needed." The employer's actions in hiring new workers, and assigning some of claimant's usual shifts to those new workers was consistent with the scheduling manager's statement to claimant, and assigning claimant extra shifts had caused the employer to be overstaffed. Under all of those circumstances, it is more likely than not that claimant's reduced-hour schedule was not just the result of a scheduling app problem. It is more likely than not that the reduced-hour schedule would be on-going.

Claimant's reduction in hours caused her to be unable to meet her financial obligations. Rather than continue to work for the employer and experience ongoing financial problems, unless and until either the employer increased her hours again or she obtained a second job to supplement her income, claimant notified the employer that she was going to quit her job, and, during her notice period, sought and obtained a new job prior to the effective date of her resignation, thus resolving the ongoing financial problems she would have experienced had she continued working the reduced-hour schedule for the employer. Claimant's decision to leave her job with the employer under those circumstances is consistent with what any reasonable and prudent person experiencing similar circumstances would have done.

For all those reasons, claimant voluntarily quit work with good cause. Claimant is not disqualified from receiving unemployment insurance benefits on the basis of this work separation.

DECISION: Order No. 20-UI-150976 is set aside, as outlined above.

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

DATE of Service: July 24, 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.surveymoz.com/s3/5552642/EAB-Customer-Service-Survey>. 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 ໂດຍປະຕິບັດຕາມຄໍາແນະນໍາທີ່ບອກໄວ້ຢູ່ຕອນຫ້າຍຂອງຄໍາຕັດສິນນີ້.

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 الإستئناف 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.

Employment Appeals Board - 875 Union Street NE | Salem, OR 97311
 Phone: (503) 378-2077 | 1-800-734-6949 | Fax: (503) 378-2129 | TDD: 711
www.Oregon.gov/Employ/eab

The Oregon Employment Department is an equal opportunity employer/program. Auxiliary aids and services are available upon request to individuals with disabilities. Language assistance is available to persons with limited English proficiency at no cost.

El Departamento de Empleo de Oregon es un programa que respeta la igualdad de oportunidades. Disponemos de servicios o ayudas auxiliares, formatos alternos y asistencia de idiomas para personas con discapacidades o conocimiento limitado del inglés, a pedido y sin costo.