

EMPLOYMENT APPEALS BOARD DECISION
2020-EAB-0522

Affirmed
Request to Reopen Allowed
No Disqualification

PROCEDURAL HISTORY: On January 30, 2020, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant quit working for the employer without good cause and was disqualified from receiving unemployment insurance benefits effective December 15, 2019 (decision # 132558). Claimant filed a timely request for hearing. On February 25, 2020, the Office of Administrative Hearings (OAH) served, by mail, notice of a telephone hearing scheduled for March 10, 2020 at 9:30 a.m. On March 10, 2020, ALJ S. Lee conducted the hearing, at which the employer failed to appear, and on March 12, 2020 issued Order No. 20-UI-146099, concluding claimant quit work with good cause.

On March 25, 2020, the employer filed a timely request to reopen the hearing. On May 19, 2020, OAH served, by mail, notice of a telephone hearing scheduled for May 29, 2020. On May 29, 2020, ALJ S. Lee conducted the hearing, at which both claimant and the employer appeared, and on June 23, 2020 issued Amended Order No. 20-UI-151397, orally granting the employer's request to reopen the hearing and concluding claimant voluntarily quit work with good cause. On July 8, 2020, the employer filed an application for review of Order No. 20-UI-151397 with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Effin Amazing employed claimant as director of technology from November 2, 2019 to December 16, 2019.

(2) The employer was a small company with only five employees and did not have a human resources department. It was tightly managed by its chief executive officer (CEO), who recorded all employee telephone conversations and did not allow its employees to discuss work matters with each other during work hours. The employer paid its employees their paychecks twice each month.

(3) Shortly after claimant began his employment, the CEO told him to bill his hours to training rather than to clients. When claimant submitted a timesheet for his training hours, the CEO told him that he had recorded too many training hours and the employer would not pay him for all the hours.

(4) The employer assigned claimant to provide an estimate for a project and then complete the project for a client. Claimant estimated that the project would take 25 hours to complete, but claimant worked 28 hours to complete it. The CEO told claimant that he would not be paid for the hours he worked that exceeded his estimate for the project. The CEO also told claimant that after other workers sent him invoices for hours worked on a project, if the CEO was not satisfied with their work, the employer would not pay them for all of the hours worked. Transcript at 9.

(5) On December 15, 2019, the CEO spoke to claimant by telephone and told him he would not be paid as scheduled the next day, that his “paycheck would be delayed” indefinitely, and would not be issued before the holidays. Transcript at 34.

(6) On December 16, 2019, the CEO again spoke to claimant by telephone and told him that he “was training too much,” and that his hours would be reviewed and his pay “clawed back.” Transcript at 34. The CEO told claimant that when claimant received his paycheck, the employer would not pay him for all of the hours he had worked. Transcript at 34, 42.

(7) On December 16, 2019, claimant quit work because the employer failed to pay him on his regular payday for all of the hours he had worked.

(8) On January 14, 2020, the employer mailed claimant his final paycheck, but paid claimant for 45 hours less than what he was owed because the CEO was dissatisfied with claimant’s work.

(9) In early February 2020, the employer moved its offices from its address of record on file with the Department to a new address. The employer filed a change of address with the U.S. Postal Service (USPS) but did not file a change of address with the Department.

(10) On February 25, 2020, OAH served, by mail, notice of a telephone hearing on decision # 132558 scheduled for March 10, 2020 at 9:30 a.m. OAH mailed the notice to the employer’s address on file with the Department.

(11) The employer was unaware of claimant’s request for hearing and the scheduled hearing on March 10, 2020 because the employer had moved its office location and, although its mail had been forwarded to the employer’s new address, the employer did not receive all of its forwarded mail. Some of the delayed or lost mail included checks from clients. The employer did not receive the notice of hearing or Order No. 20-UI-146099 until March 24, 2020.

CONCLUSIONS AND REASONS: The employer’s request to reopen the March 10, 2020 hearing on decision # 132558 is allowed. Claimant quit work with good cause.

Request to Reopen. ORS 657.270(5) provides that any party who failed to appear at a hearing may request to reopen the hearing, and the request will be allowed if it was filed within 20 days of the date the hearing decision was issued and shows good cause for failing to appear. “Good cause” exists when the requesting party’s failure to appear at the hearing arose from an excusable mistake or from factors beyond the party’s reasonable control. OAR 471-040-0040(2) (February 10, 2012).

The employer's March 25, 2020 request to reopen the March 10 hearing was timely because it was filed within 20 days of the date Order No. 20-UI-146099 was issued. It was within the employer's reasonable control to file a change of address with the Department when it moved its offices to a new address in early February. However, because it was not the party that requested a hearing on decision # 132558, the employer was not aware of claimant's pending appeal. In addition, because some of its forwarded mail had been lost or delayed, the employer's failure to receive the Department's notice of hearing until March 24, after the hearing, was, at worst, the result of an excusable mistake under OAR 471-040-0040(2). Accordingly, the employer's request to reopen the March 10, 2020 hearing on decision # 132558 is 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). 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.

As a preliminary matter, the employer provided only hearsay evidence regarding the conversations between claimant and the employer's CEO. Absent a basis for concluding that claimant was not a credible witness, EAB gave his firsthand testimony under oath more weight than the employer's hearsay evidence, and therefore found facts in accordance with his testimony on matters in dispute between the parties.

Claimant quit work on December 16, 2019 because the employer failed to pay him on his regular payday and for all of the hours he had worked. By failing to pay claimant all the wages "due and owing" to him on the regular payday the employer established, the employer's pay practices were in violation of ORS 652.120(1).¹ Thereafter, more than four weeks later, the employer paid claimant for 45 hours less than what claimant had worked and was owed because the CEO reportedly concluded that the hours were "unusable." Transcript at 26.

Claimant had the right under Oregon wage and hour law to receive the full amount of wages owed to him on his regular payday, regardless of whether or not the employer was satisfied with claimant's services. No reasonable and prudent person would continue working for an employer who failed to pay all of the wages owed on time, had admittedly done the same to other employees as well, and based on the employer's failure to pay all wages when due in the past, would likely continue to underpay claimant in the future. It was not reasonable to expect claimant to complain to the Oregon Bureau of Labor and Industries (BOLI) about the employer's wage practices and continue working while being significantly underpaid for an indefinite period of time while BOLI investigated the wage dispute. *Accord, J. Clancy Bedspreads and Draperies v. Wheeler*, 152 Or App 646, 954 P2d 1265 (1998) (where unfair labor

¹ ORS 652.120(1) provides, "Every employer shall establish and maintain a regular payday, at which date the employer shall pay all employees the wages due and owing to them."

practices are ongoing or there is a substantial risk of recurrence, it is not reasonable to expect claimant to continue to work for an indefinite period of time while the unfair practices are handled by BOLI).

Claimant quit working for the employer with good cause and is not disqualified from receiving unemployment insurance benefits based on this work separation.

DECISION: Order No. 20-UI-151397 is affirmed.

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

DATE of Service: August 12, 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.

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>. 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 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

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.

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.