

State of Oregon
Employment Appeals Board
875 Union St. N.E.
Salem, OR 97311

EMPLOYMENT APPEALS BOARD DECISION
2020-EAB-0564

Reversed & Remanded

PROCEDURAL HISTORY: On June 26, 2020, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant quit work without good cause and was disqualified from receipt of benefits effective December 29, 2019 (decision # 113524). Claimant filed a timely request for hearing. On July 15, 2020, ALJ Shoemake conducted a hearing, and on July 21, 2020 issued Order No. 20-UI-152354, affirming decision # 113524. On August 3, 2020, claimant filed an application for review with the Employment Appeals Board (EAB).

WRITTEN ARGUMENT: 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).

The parties may offer new information (such as the substance of claimant's written argument) into evidence at the remand hearing. At that time, it will be determined if the new information will be admitted into the record. The parties must follow the instructions on the notice of the remand hearing regarding documents they wish to have considered at the hearing. These instructions will direct the parties to provide copies of such documents to the ALJ and the other parties in advance of the hearing at their addresses as shown on the certificate of mailing for the notice of hearing.

FINDINGS OF FACT: (1) Claimant worked as a hair stylist and colorist for A Beautiful People Company (the employer) from January 1, 2019 until late 2019 or early 2020. Claimant had previously worked at the same salon under different business ownership since 2006.

(2) On November 17, 2019, claimant took a personal leave of absence for health reasons. She sent her manager a text message indicating the same.

(3) At some point on or after November 17, 2019, the owner of the business contacted claimant via text message regarding the leave of absence and told claimant that it sounded like she was quitting. Claimant denied that she was quitting, and informed the owner that she would return to work on January 2, 2020.

(4) On December 16, 2019, the owner told claimant via text message that she would have to agree to several conditions before returning to work, including accepting a reduced commission rate, lowering her haircut prices, and confirming that she would not bring alcohol to work or otherwise come to work impaired. Claimant did not agree to these terms.

(5) Claimant never returned to work. At some point after January 2, 2020, claimant returned to the salon to retrieve her belongings.

CONCLUSIONS AND REASONS: Order No. 20-UI-152354 is reversed and remanded to OAH for further development of the record.

Order No. 20-UI-152354 concluded that claimant's work separation was a voluntary leaving, and that claimant voluntarily left work without good cause. However, additional information is needed to determine the nature of the work separation and, if claimant did quit her job, whether claimant had good cause to quit work when she did; or alternately, if the work separation was a discharge, if the employer discharged claimant for misconduct.

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).

Information on the record is currently insufficient to determine not only whether claimant quit or was discharged, but also when the separation actually occurred. In his testimony, the owner contended that claimant's employment ended on November 17, 2019, and characterized claimant's planned January 2, 2020 return to work as a "rehire." Transcript at 31. By contrast, the employer's former manager (to whom claimant reported at the time of the events at issue here) testified that claimant was still employed while on leave, and that her position had not been terminated. Transcript at 40. All three witnesses at the hearing testified that claimant refused to accept the owner's conditions for her return to work.

In short, the record presents two possible but mutually-exclusive scenarios: either the employment relationship was severed on or shortly after November 17, 2019 when claimant began her leave of absence; or else the employment relationship was severed when claimant definitively refused the employer's return-to-work conditions. Because the parties contest the nature of the separation, due inquiry on remand should be made into other actions the parties took that would tend to support a finding one way or the other. The record should therefore be developed to determine, for instance: when the owner first learned about claimant's leave of absence; on what schedule the employer typically paid its employees; when claimant's final paycheck was issued; whether any of claimant's employment benefits (such as health insurance) continued through her leave of absence and when they were terminated; and when claimant's employment status was changed in any accounting, payroll, or similar software that the employer used. The record should also be further developed to identify, with as much precision as possible, the dates of the relevant events in the timeline as well as the text messages in Exhibit 1.

If the record on remand shows that the employment relationship was severed on or shortly after November 17, 2019, the facts currently on the record would suggest that claimant was discharged.

Conversely, if the record on remand demonstrates that the employment relationship continued until the date on which claimant refused the employer's conditions, the facts currently on the record would suggest that continuing work was available and that, in refusing to accept it, claimant quit. The record should be developed to anticipate both of these possibilities.

ORS 657.176(2)(a) requires a disqualification from unemployment insurance benefits if the employer discharged claimant for misconduct connected with work. "As used in ORS 657.176(2)(a) . . . a willful or wantonly negligent violation of the standards of behavior which an employer has the right to expect of an employee is misconduct. An act or series of actions that amount to a willful or wantonly negligent disregard of an employer's interest is misconduct." OAR 471-030-0038(3)(a). "[W]antonly negligent' means indifference to the consequences of an act or series of actions, or a failure to act or a series of failures to act, where the individual acting or failing to act is conscious of his or her conduct and knew or should have known that his or her conduct would probably result in a violation of the standards of behavior which an employer has the right to expect of an employee." OAR 471-030-0038(1)(c).

If appropriate, inquiry should be made as to what led the employer to decide to discharge claimant, and when that decision was made. Did the employer, for instance, sever the employment relationship under a genuine but mistaken belief that claimant had intended to quit; was it in response to circumstances surrounding her leave of absence (such as its sudden announcement or her failure to provide the supporting documentation the owner had requested); or for some other reason? Finally, inquiry should be made as to whether claimant had previously been warned for or engaged in similar behavior, and regarding any other factors that would tend to support a finding of misconduct.

Should the record on remand support the conclusion that claimant quit, the record must also be sufficiently developed to determine whether or not claimant quit for 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). "[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.

Claimant has already testified conclusively that she was not willing to work at the lower rate that the employer offered. In order to determine the impact that the lower rate would have had on claimant, however, inquiry must be made into how her compensation had been structured prior to her leave of absence (e.g. if she was paid a base salary, or worked on straight commission), how that translated into dollar amounts, and likewise how much less claimant stood to make in actual dollar amounts if she had accepted the lower rate. The record should also be further developed to confirm whether claimant objected to any of the other terms that the employer offered to her, or whether she rejected them solely (or primarily) because of the commission decrease. Finally, the record should be developed as to why claimant considered the employer's proposed changes to claimant's compensation structure to be a grave situation such that no reasonable and prudent person would have accepted the changes.

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 for good cause (including whether claimant had reasonable alternatives to quitting), Order No. 20-UI-152354 is reversed, and this matter is remanded.

DECISION: Order No. 20-UI-152354 is set aside, and this matter remanded for further proceedings consistent with this order.

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

DATE of Service: August 31, 2020

NOTE: The failure of any party to appear at the hearings on remand will not reinstate Order No. Order No. 20-UI-152354 or return this matter to EAB. Only a timely application for review of the subsequent order will cause this matter to return to EAB.

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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 ໄດ້ໂດຍປະຕິບັດຕາມຄໍາແນະນໍາທີ່ບອກໄວ້ຢູ່ຕອນທ້າຍຂອງຄໍາຕັດສິນນີ້.

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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