

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

EMPLOYMENT APPEALS BOARD DECISION
2020-EAB-0569

Affirmed
Disqualification

PROCEDURAL HISTORY: On June 30, 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 May 24, 2020 (decision # 165716). Claimant filed a timely request for hearing. On July 22, 2020, ALJ Meerdink conducted a hearing and issued Order No. 20-UI-152438, concluding that claimant quit without good cause but modifying the effective disqualification date to June 14, 2020. On August 9, 2020, claimant filed an application for review with the Employment Appeals Board (EAB).

WRITTEN ARGUMENT: Claimant did not declare that she provided a copy of her 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 her 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).

Claimant asserted that the hearing proceedings were unfair or the ALJ was biased. EAB reviewed the hearing record in its entirety, which shows that the ALJ inquired fully into the matters at issue and gave all parties reasonable opportunity for a fair hearing as required by ORS 657.270(3) and (4) and OAR 471-040-0025(1) (August 1, 2004).

FINDINGS OF FACT: (1) Claimant worked for Indian Head Casino (the employer) from March 16, 2020 until June 18, 2020. The employer primarily hired claimant to work in their lounge as a bartender.

(2) Claimant lived in Redmond, Oregon, which is approximately a 41 mile one-way drive to the employer's casino in Warm Springs, Oregon. Claimant's vehicle averaged 10 miles per gallon of gasoline. In June 2020, the average price of gasoline in claimant's area was \$2.30 per gallon.

(3) On March 18, 2020, the employer closed its casino due to the COVID-19 pandemic and temporarily laid off its employees.

(4) On June 17, 2020, the employer recalled claimant and its other employees to the casino for work. When claimant reported to work that day, she learned that the employer would not be reopening the

lounge, and that she was instead assigned to work as a coffee station attendant. The coffee station role paid the same wage of \$12.00 per hour as the lounge did, but coffee station attendants were generally expected to earn less in tips than bartenders in the lounge.

(5) Claimant determined that she could not afford to continue commuting to the casino without the larger tips that bartenders could expect, and quit on June 18, 2020.

CONCLUSIONS AND REASONS: Claimant quit without good cause and is disqualified from benefits.

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-152438 concluded that because claimant “did not establish that the cost of traveling to work... was greater than the wages she [would have earned], she did not face a reason of such gravity that she had no reasonable alternative but to quit.¹ The order under review appears to rest its analysis on OAR 471-030-0038(5)(e), which mandates, in relevant part, that “if an individual leaves work due to a reduction in hours, the individual has left work without good cause... unless the cost of working exceeds the amount of remuneration received.” However, the record indicates that claimant left work due to a reduction in pay, rather than hours, and as such this section of the rule does not apply here.

Notably, OAR 471-030-0038(5)(d), which addresses leaving work due to a reduction in pay, is also inapplicable here:

This section applies only when the employer reduces the rate of pay for the position the individual holds. It does not apply when an employee's earnings are reduced as a result of transfer, demotion or reassignment.

OAR 471-030-0038(5)(d)(A). Because claimant left work due to a reduction in pay that resulted from a reassignment, the scenario must be analyzed under the standard framework of OAR 471-030-0038(4).

Claimant testified that her shifts were scheduled from 6:00 p.m. until 1:00 or 1:30 a.m. Assuming that she took a legally-required unpaid 30-minute meal break² during each shift, her gross earnings before

¹ Order No. 20-UI-152438 at 2.

² See OAR 839-020-0050(2)

tips³ would have been between \$78.00 and \$84.00 daily. Order No. 20-UI-152438 correctly determined that, based on the figures claimant provided, claimant would have spent roughly \$18.86 on fuel to get to work each day. The record does not indicate how much claimant would have likely earned in tips if she had continued in her original role as a bartender, and as such it is impossible to determine how much less she would have earned as a coffee station attendant. However, regardless of the difference in pay, the record is clear that claimant would nevertheless have been able to take home some pay. While it was unfortunate that the reassignment affected claimant's tip-earning potential, the fact that claimant would have earned less than she had originally anticipated was not a situation of such gravity that a similarly situated reasonable and prudent person would have felt they had no reasonable alternative but to leave work. As such, claimant quit work without good cause and is disqualified from benefits.

DECISION: Order No. 20-UI-152438 is affirmed.

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

DATE of Service: September 1, 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.

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³ Claimant testified that she assumed that coffee station attendants were not tipped. The employer's witness testified that in fact the attendants earned an average of \$3.08 per hour in tips, suggesting that claimant's actual gross earnings would have been \$15.08 per hour. Audio record at 23:25. For purposes of this analysis, however, the un-tipped wage is used because claimant appears to have considered that rate when deciding to quit.



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

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.

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