

**EMPLOYMENT APPEALS BOARD DECISION**  
**2020-EAB-0584**

*Reversed*  
*Disqualification*

**PROCEDURAL HISTORY:** On June 16, 2020, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant had failed without good cause to accept a suitable offer of work and was disqualified from unemployment insurance benefits effective May 17, 2020 (decision # 85858). Claimant filed a timely request for hearing. On August 3, 2020, ALJ Monroe conducted a hearing, and on August 11, 2020 issued Order No. 20-UI-153030, reversing decision # 85858 and concluding that claimant did not fail to accept a suitable offer of work<sup>1</sup>. On August 17, 2020, the employer filed an application for review with the Employment Appeals Board (EAB).

**WRITTEN ARGUMENT:** The employer's argument contained information that was not part of the hearing record, and did not show that factors or circumstances beyond the employer's reasonable control prevented them from offering the information during the hearing. Under ORS 657.275(2) and OAR 471-041-0090 (May 13, 2019), EAB considered only information received into evidence at the hearing when reaching this decision.

**FINDINGS OF FACT:** (1) Claimant began working intermittently as a bartender for Raven Inn Inc. (the employer) on January 29, 2019.

(2) Claimant filed an initial application for benefits on March 18, 2020.

(3) On May 20, 2020, the employer offered claimant shifts as a "second bartender" on May 22 and May 23, 2020.

(4) Claimant declined the employer's offer of work on May 21, 2020 because she believed that the "second bartender" shift would pay substantially less than the "first bartender" shift.

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<sup>1</sup> The order under review concluded that "claimant is disqualified from receiving unemployment insurance benefits for failing without good cause to accept suitable work when offered." Order No. 20-UI-153030 at 3. However, this appears to be erroneous, as the rest of the order otherwise found that claimant had *not* failed to accept an offer of suitable work and was *not* disqualified.

**CONCLUSIONS AND REASONS:** Claimant failed without good cause to accept a suitable offer of work and is disqualified from benefits.

ORS 657.176(2)(e) requires a disqualification from unemployment insurance benefits if an individual failed without good cause to accept suitable work when offered. In a job refusal case, the burden of proof is on claimant to establish that a valid offer of work made by an employer was not suitable, or that claimant had good cause to refuse the offer. *Vail v. Employment Department*, 30 Or App 365, 567 P2d 129 (1977) (a claimant who is unemployed and who refuses an offer of employment has the burden of showing that the work offered is not suitable). However, the employer must first establish that they made claimant a *bona fide* offer of suitable work and that claimant refused it, thus making a *prima facie* showing that claimant was not entitled to benefits.

**Bona Fide Offer.** To establish that they made a “bona fide” offer of employment, the employer must show that claimant understood the “[t]he details of the job (type of work, duties, hours and days, rate of pay, start date, etc.)” Oregon Employment Department, UI Benefit Manual §450 (Rev. 04/01/10). Only if the employer meets that burden does the burden then shift to claimant to show the offer of work was not suitable, or show claimant had good cause for refusing it.

The order under review concluded that “the preponderance of the evidence fails to support a finding that claimant was provided with all of the ‘details of the job’ necessary to establish a *bona fide* offer of work” because the employer never advised her of the hours she would be working during the shifts offered. Order No. 20-UI-153030 at 3 (emphasis in original).

Claimant did in fact testify at the hearing that she was not advised of the time that the shifts would start. Transcript at 29. While both of the employer’s witnesses speculated on the record that the shift was likely to have been from 7:00 to 11:00 pm, neither gave a definitive answer. Transcript at 17-18. At the time claimant refused the offered work, however, she had worked for the employer on and off for more than a year. The record therefore shows that claimant more likely than not was aware of most of the “details of the job,” and that the only uncertainties were regarding the changes made as a result of the pandemic. Her testimony illustrates the knowledge of the job that she accrued during that period, and that she had a detailed understanding of another “second bartender’s” duties and compensation structure. Transcript at 29, 37. Further, the text-message exchange in which claimant refused to work for the employer as a “barback” (i.e. “second bartender”) demonstrates that she essentially precluded discussion of additional details of the job offer by rejecting the work. Exhibit 4 at 13-19. There is no reason to believe that the employer would not have told claimant what time to report to work had claimant not refused the offer as she did.

Similarly, while the record is settled that claimant’s base pay would be minimum wage, it also reflects uncertainty regarding what percentage of tips she would have received during the offered shifts. During testimony, claimant explained her concern that working as “second bartender” for the offered shifts would result in a significantly smaller share of tips than she had previously enjoyed. Transcript at 29, 39. The employer appeared to counter that claimant would actually likely have earned about the same percentage of tips as before, if not higher. Transcript at 57-58. Whether or not the employer actually advised claimant of this fact prior to the refusal is immaterial, however, as claimant’s testimony demonstrated that she acted upon her own assumptions regarding the details of her compensation

structure in refusing the work, thereby precluding the possibility of the employer actually providing the missing information.

For those reasons, the preponderance of the evidence supports the conclusion that claimant either knew the necessary details of the job or else precluded the employer from providing them. As such, the work offer was bona fide.

**Suitability.** Because the employer established that they made a bona fide offer to claimant, the next question is whether claimant has established that the work was not suitable. Factors to consider when determining whether work is “suitable” include, in pertinent part, “the degree of risk involved to the health, safety and morals of the individual, the physical fitness and prior training, experience and prior earnings of the individual, the length of unemployment and prospects for securing local work in the customary occupation of the individual and the distance of the available work from the residence of the individual.” ORS 657.190.

Claimant did not establish that the work the employer offered to her was unsuitable. Although claimant asserted that she was unable to work for the employer due to health concerns, the record is also clear that those concerns arose after she refused the work, as the first text message claimant sent the employer regarding those concerns is dated about three hours after she initially refused the job offer. Exhibit 4 at 19. The evidence on the record does not suggest that those concerns were present at the time claimant initially refused the work, or that any other matters of health, safety or morals were present at the time of the refusal.<sup>2</sup> Likewise, because claimant had performed essentially the same work for the employer previously, nothing on the record suggests that she lacked the training or fitness required to perform the work.

Finally, while the record is clear that claimant’s initial rejection of the offer was due to her belief that she would earn a smaller percentage of tips than she previously had, claimant did not ask the employer to confirm that belief, and the employer’s testimony contradicts that belief. The employer testified, for instance, that the other “second bartender” earned about 15-20% of total tips because the latter was a “new person” who had “zero experience”; but that when claimant had worked with another bartender she got anywhere from 40% to “more than half” of the tips. Transcript at 57-58. The preponderance of the evidence therefore indicates that claimant’s actual compensation structure for the shifts, had she accepted them, would have been comparable to what it had been when she had worked for the employer previously. The record does not indicate that claimant’s previous compensation structure with the employer made her previous bartending work unsuitable, and she has not met her burden to prove that the bartending work offered here, with a substantially similar compensation structure, was unsuitable.

**Good cause.** Because claimant has not met her burden to prove that the work was not suitable, the next question is whether claimant has had good cause for refusing the work. OAR 471-030-0038(6)(a) (December 23, 2018) defines “good cause” as “such that a reasonable and prudent person, exercising ordinary common sense, would refuse to \* \* \* accept suitable work when offered by the employer.”

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<sup>2</sup> Claimant suggested, for instance, that as a “barback” she would “be closer than six feet [to patrons]” while checking IDs. Transcript at 32. However, claimant gave no explanation for why this would be more inherently risky than working as a “first bartender” in close proximity to the person tasked with checking IDs, or leaning in close over the bar to take a drink order from a patron or check the patrons’ IDs.

The question of whether claimant refused the work for good cause must be premised upon the reason that claimant had for refusing the work at the time she refused it, rather than any after-the-fact rationalizations such as her medical or safety concerns. Although claimant claimed at the hearing that she was uncomfortable with the prospect of being exposed to COVID-19 at work, she raised no such concerns to the employer when she explained her reluctance to accept the work. Transcript at 32-34. In fact, the text messages between claimant and the employer on the morning of May 21, 2020—a contemporaneous account of the conversation between claimant and the employer—demonstrate claimant’s protest was on the basis of being assigned work as a barback, and further show that claimant only raised concerns about the safety of returning to work several hours after actually refusing it. Exhibit 4 at 13-19.

As discussed above, the record is clear that claimant’s actual reason for refusing the work was because she believed that, as “second bartender,” she would receive a smaller portion of the tips and therefore less compensation. In order to find that claimant had good cause for refusing the work for that reason, however, claimant would need to show by a preponderance of the evidence that any reasonable and prudent person in such circumstances would refuse work for the same reason. However, a reasonable and prudent person would not reject an offer of work as a second bartender because she was concerned her portion of the tips would be less than she received when she was the main bartender, particularly where, as here, the compensation structure was substantially the same in both jobs and she had not confirmed her assumption that she would receive a reduced portion of the tips with the employer prior to refusing the offered work. *See, e.g., Marella v. Employment Dep’t.*, 223 Or. App. 121, 194 P.3d 849 (2008) (claimant did not have good cause to reject an offer of work based on her belief that it would preclude her from getting medical benefits, in part because she did not test the validity of her belief before rejecting the job; the Court did not make it clear whether the outcome would remain the same had she tested her belief and found it true). Because a reasonable and prudent person would not reject a job offer on the basis of pay without first confirming the compensation structure, claimant failed without good cause to accept a suitable offer of work.

**Conclusion.** Claimant refused a bona fide offer of suitable work without good cause. Claimant must therefore be disqualified from receiving regular unemployment benefits because of this job refusal.

**DECISION:** Order No. 20-UI-153030 is set aside, as outlined above.

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

**DATE of Service:** September 16, 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](http://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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# 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.

**Employment Appeals Board - 875 Union Street NE | Salem, OR 97311**  
 Phone: (503) 378-2077 | 1-800-734-6949 | Fax: (503) 378-2129 | TDD: 711  
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