EO: 200
BYE: 202113

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

875
MC 000.00
VQ 005.00

EMPLOYMENT APPEALS BOARD DECISION
2020-EAB-0677-R

Requests for Reconsideration Allowed
Late Applications for Review Allowed
Orders No. 20-UI-152923 and 20-UI-152921 Reversed
No Disqualifications

PROCEDURAL HISTORY: On July 1, 2020, the Oregon Employment Department (the Department) served two notices of two administrative decisions, one concluding claimant quit work with employer Calfee without good cause and was disqualified from receiving unemployment insurance benefits effective November 10, 2019 (decision # 153342), and the other concluding that claimant quit work with employer Jones without good cause and was disqualified from receiving unemployment insurance benefits effective November 10, 2019 (decision # 153614).[1] Claimant filed timely requests for hearing on both decisions.

On August 5, 2020, ALJ Roberts conducted hearings on both decisions, and on August 6, 2020 issued Orders No. 20-UI-152923 and 20-UI-152921, affirming decisions # 153342 and 153614. On August 26, 2020, Orders No. 20-UI-152923 and 20-UI-152921 became final without claimant having filed timely applications for review with the Employment Appeals Board (EAB). On October 22, 2020, claimant filed late applications for review of Orders No. 20-UI-152923 and 20-UI-152921 with EAB.

On November 9, 2020, EAB issued EAB Decisions 2020-EAB-0678 and 2020-EAB-0677, dismissing claimant's late applications for review without prejudice, subject to her right to request reconsideration and provide additional evidence to EAB about the reason(s) for the late filings. On November 27, 2020, claimant filed a timely request for reconsideration of EAB Decisions 2020-EAB-0678 and 2020-EAB-0677.

[1] The Department issued four decisions in total on July 1, 2020. This consolidated case is handling appeals from two of those orders in Case Nos. 2020-UI-10477 and 2020-UI-10478. EAB has issued decisions in the other two cases (Case No. 2020-UI-10475 and 2020-UI-10476 – claimant's separations from employers Weber and Mok) on December 14, 2020 that remanded both of those cases to the Office of Administrative Hearings for hearings about whether claimant had good cause for quitting those jobs.

Pursuant to OAR 471-041-0095 (October 29, 2006), EAB consolidated its review of claimant's requests for reconsideration. For case-tracking purposes, this decision is being issued in duplicate (EAB Decisions 2020-EAB-0678-R and 2020-EAB-0677-R).[2]

EVIDENTIARY RULING: With claimant's requests for reconsideration, she submitted transmission logs showing that on August 24, 2020 she successfully transmitted applications for review, letters, and requests to reopen to the Department on August 24, 2020. Because that evidence is necessary to complete the record in these matters, EAB has considered it when reaching this decision under OAR 471-041-0090(1) (May 13, 2019). The additional evidence has been marked as EAB Exhibit 1, and a copy provided to the parties with this decision. Any party that objects to our admitting EAB Exhibit 1 must submit such objection to this office in writing, setting forth the basis of the objection in writing, within ten days of our mailing this decision. OAR 471-041-0090(2). Unless such objection is received and sustained, the exhibit will remain in the record.

FINDINGS OF FACT: (1) Employers Calfee and Jones, along with two other employers, employed claimant under a single "nanny share" contract until November 14, 2019. Claimant worked Monday through Thursday from approximately 8:00 a.m. to 5:00 p.m. She worked two days per week at the Calfee home and two days per week at the Jones home as nanny to Calfee's, Jones's, and the two other employers' children.

(2) Under claimant's contract of employment, each employer paid claimant separately for providing nanny services. Claimant's rate of pay remained constant, and the amount of pay she actually received during each pay period depended on how many children she watched during that period.

(3) Claimant typically communicated concerns to one or two employers at a time; the employer(s) claimant spoke with would then pass things on to the other employers; the four employers then discussed things among themselves as needed and responded to claimant. Claimant was not expected to notify any particular one of the employers about issues or concerns, and she could raise any issue with the children to any one of the employers for resolution.

(4) Prior to 2019, claimant customarily made an average of $2,730 per month under the nanny share contract. In September 2019, claimant and the employers implemented a new contract. Under the new contract, the number of children claimant watched was reduced. Because the number of children claimant watched reduced, her earnings were reduced between September and November 14, 2019 to an average of $2,469.76.[3]

(5) Under the new contract, the employers changed claimant's childcare schedule. Claimant did not agree to the changes in advance; there was some discussion in early 2019, but then employers decided what the new schedule would be and gave it to claimant.

[2] EAB Decisions 2020-EAB-0678-R and 2020-EAB-0677-R are identical, except the party address fields, EAB Decision numbers, and the Case Nos. in the document footers.

[3] The average earnings were calculated by adding claimant's total earnings for each month and dividing them by the number of months.

(6) Under the old contract, from 2016 to 2019, there had been a gap in claimant's schedule between the time she put the children she watched during the morning down for naps and when the older children arrived in the afternoon. The gap in the schedule allowed claimant to clean and set up planned activities for the afternoon, as well as to have a rest break and eat her lunch. Under the new contract claimant no longer had that gap in her schedule, so she no longer had even 10 minutes to sit, rest, or eat her lunch.

(7) Under the new contract claimant was also responsible for caring for a new baby. The employers who were that baby's parents split the baby's care between claimant, who cared for the baby two half-days a week, and other providers. As a result, the baby was not able to become familiar or bond with claimant, and screamed nonstop while in claimant's care. Claimant experienced stress and had difficulty caring for the distressed baby while also responsible for providing care for two other babies.

(8) One of the employers was present during an afternoon when claimant was caring for the screaming baby. That employer thought the situation as terrible, was alarmed, and told claimant she had to talk to the baby's mother about it. Claimant had spoken with the baby's mother twice; the only suggestions she received were to dab some of the mother's breastmilk on her shirt so the baby would smell the mother while claimant held her, or to crawl on the floor outside the baby's field of vision so the baby would not see claimant and get upset. The mother did not respond to claimant's concerns about having only one caregiver for the baby instead of splitting the baby's time between claimant and other caregivers.

(9) Claimant spoke with some of her employers about the schedule, lack of breaks, and the screaming baby, and told them "how stressed out I was feeling," that she was "really unhappy right now," and felt like she was "working [] harder for less." *See* August 5, 2020 1:30 hearing, Transcript at 23. Nothing changed as a result of speaking with those employers. Claimant was not given a break, reassured about her wages, or provided with options with respect to the screaming baby.

(10) In October, claimant discussed her concerns about the reduction in her earnings with one of the Calfees. That employer told claimant that she could expect a further reduction in earnings once their new baby was born. Claimant believed as a result of that conversation that the Calfees would not use her nanny services during the Calfee's maternity leave period; neither claimant nor the Calfees tried to clarify what would happen during the Calfee's maternity leave.[4]

(11) Claimant was concerned about the prospect of a further reduction in earnings, and calculated that without her pay from watching the Calfee children her income would be reduced by another $524.00 per month. During previous times when her employers had reduced the number of children she watched for any period of time, the employers had brought in others' children to watch so that claimant's earnings remained constant.

(12) Claimant was experiencing a great deal of stress because of the reduction in wages, working the same number of hours every day but receiving less pay, the prospect of a further pay reduction once the Calfee's baby was born, the employers' failure to secure other work for her to make up for that reduction as they had done in the past, the elimination of her mid-day lunch and rest period, and the lack

[4] The Calfees testified that they planned to continue employing claimant to watch their older children during their maternity leave period; nothing in this record suggests that the Calfees or any of the other employers communicated that to claimant when she told the employers about pay reduction concerns.

of continuity or bonding opportunities with the infant whose care was divided between claimant and other providers, and who screamed the whole time claimant watched the infant.

(13) Claimant was having difficulty meeting her expenses because of the reduction in her pay, and her family offered to support her and meet her expenses if she was unemployed between ending her nanny share contract and finding a new job. Claimant's discussions with some of her employers about her pay concerns did not result in any clarification or resolution to claimant's pay concerns.

(14) On approximately October 23, 2020, prior to giving notice of her resignation, claimant told employer Jones that she was "very unhappy" for many reasons, including her wages and other issues. August 5, 2020 2:30 p.m. hearing, Audio recording at 49:00. No resolutions to claimant's concerns were offered. At least one employer thought that further reduction in claimant's pay was inevitable as the kids in her care grew up, went to school, and needed less care, and that reductions would continue until more of the kids in her care grew up and other, younger children were brought into claimant's care.

(15) On October 27, 2019, claimant notified her four employers that she was going to resign effective November 14, 2019. On November 14, 2019, claimant voluntarily left her jobs.

(16) On August 24, 2020, claimant sent a fax to the Department that included applications for review for each of the cases at issue in this consolidated decision. For unknown reasons, claimant's August 24, 2020 fax was either not received or not accurately processed and sent to EAB or OAH.

CONCLUSIONS AND REASONS: Claimant's requests for reconsideration are allowed. Claimant's late applications for review are allowed. Claimant voluntarily left work with employers Calfee and Jones with good cause, and is not disqualified from receiving unemployment insurance benefits because of those work separations.

Requests for Reconsideration. ORS 657.290(3) authorizes the Employment Appeals Board, upon its own motion or at the request of a party, to reconsider any previous decision of the Employment Appeals Board, including "the making of a new decision to the extent necessary and appropriate for the correction of previous error of fact or law." *See also* OAR 471-041-0145(1) (May 13, 2019).

Given the procedural irregularities in this case, including EAB's and OAH's failure to timely receive documents claimant filed with the Department, sufficient errors of fact and law have occurred such that due process of law requires that EAB reconsider our prior decisions in these matters. Claimant's requests for reconsideration are therefore allowed.

Late Applications for Review. An application for review is timely if it is filed within 20 days of the date that the Office of Administrative Hearings (OAH) mailed the order for which review is sought. ORS 657.270(6); OAR 471-041-0070(1) (May 13, 2019). The 20-day filing period may be extended a "reasonable time" upon a showing of "good cause." ORS 657.875; OAR 471-041-0070(2).

Orders No. 20-UI-152923 and 20-UI-152921 became final on August 26, 2020 and claimant filed her applications for review on November 27, 2020. Claimant's applications for review were therefore filed late. Given the procedural irregularities in this case, the difficulty parties have regularly experienced contacting the Department during the pandemic, and the errors or omissions that have occurred with

respect to handling claimant's filings in this case, due process of law requires that claimant be allowed review of the orders that disqualified her from receiving unemployment insurance benefits in these two cases. Claimant's late applications for review are therefore allowed.

Work Separations. 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) (September 22, 2020). "[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.[5]

The orders under review concluded that claimant left work without good cause.[6] The orders reasoned that the primary reason claimant quit her job was the reduction in her wages and her anticipation that her wages would be further reduced.[7] The orders concluded that because claimant did not confirm that her wages would be further reduced and did not improve her financial situation by quitting her jobs and losing all of her income, she did not have good cause to quit her jobs.[8] The records do not support that conclusion.

At the time claimant left work, her wages had been reduced even though her pay rate and hours of work remained the same and the difficulty of her job had increased. She was told that her wages would soon be further reduced; at least one employer thought that even more reductions were inevitable as the children in claimant's care grew up and required less care. As a result of the pay cut, claimant had to borrow to pay her bills, and was concerned about the prospect of further reductions in pay. Two afternoons a week, claimant was responsible for caring for a baby that was so distressed that she screamed all afternoon. Claimant's mid-day rest break had been eliminated, leaving her without even 10 minutes to rest or eat her lunch. Any reasonable and prudent person would consider claimant's working conditions to be a grave situation.

Prior to quitting work or giving notice that she planned to quit work, claimant discussed her concerns with some of her employers. The employers allowed claimant to discuss any concern with any employer, and the employer would share the concerns claimant expressed with the other employers. The employers did not require claimant to bring certain concerns to certain employers. Claimant disclosed to

[5] OAR 471-030-0038(5)(d) does not apply to these cases because claimant's pay was reduced based on a reduction in the number of children she watched, and not because the employers reduced her rate of pay. OAR 471-030-0038(5)(d) does not apply to these cases because although the number of children claimant watched was reduced, she continued to work the same number of hours. These consolidated cases were therefore decided under the general "good cause" rule set forth at OAR 471-030-0038(4).

[6] *See* Orders No. 20-UI-152921 and 20-UI-152923.

[7] *See* Orders No. 20-UI-152921 and 20-UI-152923 at 3.

[8] *See* Order No. 20-UI-152921 at 6; Order No. 20-UI-152923 at 4.

two or three of her employers prior to quitting work that she was "very unhappy," stressed, and working harder for less pay; she also shared her concerns about the screaming baby with that baby's mother on two occasions and with another of the employers. She was not given reassurances about her pay reduction or resolutions that would allow her to take a mid-day rest or lunch break. With regard to the screaming baby, she was told she could crawl around the floor or douse her clothing with another woman's breastmilk, but that employer did not express willingness to take steps to help claimant bond with the baby or provide the baby with continuity of care. In sum, at the time claimant left work she had expressed her concerns to the employers, the employers did not implement any changes as a result, and at all relevant times, claimant's options were to continue working in a grave situation without the prospect that changes to reduce the gravity of the situation would be implemented.

It is well-settled in Oregon law that for an individual to show good cause to voluntarily leave work, the claimant must derive some benefit from leaving work.[9] In the orders under review, the ALJ concluded that claimant did not, because "claimant's financial situation was not improved by taking an action that resulted in her having no income."[10] The record does not support that conclusion. The record establishes that claimant had not reduced her income to zero by quitting, because she had secured funding from her family to cover her expenses. Claimant's decision to quit work therefore neither improved nor harmed her finances. However, quitting work did improve claimant's situation by eliminating the growing stress she was experiencing due to the income reductions, working the same hours for less pay without a mid-day break, and caring for a baby who was in distress and screaming the entire time the baby was in claimant's care. Claimant therefore did derive some benefit from quitting work.

For the foregoing reasons, claimant quit work with employers Calfee and Jones with good cause. She is not disqualified from receiving unemployment insurance benefits because of those work separations.

DECISION: Orders No. 20-UI-152921 and 20-UI-152923 are set aside, as outlined above.

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

DATE of Service: <u>December 15, 2020</u>

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.

<u>Please help us improve our service by completing an online customer service survey</u>. To complete the survey, please go to <u>https://www.surveygizmo.com/s3/5552642/EAB-Customer-Service-Survey</u>. 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.

[9] *See Oregon Public Utility Commission v. Employment Dep't.*, 267 Or.App. 68, 340 P.3d 136 (2014) (so stating).

[10] *See* Orders No. 20-UI-152921 and 20-UI-152923 at 6.

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 – 本判决会影响您的失业救济金。 如果您不明白本判决， 请立即联系就业上诉委员会。 如果您不同意此判决，您可以按照该判决结尾所写的说明，向俄勒冈州上诉法院提出司法复审申请。

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 فورا، 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 دستورالعمل 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