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

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EMPLOYMENT APPEALS BOARD DECISION 2020-EAB-0753

Order No. 20-UI-156812 Reversed – No Disqualification
Order No. 20-UI-156896 Modified – No Overpayment or Penalties
Order No. 20-UI-156869 Reversed – Eligible for SEA benefits

PROCEDURAL HISTORY: On September 17, 2020, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant quit work with Kenton Station without good cause and was disqualified from receiving unemployment insurance benefits effective March 22, 2020 (decision # 100149). On September 17, 2020, the Department served notice of another administrative decision concluding claimant quit work with Nice Shoes LLC without good cause and was disqualified from receiving unemployment insurance benefits effective March 15, 2020 (decision # 105030). On September 17, 2020, the Department served notice of a third administrative decision concluding claimant was not available for work from March 22, 2020 through April 4, 2020, May 17 through May 30, 2020, and July 12 through July 18, 2020, and was ineligible for benefits for those weeks and until the reason for the denial had ended (decision # 110611). On September 28, 2020, the Department served notice of an administrative decision concluding claimant was not eligible for benefits under the Self Employment Assistance (SEA) Program (decision # 133351). On September 29, 2020, the Department served notice of an administrative decision concluding claimant willfully made misrepresentations and failed to report material facts to obtain benefits, and assessing an $867 overpayment, a $40.05 monetary penalty, and a four-week penalty disqualification from future benefits. Claimant filed a timely request for hearing on decisions # 100149, 105030, 110611, 133351 and the overpayment and penalties decision issued on September 29, 2020.

On November 17, 2020, ALJ Murdock conducted a hearing on decision # 100149, and on November 23, 2020 issued Order No. 20-UI-156812, affirming the Department's decision. Also on November 17 and 18, 2020, ALJ Murdock conducted a consolidated hearing on decisions # 110611 and 133351. On

November 23, 2020 issued Order No. 20-UI-156869 affirming decision # 133351. On November 24, 2020 issued Order No. 20-UI-156866, reversing decision # 110611 by concluding claimant was available for work during each of the weeks at issue and was eligible for benefits for those weeks. Also on November 17 and 18, 2020, ALJ Murdock conducted a consolidated hearing on decision # 105030 and the September 29, 2020 overpayment and penalties decision. On November 23, 2020 issued Order No. 20-UI-156821, reversing decision # 105030 by concluding claimant quit work with Nice Shoes LLC with good cause and was not disqualified from receiving benefits based on that work separation. On November 25, 2020, issued Order No. 20-UI-156896, modifying the September 29, 2020 overpayment and penalties decision by not assessing an overpayment or a monetary penalty, but assessing a four-week penalty disqualification from future benefits.

On December 1, 2020, claimant filed timely applications for review of Orders No. 20-UI-156812, 20-UI-156869 and 20-UI-156896 with the Employment Appeals Board (EAB). Pursuant to OAR 471-041-0095 (October 29, 2006), EAB consolidated its review of Orders No. 20-UI-156812, 20-UI-156869, and 20-UI-156896. For case-tracking purposes, this decision is being issued in triplicate (EAB Decisions 2020-EAB-0752, 2020-EAB-0754 and 2020-EAB-0753, respectively). EAB considered claimant's written argument in reaching these decisions.

EAB conducted a *de novo* review of the entire consolidated record regarding Orders No. 20-UI-156812, 20-UI-156869, and 20-UI-156896. Pursuant to ORS 657.275(2), the portion of Order No. 20-UI-156896 concluding claimant was not overpaid regular or FPUC benefits and was not subject to a monetary penalty is **adopted.** The remainder of this decision will address whether claimant quit work with Kenton Station with or without good cause, whether claimant was eligible for SEA benefits, and whether claimant is subject to a four-week penalty disqualification from future benefits.

FINDINGS OF FACT: (1) Kenton Station employed claimant as a server from August 21, 2017 to March 16, 2020.

(2) Kenton Station paid claimant $12.75 per hour and claimant worked approximately 15 hours per week.

(3) In early March 2020, Nice Shoes LLC offered claimant work in a position with some managerial and supervisory functions. The offered work was definite, expected to continue, paid a minimum of $12.75 per hour, and came with benefits, for which claimant was required to work a minimum of 30 hours per week. On or about March 11, 2020, claimant accepted the offered work, which was scheduled to begin in mid-March 2020, and gave Kenton Station two weeks' notice of her intent to quit work on March 25, 2020.

(4) On or about March 16, 2020, Kenton Station laid claimant off from work due to the COVID-19 pandemic.

(5) Nice Shoes LLC employed claimant as a delivery driver for one day on March 21, 2020. On that day, which claimant considered a working interview or training session, claimant observed the close contact between employees in a small work area with few coworkers wearing masks, and concluded that she could not remain safe from contracting COVID-19 with coworkers working together in such close

quarters. Claimant notified Nice Shoes LLC that she would not be returning to the job after that day. Nice Shoes LLC later paid claimant for her one day of work.

(6) On March 31, 2020, claimant filed an initial claim for unemployment insurance benefits. The Department determined that claimant's claim was monetarily valid with a weekly benefit amount of $267. When claimant filed her claim, she was required to provide information about her prior employers. Claimant did not provide information to the Department about her one day of work with Nice Shoes LLC. Claimant was confused about if she should include the single shift in her application for benefits because she considered it a working interview and/or training session. Claimant was also confused about where to put the information about Nice Shoes LLC in the benefits application. Claimant believed that there was no appropriate place to include her single day of work at Nice Shoes LLC on the application form and attempted to call the Department for clarification, but was not able to speak with someone at the Department.

(7) On April 7, 2020, claimant spoke with a representative with the Department's Self-Employment Assistance (SEA) program to determine if she might be eligible for SEA. During the conversation, claimant discussed her past work history with the representative including her one day with Nice Shoes LLC. She told the representative that she did not include it when she applied for benefits because she was confused about her one day at Nice Shoes LLC and did not understand where to put it on the application form. Transcript (Order No. 20-UI-156869) at 81. After that conversation, claimant believed that the information she provided about Nice Shoes LLC would be "entered into the system." Transcript (Order No. 20-UI-156869) at 82. At the end of their conversation, the representative encouraged claimant to apply for the SEA program because she had an "excellent score." Transcript (Order No. 20-UI-156869) at 81.

(8) On May 4, 2020, claimant applied for participation in the SEA program. The Department concluded that she did not qualify for the program because it had also concluded that her work separations from Kenton Station and Nice Shoes LLC disqualified her from receiving regular benefits.

CONCLUSIONS AND REASONS: Kenton Station discharged claimant, not for misconduct, within 15 days of claimant's planned voluntary leaving from Kenton Station with good cause. Claimant is eligible for SEA benefits. Claimant is not subject to a misrepresentation penalty disqualification from future benefits.

Work Separation from Kenton Station. 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) (September 22, 2020). 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).

Order No. 20-UI-156812 concluded that claimant "voluntarily left work to accept other work" because, on March 11, 2020, she "[gave] the employer notice of her resignation, effective March 25, 2020." Order No. 20-UI-156812 at 1, 3. However, the record does not support the order's conclusion that claimant quit. Although claimant had given the employer two weeks' notice of her intent to quit to begin another job, the employer did not allow claimant to work through her notice period, laying her off work on March 16, 2020 due to the COVID-19 pandemic. Because claimant was willing to continue working

for the employer until March 25, 2020, but was not allowed to do so by the employer, the work separation was a discharge that occurred on March 16, 2020.

Discharge. 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).

The employer discharged claimant on March 16, 2020 after the state of Oregon notified the employer that it would have to cease operations effective March 17, 2020 due to the COVID-19 pandemic. Accordingly, the record fails to show that it discharged claimant because of a willful or wantonly negligent violation of the standards of behavior the employer had the right to expect of her or a disregard of its interests. Accordingly, the employer did not discharge claimant for misconduct under ORS 657.176(2)(a).

Discharge within 15 Days of a Planned Quit. Because the employer discharged claimant on March 16, 2020, within 15 days of her planned quit on March 25, 2020, it is necessary to determine if the provisions of ORS 657.176(8) apply to this case. That provision states, "For purposes of applying subsection (2) of this section, when an individual has notified an employer that the individual will leave work on a specific date and it is determined that: (a) The voluntary leaving would be for reasons that do not constitute good cause; (b) The employer discharged the individual, but not for misconduct connected with work, prior to the date of the planned voluntary leaving; and (c) The actual discharge occurred no more than 15 days prior to the planned voluntary leaving, then the separation from work shall be adjudicated as if the discharge had not occurred and the planned voluntary leaving had occurred. However, the individual shall be eligible for benefits for the period including the week in which the actual discharge occurred through the week prior to the week of the planned voluntary leaving date."

First, it must be determined whether claimant's planned quit on March 25, 2020 was with or without good cause. "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. In applying OAR 471-030-0038(4), a claimant who leaves work to accept an offer of other work "has left work with good cause only if the offer is definite and the work is to begin in the shortest length of time as can be deemed reasonable under the individual circumstances. Furthermore, the offered work must reasonably be expected to continue, and must pay [either] an amount equal to or in excess of the weekly benefit amount; or an amount greater than the work left." OAR 471-030-0038(5)(a).

Order No. 20-UI-156812 found that claimant voluntarily left work at Kenton Station to accept other work that was expected to begin in a reasonably short time and was expected to continue. Order No. 20-UI-156812 at 3. The record supports these conclusions, and that the offer of work was definite. However, Order No. 20-UI-156812 concluded that claimant quit work with Kenton Station without good cause under OAR 471-030-0038(5)(a) because the pay rate and the hours claimant would have worked

at the new job at Nice Shoes LLC were "unknown or uncertain," and it was not established "that the new work paid more than her weekly benefit amount or more than the work that she left." Order No. 20-UI-156812 at 3. The record fails to support that conclusion.

The preponderance of the evidence shows that the offered work likely paid more than both claimant's Kenton Station position and claimant's weekly benefit amount. At Kenton Station, claimant earned $12.75 per hour and worked approximately 15 hours per week, making approximately $191.25 per week. Transcript (Order No. 20-UI-156812) at 24. Claimant's weekly benefit amount was $267. The witness for Nice Shoes LLC asserted that the offered work paid at least $12.75 per hour and came with benefits, which required that claimant work at least 30 hours per week. Transcript (Order No. 20-UI-156812) at 19, 21-22. If claimant had worked a minimum of 30 hours per week at an hourly wage of $12.75, claimant would have earned $382.50 per week, which would have been greater than both the work that she left at Kenton Station and her weekly benefit amount. Accordingly, under OAR 471-030-0038(5)(a), claimant quit work with Kenton Station with good cause.

In sum, after claimant notified the employer of her intention to quit work, with good cause, she was discharged within fifteen days of the planned quit for a reason that did not constitute misconduct. Thus, ORS 657.176(8) does not apply to this case. Accordingly, the employer discharged claimant, but not for misconduct under ORS 657.176(2)(a), and claimant is not disqualified from receiving unemployment insurance benefits on the basis of this work separation.

Eligibility for SEA Benefits. Any individual eligible for "regular benefits," as defined in ORS 657.158(1)(a), can request to participate in self-employment assistance activities under the Department's SEA program and while doing so, receive benefits in accordance with ORS 657.158. If participation is granted, the individual is given a self-employment assistance allowance in lieu of regular benefits, which is equal to the individual's weekly benefit amount, at the same intervals and under the same terms and conditions as regular benefits. ORS 657.158(2) and (3).

Order No. 20-UI-156869 concluded that claimant was ineligible for the SEA program because claimant's work separations from Kenton Station and Nice Shoes LLC disqualified her from receiving regular unemployment insurance benefits. Order No. 20-UI-156869 at 2. At hearing, the Department's witness testified that the Department denied claimant's participation in the program because the Department determined that claimant's work separations from Kenton Station and Nice Shoes LLC were disqualifying, and that but for those disqualifications, claimant would have been eligible to participate in the program because she met all other program criteria. Transcript (Order No. 20-UI-156869) at 10. However, Order No. 20-UI-156821 concluded that claimant quit work with Nice Shoes LLC with good cause, and that order became final on December 13, 2020, without the employer having filed an application for review. Having concluded in this consolidated decision that that Kenton Station discharged claimant, but not for misconduct, claimant is not disqualified from receiving benefits based on that work separation. Accordingly, on this record, claimant is no longer ineligible for SEA benefits under ORS 657.158.

Misrepresentation Penalty. An individual who willfully makes a false statement or misrepresentation, or willfully fails to report a material fact to obtain benefits, may be disqualified for benefits for a period not to exceed 52 weeks. ORS 657.215.

Order No. 20-UI-156896 concluded, in relevant part, that "the record is persuasive" that claimant "willfully failed to disclose" her work separation from Nice Shoes LLC on March 21, 2020 "in order to obtain benefits," and for that reason was subject to four penalty weeks. Order No. 20-UI-156896 at 4. The order reasoned as follows:

> Claimant did not credibly establish that her failure to disclose her last employment and work separation on March 21, 2020 was not willful. She asserted that she did not consider her employment on that date to be employment, but she knew that she had been hired and worked a paying shift for an employer. She could not logically explain the reason that she did not consider that activity to be employment that she was required to report to the Employment Department.

Order No. 20-UI-156896 at 4. However, because the Department originally gave claimant waiting week credit and paid claimant benefits it subsequently denied, the Department, rather than claimant, had the burden to establish by a preponderance of the evidence that claimant was subject to penalties because she willfully made false statements or misrepresentations to obtain those benefits. *See Nichols v. Employment Division*, 24 Or App 195, 544 P2d 1068 (1976). The record fails to show the Department met its burden of proof on that issue.

Claimant testified that she was confused about whether she should include the single shift in her application for benefits, as she considered it a working interview. Transcript (Order No. 20-UI-156896) at 10. She also testified that she was confused about where to put the training session at Nice Shoes LLC in her application, believed that there was no appropriate place to include her training session on the form, and was not able to reach the Department by telephone for clarification. Transcript (Order No. 20-UI-156896) at 74-78. She also testified that she eventually did bring it up to a Department representative when she discussed her SEA application and thought it would be "entered into the system" at that time. Transcript (Order No. 20-UI-156896) at 78.

The record contains no direct or circumstantial evidence to contradict claimant's account of her state of mind when she filed her claim for benefits, or that which tended to show that claimant had to have been aware that her failure to report her one-day training session could disqualify her. On this record, the evidence regarding whether claimant willfully failed to report her one-day training session at Nice Shoes LLC on her application "to obtain benefits" was no more than equally balanced. Where the evidence is no more than equally balanced, the party with the burden of persuasion - here, the Department - has failed to satisfy its evidentiary burden. Accordingly, the Department failed to meet its burden to show that claimant willfully failed to report her one-day training session at Nice Shoes LLC on her application "to obtain benefits," and claimant is not subject to a four-week penalty disqualification from future benefits.

DECISION: Orders No. 20-UI-156812 and 20-UI-156869 are set aside, and Order No. 20-UI-156896 is modified, as outlined above.

S. Alba and D. P. Hettle.

DATE of Service: January 8, 2021

NOTE: This decision reverses an order that denied benefits. Please note that payment of benefits, if any are owed, may take approximately a week for the Department to complete.

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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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

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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 دستورالعمل موجود در پایان آن، از دادگاه تجدید نظر اورگان درخواست تجدید نظر کنید.

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