

EMPLOYMENT APPEALS BOARD DECISION
2021-EAB-0139

Reversed & Remanded

PROCEDURAL HISTORY: On December 3, 2020, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant quit working for the employer with good cause and was not disqualified from receiving benefits based on his work separation (decision # 135103). The employer filed a timely request for hearing. On January 28, 2021, ALJ Scott conducted a hearing, and on February 4, 2021 issued Order No. 21-UI-160333, concluding claimant quit work without good cause and was disqualified from receiving unemployment insurance benefits, effective August 30, 2020. On February 24, 2021, 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).

However, the parties may offer new information into evidence, such as that contained in written argument and not considered in reaching this decision, 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) Morrison Gederos LLC employed claimant as a carpenter from 2014 until August 31, 2020.

(2) In 2014, claimant began working for the employer at a wage of at \$16.00 per hour. In 2016, the employer increased claimant's wage to \$17.50 per hour. In 2018, the employer promoted claimant to lead carpenter and increased his wage to \$19.00 per hour. As a lead carpenter, claimant began

supervising jobs and ordering material for the employer. In 2020, claimant demanded an increase in pay to \$24.00 per hour because he believed that was what he deserved and asserted he would “go elsewhere” if he did not get the pay increase. Transcript at 17. In March 2020, the employer formally promoted claimant to supervisor and increased his wage to \$24.00 per hour.

(3) Claimant’s wife had chronic obstructive pulmonary disease (COPD), asthma and other medical conditions, was restricted to a wheelchair, and could not drive to frequent medical appointments. Claimant’s minor daughter suffered from a heart condition and was treated by a physician in Eugene, Oregon. Claimant had to drive his wife and daughter to their medical appointments and often missed work for that reason. Claimant’s frequent absences from work created a problem for the employer because on days claimant missed work he was not available to supervise employees at job sites.

(4) During the week of August 24 to August 28, 2020, claimant notified the employer that he was unable to be at work due to an emergency. Transcript at 6-7; Exhibit 2. The bathroom on the lower floor of claimant’s residence was in need of immediate repair because it was unusable and his wife was unable to use the bathroom on an upper floor of the residence due to her conditions. Exhibit 3. The employer’s owners became upset with claimant’s absences that week because jobs the employer was working on needed a supervisor at the job sites.

(5) On Monday, August 31, 2020, after claimant did not report for work, the employer concluded that was “the final straw” and sent claimant a text message notifying him that it had been decided that claimant was “not able to be in a supervisor role” and that the employer had made arrangements for employer’s property in claimant’s possession to be picked up from his house that day. Transcript at 7; Exhibit 2. The text message also stated, “We are offering you a job at the position you were hired to do.” Exhibit 2. When an employee came to claimant’s residence to pick up his property, she told claimant that he had been “fired” the previous Friday. Transcript at 25. However, claimant learned that the employer intended to demote him from a supervisory position and also intended to lower his wage back to \$19 per hour. Claimant told a co-owner that “he would not come back at the lower wage.” Transcript at 5-6. Thereafter, claimant did not report for work.

CONCLUSIONS AND REASONS: Order No. 21-UI-160333 is reversed and this matter is remanded for further development of the record.

Work Separation. 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). “Work” means “the continuing relationship between an employer and an employee.” OAR 471-030-0038(1)(a).

Claimant asserted that he did not report to work after August 31, 2020 because he believed he had been “fired” the previous Friday because that is what an employee told him when the employer’s property was picked up from his residence on August 31, 2020. Transcript at 25. However, claimant understood that the employee in question did not have the authority to fire claimant, and the co-owner’s text message to claimant that day showed that although the employer’s intent was to demote him from a supervisor position, the employer remained willing to employ him “at the position you were hired to

do,” which was as a carpenter. Claimant also told the employer that he “would not come back at the lower wage.” Because claimant could have continued to work for the employer for an additional period of time, but was unwilling to do so, the work separation was a voluntary leaving that occurred on August 31, 2020. OAR 471-030-0038(2)(a)

Voluntary Leaving. 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.

Order No. 21-UI-160333 concluded that claimant quit work without good cause, reasoning that claimant quit work due to a mistaken belief that he had been “fired,” and because the record showed that he did not contact the employer to clarify his work status, he quit work without good cause. Order No. 21-UI-160333 at 4. However, the order also reasoned, “claimant was aware that he had been offered \$19/hour” and claimant’s wife later sent the employer a text message “complaining about the inadequacy of this rate of pay.” Order No. 21-UI-160333 at 4. Viewing the record as a whole, including claimant’s statement that “he would not come back at the lower wage” and his wife’s text message to the employer after the work separation that the proposed wage of \$19.00 per hour was “ludicrous,” more likely than not, claimant quit work due to the reduction in pay from \$24.00 per hour to \$19.00 per hour and to seek other work as a carpenter that would pay him a higher wage as he had planned to do in 2020. Exhibit 3.

For purposes of applying OAR 471-030-0038(4), a claimant who leaves work due to a reduction in pay has left work without good cause unless “the newly reduced rate of pay is ten percent or more below the median rate of pay for similar work in the individual’s normal labor market area. The median rate of pay in the individual’s labor market shall be determined by employees of the Employment Department adjudicating office using available research data compiled by the department.” OAR 471-030-0038(5)(d). However, OAR 471-030-0038(5)(d) 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). Here, because claimant’s reduction in pay was the result of claimant’s demotion from supervisor to carpenter, OAR 471-030-0038(5)(d) does not apply.

However, a grave situation for claimant still may have existed for purposes of applying OAR 471-030-0038(4), if the rate of pay for the new position of carpenter was substandard under the Department’s wage data.¹ The Department’s wage information research data appears to show that the occupational profile applicable to claimant was “Carpenter” and that the proposed wage of \$19.00 per hour for such work in claimant’s likely labor market of Coos County was ten percent or more below the median rate of

¹ See, Oregon Employment Department, UI Benefit Manual §441 VOLUNTARY LEAVING – REDUCTION IN HOURS OR RATE OF PAY (Rev. 04/01/10) and examples cited therein.

pay for similar work in that labor market area, \$22.34 per hour.² Given the uncertainty of that match in the Department's data, and that generally the median rate of pay for an occupation in a labor market is determined by employees of the Employment Department adjudicating office, the Office of Administrative Hearings should send notice of the remand hearing to the Department, and direct the Department to provide a representative as a witness at the hearing on remand. The ALJ can then make an appropriate inquiry into the correct occupational profile for claimant's work and establish the median wage for that work in claimant's labor market. With that information, a full inquiry under OAR 471-030-0038(4) can be conducted to determine whether claimant's situation was sufficiently grave for him, given his family's circumstances, that claimant had no reasonable alternative but to quit work when he did due to the reduction in his wage rate.

The record also needs to be developed to determine whether claimant's apparent decision to seek other work as a carpenter that would pay him a higher wage than \$19.00 per hour was with or without good cause. Per OAR 471-030-0038(5)(b)(A), leaving work without good cause includes "[l]eaving suitable work to seek other work." Under ORS 657.190, factors to consider in determining whether any work is suitable include the "prior training, experience and prior earnings of the individual." Under ORS 657.195, "no work is deemed suitable and benefits shall not be denied . . . to any otherwise eligible individual for refusing to accept new work" "if the remuneration, hours or other conditions of the work offered are substantially less favorable to the individual than those prevailing for similar work in the locality." Once the record is sufficiently developed to determine the correct occupational profile for claimant's work and the median wage for that work in claimant's labor market, that determination would also be relevant in determining whether the work claimant left was suitable under the cited statutory provisions.

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 work with or without good cause, Order No. 21-UI-160333 is reversed, and this matter is remanded.

DECISION: Order No. 21-UI-160333 is set aside, and this matter remanded for further proceedings consistent with this order.

S. Alba and D. P. Hettle

DATE of Service: April 2, 2021

NOTE: The failure of any party to appear at the hearing on remand will not reinstate Order No. 21-UI-16033 or return this matter to EAB. Only a timely application for review of the subsequent order will cause this matter to return to EAB.

² <https://www.qualityinfo.org/jc-oprof/?at=1&t1=Carpenter~472031~4115000013~0~true~true~true~true~true~true~true~true~true~true~false~true~none~0~1~1>

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



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 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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