

EMPLOYMENT APPEALS BOARD DECISION
2021-EAB-0379

Reversed & Remanded

PROCEDURAL HISTORY: On April 2, 2021, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant quit working for the employer without good cause and was disqualified from receiving unemployment insurance benefits effective May 17, 2020 (decision # 95449). Claimant filed a timely request for hearing. On May 4, 2021, ALJ Logan conducted a hearing at which the employer failed to appear, and on May 6, 2021 issued Order No. 21-UI-166312, modifying decision # 95449 by concluding that claimant quit work without good cause and was disqualified from receiving benefits effective May 31, 2020. On May 12, 2021, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Elwood Staffing Services Inc. employed claimant beginning in November 2019 via a work assignment with their client NPC. Claimant worked as a flagger at the assignment with NPC.

(2) In late May 2020, claimant was exposed to COVID-19 while interacting with his father, who had contracted the virus. Claimant decided to quarantine because of the exposure. Claimant planned to quarantine for 14 days, then return to work. Claimant informed his work assignment supervisor of his decision to quarantine for 14 days, and the supervisor agreed that doing so was a good idea.

(3) On May 22, 2020, claimant began his quarantine. Near the end of the 14 days claimant initially spent in quarantine, claimant was exposed to COVID-19 a second time while interacting with another relative who had contracted COVID-19.

(4) Claimant's second exposure led him to conclude that "the threat was still there" and claimant decided to continue to quarantine. Audio Record at 15:49. Claimant informed the work assignment supervisor that he was going to continue to quarantine and he did not return to work at the end of the 14-day period.

CONCLUSIONS AND REASONS: Order No. 21-UI-166312 is reversed and the matter 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). The date an individual is separated from work is the date the employer-employee relationship is severed. OAR 471-030-0038(1)(a). In the case of individuals working for temporary agencies, employee leasing companies, or under a governmental program where a state agency serves as the employer of record for individuals performing home care services, the employment relationship shall be deemed severed at the time that a work assignment ends. OAR 471-030-0038(1)(a).

The order under review concluded that, as to the first 14 days of claimant’s quarantine, claimant met the definition of the COVID-19 related situation that relates to being advised by public health officials to self-quarantine due to possible exposure to the novel coronavirus. Order No. 21-UI-166312 at 3. According to the order, this meant that claimant was “not subject to disqualification for the first two weeks after leaving work on May 22, 2020.” Order No. 21-UI-166312 at 3. After concluding that claimant was not subject to disqualification for the two weeks following May 22, 2020, the order under review identified the date of claimant’s work separation as the point that the initial 14 days of claimant’s quarantine ended. Order No. 21-UI-166312 at 3. Reasoning that the circumstances did not meet the definition of a COVID-19 related situation, the order under review then concluded that claimant quit work without good cause under the general rule set forth by OAR 471-030-0038(4). Order No. 21-UI-166312 at 3-4.

However, the record indicates that claimant was not separated from work on May 22, but was on a leave of absence during the 14-day period beginning on that day. For this reason, it was unnecessary for the order under review to analyze whether claimant was subject to disqualification for the two weeks following May 22, 2020. During this period, the record shows that the work assignment was ongoing. The further record shows that during the initial 14-day period of claimant’s quarantine, a continuing relationship between claimant and the employer (through their work assignment client) existed because claimant informed the client supervisor of his decision to quarantine with an intent to return after 14 days and the supervisor agreed that doing so was a good idea. Thus, the employer-employee relationship remained intact during the first 14 days of claimant’s quarantine, claimant did not separate from work during that time period, and analyzing whether claimant was subject to disqualification during that time period was unnecessary.

Nor does the record support the conclusion that claimant quit work when he did not return to work after his initial 14-day self-quarantine. More specifically, the record fails to show whether claimant extended his leave of absence and the employment relationship remained ongoing for an additional period of time or, rather, whether the employment relationship ended because claimant either quit work or was discharged. On remand, the record must be developed to establish what precisely claimant told the work assignment supervisor when he decided not to return to work after the first 14 days of his quarantine and

how the supervisor responded, if at all. The ALJ should also inquire whether claimant ever informed the employer staffing agency of his quarantine.

One possibility is that at the end of the initial 14 days of claimant's quarantine period, claimant and the employer agreed to extend claimant's leave of absence. If the record on remand shows that this occurred, further inquiry is required to determine how long the parties intended the extended leave to last. The ALJ should inquire whether claimant remained in contact with the client or employer during the extended leave and, if so, what he told them and what their responses, if any, were. The ALJ should also ask questions to determine whether claimant did not return to work after the end of the extended leave period and, if so, why.

Voluntary Leaving. Assuming the record shows that claimant quit work, 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.

However, Oregon temporary rules set out unemployment insurance provisions applicable to the unique situations arising due to COVID-19 and the actions to slow its spread. OAR 471-030-0070(2)(b) (effective March 8, 2020 through September 12, 2020) provides that an individual who quits work because of a COVID-19 related situation is not disqualified from receiving unemployment insurance benefits. Under OAR 471-030-0070(1), a COVID-19 related situation includes the following:

* * *

(b) A person is unable to work because they have been potentially exposed to the novel coronavirus and have been subjected to a mandatory quarantine period;

(c) A person is unable to work because they have been advised by their health care provider or by advice issued by public health officials to self-quarantine due to possible risk of exposure to, or spread of, the novel coronavirus[.]

If the record on remand shows that claimant quit, the ALJ should develop the record sufficiently to apply the temporary rules applicable to COVID-19 related situations and the general rule set forth by OAR 471-030-0038(4) to determine whether claimant's voluntary leaving was disqualifying. The ALJ should inquire as to whether claimant was advised by public health officials to self-quarantine or was subjected to a mandatory quarantine period and, if so, which authority did so. The record should also be developed as to how long any such quarantine period was advised to last.

Discharge. It is also possible that after the end of the initial 14 days of claimant's quarantine period, the employer discharged claimant. 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) (September 22, 2020). “[W]antonly negligent’ means indifference to the consequences of an act or series of actions, or a failure to act or a series of failures to act, where the individual acting or failing to act is conscious of his or her conduct and knew or should have known that his or her conduct would probably result in a violation of the standards of behavior which an employer has the right to expect of an employee.” OAR 471-030-0038(1)(c). In a discharge case, the employer has the burden to establish misconduct by a preponderance of evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976). Isolated instances of poor judgment, good faith errors, and absences due to illness or other physical or mental disabilities, are not misconduct. OAR 471-030-0038(3)(b).

However, Oregon temporary rules set out unemployment insurance provisions applicable to the unique situations arising due to COVID-19 and the actions to slow its spread. OAR 471-030-0070(2)(a) (effective March 8, 2020 through September 12, 2020) provides that an individual who is discharged from work because of a COVID-19 related situation is not disqualified from receiving unemployment insurance benefits. Under OAR 471-030-0070(1), a COVID-19 related situation includes the following:

* * *

- (b) A person is unable to work because they have been potentially exposed to the novel coronavirus and have been subjected to a mandatory quarantine period;
- (c) A person is unable to work because they have been advised by their health care provider or by advice issued by public health officials to self-quarantine due to possible risk of exposure to, or spread of, the novel coronavirus[.]

If the record on remand shows that claimant was discharged, the record should be developed as to why the employer discharged claimant and whether the basis for the discharge constituted misconduct. The ALJ should develop the record sufficiently to apply the temporary rules applicable to COVID-19 related situations and the general rule set forth in OAR 471-030-0038(3)(a) to determine whether claimant’s discharge was disqualifying. The ALJ should ask questions to determine, for example, whether the employer discharged claimant for not returning to work, and whether claimant was unable to return to work because he was advised by public health officials to self-quarantine or was subjected to a mandatory quarantine period. If so, the ALJ should ask questions to determine which authority so advised claimant, and how long any such quarantine period was advised to last. The ALJ also should ask questions to determine whether claimant instead was discharged for failing to keep the employer informed of his status during his quarantine.

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 separated from

work and, if so, whether it was for a disqualifying reason, Order No. 21-UI-166312 is reversed, and this matter is remanded.

DECISION: Order No. 21-UI-166312 is set aside, and this matter remanded for further proceedings consistent with this order.

D. Hettle and A. Steger-Bentz;
S. Alba, not participating.

DATE of Service: June 17, 2021

NOTE: The failure of any party to appear at the hearing on remand will not reinstate Order No. 21-UI-166312 or return this matter to EAB. Only a timely application for review of the subsequent order will cause this matter to return to EAB.

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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 desisyong ito.

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 ໂດຍປະຕິບັດຕາມຄໍາແນະນໍາທີ່ບອກໄວ້ຢູ່ຕອນຫ້າຍຂອງຄໍາຕັດສິນນີ້.

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.

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