

EMPLOYMENT APPEALS BOARD DECISION
2021-EAB-0399-R

EAB Decision 2021-EAB-0399 Reversed On Reconsideration
Order No. 21-UI-165965 Affirmed
No Disqualification

PROCEDURAL HISTORY: On December 3, 2020, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the claimant quit working for the employer with good cause and was not disqualified from receiving unemployment insurance benefits based on the 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, reversing decision # 135103 by concluding that claimant quit without good cause and was disqualified from receiving benefits effective August 30, 2020. On February 24, 2021, claimant filed an application for review of Order No. 21-UI-160333 with the Employment Appeals Board (EAB). On April 2, 2021, EAB issued EAB Decision 2021-EAB-0139, reversing Order No. 21-UI-160333 and remanding the matter to the Office of Administrative Hearings (OAH). On April 28, 2021, ALJ Scott conducted a hearing, and on April 30, 2021 issued Order No. 21-UI-165965, affirming decision # 135103 by concluding that claimant quit work with good cause and was not disqualified from receiving benefits based on the work separation. On May 19, 2021, the employer filed an application for review of Order No. 21-UI-165965 with EAB.

On June 24, 2021, EAB issued EAB Decision 2021-EAB-0399 reversing Order No. 21-UI-165965 by concluding that claimant quit work without good cause and was disqualified from receiving benefits effective August 30, 2020. On July 21, 2021, claimant filed a petition for review of EAB Decision 2021-EAB-0399 with the Oregon Court of Appeals. On September 8, 2022, the Oregon Court of Appeals issued a nonprecedential memorandum opinion reversing EAB Decision 2021-EAB-0399 and remanding this matter to EAB for reconsideration. This decision is being issued pursuant to EAB's authority under ORS 657.290(3).

FINDINGS OF FACT: (1) Morrison Gederos LLC employed claimant, most recently as a construction supervisor, from 2014 until August 31, 2020. Claimant performed work for the employer in the southern Oregon coast labor market area.

(2) Claimant began working for the employer as a carpenter in 2014, at a wage of \$16 per hour. In 2016, claimant's wage increased to \$17.50 per hour. In 2018, claimant took on the role of a lead carpenter and his wage increased to \$19 per hour. As a lead carpenter, claimant began supervising jobs and ordering materials for the employer. By 2020, claimant had "been running jobs for [the employer] and ordering material for a few years." January 28, 2021 Transcript at 17. Claimant demanded an increase in pay to \$24 per hour and stated he would "go elsewhere" if he did not get the pay increase. January 28, 2021 Transcript at 17. In March 2020, the employer formally promoted claimant to supervisor and began paying claimant \$24 per hour.

(3) During most of the years claimant worked for the employer, claimant had spent each summer away from home doing commercial fishing, which was a major source of supplemental income for claimant's family. In 2019, claimant stopped going commercial fishing in the summer because of his responsibilities at home to his wife and adopted granddaughter. Claimant's wife was disabled, and needed assistance at home and with transportation to doctor's appointments. Claimant's granddaughter had a heart arrhythmia that required claimant to frequently take her from their home in Coquille, Oregon to doctor's appointments in Eugene, Oregon. By the beginning of 2020, claimant's responsibilities to his wife and granddaughter caused him to miss work on some occasions.

(4) In mid-June 2020, the employer gave claimant a job evaluation that included the critique that claimant "does not report (ask for permission to leave work early)." Exhibit 1 at 3. The employer told claimant that the behavior "will have to be changed immediately." Exhibit 1 at 3.

(5) During the week of August 24 through August 28, 2020, claimant notified one of the employer's owners that he was unable to work due to an emergency at claimant's home. Claimant's absences that week caused logistical difficulties for the employer because the employer's other supervisor also was not available to work that week.

(6) On August 31, 2020, one of the employer's owners sent claimant a text message stating that claimant was "not able to be in a supervisor role," and that the employer had arranged to pick up the employer's property in claimant's possession from claimant's house that day. Exhibit 2 at 1. The text message also stated, "We are offering you a job at the position you were hired to do." Exhibit 2 at 1. When two employees came to claimant's residence to pick up his property, one of them, an individual who did not have authority to hire or fire, told claimant that he had been "fired" the previous Friday. January 28, 2021 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 one of the owners that "he would not come back at the lower wage." January 28, 2021 Transcript at 6. Thereafter, claimant did not return to work.

(7) The Department maintained data on the median wages for various types of occupations by labor market area. Based on Department data, the median wage rate for carpenters in claimant's labor market area of Coquille, Oregon, Coos Bay, Oregon, and the southern Oregon coast area in August of 2020 was \$22.34 per hour.

(8) The employer engaged in a mix of residential and commercial construction jobs in claimant's labor market area. The employer paid union wages for some of the commercial construction jobs.

CONCLUSIONS AND REASONS: EAB Decision 2021-EAB-0399 is reversed on reconsideration. Claimant voluntarily left work with good cause.

Reconsideration. ORS 657.290(3) authorizes the Employment Appeals Board 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.” In light of the Oregon Court of Appeals September 8, 2022 Opinion reversing EAB Decision 2021-EAB-0399 and remanding this matter to EAB, EAB is reconsidering EAB Decision 2021-EAB-0399. On reconsideration, EAB Decision 2021-EAB-0399 is reversed. For the reasons stated below, claimant voluntarily left work with good cause and is not disqualified from receiving unemployment insurance benefits based on the work separation.

Nature of the 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) (December 23, 2018). 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).

At hearing, 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 on August 31, 2020. January 28, 2021 Transcript at 25. However, 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,” and did not report for work again. January 28, 2021 Transcript at 6. 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.

Whether claimant quit work with good cause is governed under OAR 471-030-0038(4), and the issue therefore is whether claimant quit work for a reason of such gravity that he had no reasonable alternative but to do so. Claimant quit work due to the reduction in pay from \$24 per hour to \$19 per hour, and to seek other work as a carpenter that would pay him a higher wage. In evaluating whether claimant’s

reason for quitting was with good cause under OAR 471-030-0038(4), it is useful to consider OAR 471-030-0038(5)(d) and OAR 471-030-0038(5)(b)(A).

OAR 471-030-0038(5)(d) states that if “an individual leaves work due to a reduction in the rate of pay, the individual 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 rule further states that the data on median rate of pay “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, where, as here, an individual’s rate of pay is reduced as a result of a demotion, OAR 471-030-0038(5)(d) does not control the outcome. OAR 471-030-0038(5)(d)(A). Nevertheless, considering the facts of this case in light of OAR 471-030-0038(5)(d) is useful because doing so offers insight into whether claimant’s reason for leaving work amounted to good cause under OAR 471-030-0038(4).

The reduction in pay claimant faced would have been sufficient to support good cause to quit under OAR 471-030-0038(5)(d). Per the Department’s witness’s testimony, the median rate of pay for similar carpenter work in claimant’s labor market area was \$22.34 per hour. April 28, 2021 Transcript at 5. Claimant’s reduced rate of pay was \$19 per hour. Ten percent below \$22.34 per hour is \$20.11 per hour. \$19 per hour is less than \$20.11 per hour, and therefore more than ten percent below the median rate of pay for similar work as a carpenter in claimant’s labor market area. The fact that claimant’s reduced rate of pay would have been sufficient to establish good cause to quit under OAR 471-030-0038(5)(d) lends support for concluding that claimant quit with good cause under OAR 471-030-0038(4).

At the April 28, 2021 hearing, one of the employer’s owners testified that he thought the \$22.34 per hour median rate of pay data for claimant’s labor market area did not reflect the typical wage in the area because he believed the Department’s data was skewed toward “a commercial and labor union market, and not a true residential market.” April 28, 2021 Transcript at 16. The owner further testified that “we wouldn’t be able to work . . . with those wages, if we pay our employees that high wage.” April 28, 2021 Transcript at 17. However, the employer’s critique of the Department’s median rate of pay data is not persuasive. The point of determining a median rate of pay is not for the Department to assess a number that is a precise match of what the employer in a given case would typically pay. The point is for the Department to take into account all wages paid for similar carpenter work in the labor market area—be it union or non-union, commercial or residential—and identify the midpoint of that distribution of wages, so that the offered wage may be assessed against that midpoint figure.

Further, the record reflects that the construction jobs the employer performed in claimant’s labor market area were a mix of residential and commercial jobs, some of which paid union wages. Indeed, the employer’s owner testified that over the course of claimant’s employment, the employer’s business shifted to 50% or more commercial construction jobs, and that the employer had done commercial jobs in the past,¹ for which it paid their workers the prevailing wage (which the owner defined as “a public works wage, set by industry standard of the union”). April 28, 2021 Transcript at 17, 18, 19. For these reasons, EAB’s rejection of the Department’s median rate of pay data for claimant’s labor market area in EAB Decision 2021-EAB-0399 was unwarranted.

¹ At the time of claimant’s voluntary leaving, the record shows that the employer was working a commercial construction job for a community college. January 28, 2021 Transcript at 6-7. The record also shows that the employer had performed a commercial construction job for the Coos County Fairgrounds in 2019. Exhibit 7 at 2-4.

Another provision that is useful to consider in evaluating whether claimant's reason for quitting was for good cause under OAR 471-030-0038(4) is OAR 471-030-0038(5)(b)(A). That provision states that leaving work without good cause includes "leaving suitable work to seek other work." Implicit in this formulation is that if one leaves *unsuitable* work to seek other work, doing so may constitute leaving work with good cause, even if leaving unsuitable work to seek other work does not automatically equate to quitting work with good cause.

Under ORS 657.190, factors to consider when determining whether work is "suitable" include "the prior training, experience and prior earnings of the individual." Additionally, ORS 657.195(1)(b), which is specifically applicable where a person refuses to accept new work, provides that "no work is deemed suitable and benefits shall not be denied . . . if the remuneration . . . of the work offered [is] substantially less favorable to the individual than those prevailing for similar work in the locality." OAR 471-030-0037(2) (effective January 11, 2018) states substantially the same as OAR 471-030-0038(5)(d) that "[a] rate of pay is substantially less favorable than the rate prevailing in the locality when the rate of pay is at least ten percent lower than the median rate of pay for similar work in the locality. The median rate of pay prevailing in the locality shall be determined by employees of the Employment Department adjudicating office using available research data compiled by the department."

Applying the above authorities, the \$19 per hour carpenter work was not suitable for claimant. Under ORS 657.190, claimant's experience and prior earnings were not consistent with the \$19 per hour carpenter work. Claimant had been performing work for the employer that was functionally supervisory in nature for years, was formally made a supervisor in March 2020, and began earning \$24 per hour at that time. Nor was the \$19 per hour carpenter work suitable work under ORS 657.195(1)(b) and OAR 471-030-0037(2) since, as discussed above, \$19 per hour is less than \$20.11 per hour and thus is more than ten percent lower than the \$22.34 median rate of pay for similar work as a carpenter in the southern Oregon coast locality. The record shows that claimant left the \$19 per hour carpenter work, which was not suitable for him, to seek other work. The fact that claimant left unsuitable work to seek other work lends further support for concluding that claimant's reason for quitting was with good cause.

With this discussion of OAR 471-030-0038(5)(d) and OAR 471-030-0038(5)(b)(A) as background, it is evident that claimant quit work with good cause under OAR 471-030-0038(4) because his reason for quitting work was of such gravity that he had no reasonable alternative but to leave work when he did. Claimant faced a demotion from \$24 per hour to \$19 per hour. The record evidence shows that this presented him with a grave situation because the \$19 per hour wage was substandard in that it was more than ten percent lower than the \$22.34 median rate of pay for work as a carpenter in claimant's locality. Claimant's difficult financial situation was compounded by the fact that claimant's wife was disabled and could not work herself, and that claimant's responsibilities to his wife and granddaughter curtailed his ability to supplement the family's income. As a result of claimant's childcare responsibilities and his wife's disability, it was no longer possible for claimant to spend his summers away from the home doing commercial fishing, which had previously been a key source of supplemental income for claimant's family. On these facts, a reasonable and prudent person of normal sensitivity, exercising ordinary common sense would leave work as claimant did to seek other work as a carpenter that would pay him a higher wage if there were no reasonable alternative.

The record establishes that claimant had no reasonable alternative but to quit work when he did. The employer's owner made it clear via text message that it was not possible for claimant to continue to

work as a supervisor at \$24 per hour, and claimant’s only option was to work “at the position you were hired to do” – a position for which the employer had never paid claimant more than \$19 per hour. Exhibit 2 at 1. Given this evidence, any effort on claimant’s part to attempt to negotiate a wage higher than \$19 per hour while continuing to work in a demoted capacity likely would have been futile.

For these reasons, claimant voluntarily quit working for the employer with good cause and is not disqualified from receiving unemployment insurance benefits based on the work separation.

DECISION: EAB Decision 2021-EAB-0399 is reversed on reconsideration.² Order No. 21-UI-165965 is affirmed.

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

DATE of Service: January 4, 2023

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.

Please help us improve our service by completing an online customer service survey. To complete the survey, please go to <https://www.surveygizmo.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.

² This decision reverses a decision that denied benefits. Please note that payment of benefits, if any are owed, may take time for the Department to complete.



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 ໄດ້ໂດຍປະຕິບັດຕາມຄໍາແນະນໍາທີ່ບອກໄວ້ຢູ່ຕອນທ້າຍຂອງຄໍາຕັດສິນນີ້.

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.

Employment Appeals Board - 875 Union Street NE | Salem, OR 97311
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