

EMPLOYMENT APPEALS BOARD DECISION
2021-EAB-0633

Reversed & Remanded

PROCEDURAL HISTORY: On December 14, 2020, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant voluntarily quit work without good cause and was disqualified from receiving unemployment insurance benefits effective June 28, 2020 (decision # 133311). Claimant filed a timely request for hearing. On July 13, 2021, ALJ Monroe conducted a hearing, and on July 21, 2021 issued Order No. 21-UI-170863, modifying decision # 133311 by concluding that claimant voluntarily quit work without good cause and was disqualified from receiving benefits effective June 13, 2020. On August 3, 2021, claimant filed an application for review with the Employment Appeals Board (EAB).

WRITTEN ARGUMENT: Claimant did not declare that he provided a copy of his argument, included with the August 3, 2021 application for review, 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 him 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).

The parties may offer new information, such as the information contained in claimant's written argument, into evidence 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) Salem Golf Club, Inc. employed claimant as a runner and dishwasher from November 24, 2019 until sometime in June or July 2020.

(2) In 2010, claimant was diagnosed with anxiety. Claimant continued to suffer from the effects of anxiety, which included feelings of being overwhelmed, increased heartrate, and dizziness, during his time working for the employer.

(3) The employer published the schedule for their staff on a weekly basis. The schedule was available online via an app, and a hard copy of the schedule was posted in the employer's kitchen where claimant worked.

(4) After claimant's last day of work, claimant was "very ill" with a fever. Transcript at 9. Claimant subsequently called the employer and attempted to notify the kitchen manager that he would be absent from work, but was unable to reach the kitchen manager. Claimant expected someone from the employer to call him back, but they never did so. Claimant later checked the schedule on the employer's app but did not see himself scheduled. Claimant assumed that the employer discharged him and neither contacted the employer again nor returned to work.

(5) Claimant was exposed to COVID-19 in late June 2020 by his grandfather, although claimant never tested positive for it. Claimant's parents also tested positive for COVID-19.

CONCLUSIONS AND REASONS: Order No. 21-UI-170863 is set aside and this matter remanded for further development of the record.

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) (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).

At hearing, the employer's operations manager testified that claimant's last day of work was June 15, 2020, after which claimant stopped reporting to work, that claimant did not respond to the employer's attempts to contact him after he had missed two or three shifts in a row, and that the employer subsequently stopped scheduling claimant for shifts. Transcript at 21. By contrast, claimant testified variously that his last day of work occurred either on July 1, 2020 or July 5, 2020,¹ and that he noticed on or around July 12, 2020 that he was no longer on the employer's schedule. The order under review concluded that "claimant's act of not returning to work or substantively communicating with the employer regarding the status of his employment" showed an intent to sever the employment relationship and that the balance of the evidence therefore showed that claimant voluntarily quit by not returning to work after June 15, 2020. Order No. 21-UI-170863 at 2. The record as developed does not support this conclusion.

On remand, the record should be developed to either resolve the conflicting evidence or establish a sufficient basis to conclude that the weight of the evidence favors one side over the other. In particular, at hearing, claimant testified that he believed the "owner" may have been confused about who claimant was, because he had corrected her a couple of times after she called him by the name of the employer's other dishwasher. Transcript at 25. This line of inquiry must be explored to determine the identity of the "owner" that claimant referenced (it is unclear from his testimony whether he meant the operations manager who testified on the employer's behalf, or a different person), and whether the employer's

¹ Claimant initially testified that his last day of work was July 1, 2021. Transcript at 6. Claimant later testified that he had been scheduled to work from July 2, 2020 through July, 5, 2020, and answered in the affirmative when the ALJ asked him if he had also worked those days. Transcript at 8.

witness was providing testimony regarding claimant's employment or if she had instead confused him with another employee. To the extent that the record on remand shows that the employer's witness did not mistake claimant for another employee, the record should nevertheless be further developed to verify how the employer's witness confirmed that claimant had not worked after June 15, 2020 and what information claimant used to determine that he had worked until early July 2020.

Additionally, neither party testified that either had explicitly severed the employment relationship, or expressed a desire to do so, at any point. Rather, the record shows only that claimant was absent from work after his last day of work because of an illness and that he attempted without success to contact the employer. Further inquiry is needed to determine whether either party was willing to continue the employment relationship and, if not, at what point they became unwilling to do so. To that end, the ALJ should inquire as to when specifically the employer stopped scheduling claimant for shifts, which shifts claimant missed prior to that date, and at what point, if any, they would have no longer been willing to allow claimant to return to work if he had contacted them. The ALJ should also inquire as to whether claimant would have been willing to continue to work for the employer after he recovered from his illness if he believed the employer would have allowed him to return to work.

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). "[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).

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), the following situations are deemed to be "COVID-19 related situations":

- (a) A person is unable to work because they are ill with the novel coronavirus;
- (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;
- (d) A person is unable to work because their employer has ceased or curtailed operations due to the novel coronavirus, including closures or curtailments based on the direction or advice of the

Governor or of public health officials;

(e) A person is unable to work because they have to stay home to care for a family member, or other person with whom they live or for whom they provide care, who is suffering from the novel coronavirus or subject to a mandatory quarantine;

(f) A person is unable to work because they have to stay home to care for a child due to the closure of schools, child care providers, or similar facilities due to the novel coronavirus; and

(g) A person is being asked to work when it would require them to act in violation of a mandatory quarantine or Governor's directive regarding the limitation of activities to limit the spread of the novel coronavirus.

To the extent that the record on remand shows that the employer discharged claimant due to one or more absences after his last day of work or his failure to report those absences to the employer, the ALJ should inquire as to why claimant was absent on those days specifically, whether any mitigating factors—such as claimant's illness or anxiety—prevented him from contacting the employer further, whether claimant previously had been warned or disciplined about attendance issues, and whether claimant had previously engaged in other behaviors that might constitute willful or wantonly negligent violations for the employer's standards of behavior. The ALJ should also inquire as to the length of claimant's illness, what, if anything, claimant told the employer when he attempted to contact the kitchen manager about his absence, whether claimant was physically or mentally able to make follow-up attempts to call the kitchen manager, when he learned that he had not tested positive for COVID-19, and whether and when he had been under advice to quarantine at any point. Additionally, because claimant testified that he had missed work due to illness around the time that he was exposed to COVID-19, the ALJ should ask questions to determine whether claimant was discharged due to a COVID-19 related situation per OAR 471-030-0070(1).

Voluntary Quit. ORS 657.176(2)(c) requires a disqualification from unemployment insurance benefits if a claimant voluntarily leaves (quits) work without good cause. *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). Claimant had anxiety, a permanent or long-term "physical or mental impairment" as defined at 29 CFR §1630.2(h). A claimant with an impairment who quits work must show that no reasonable and prudent person with the characteristics and qualities of an individual with such an impairment would have continued to work for their employer for an additional period of time. However, OAR 471-030-0070(2)(b) provides that an individual who quits work because of a COVID-19 related situation, as defined above, is not disqualified from receiving unemployment insurance benefits.

To the extent that the record on remand shows that claimant voluntarily quit, the ALJ should ask questions to determine whether claimant did so due to one or more of the COVID-19 related situations listed above.

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 when the work separation occurred, whether claimant voluntarily quit or was discharged, and whether, in either case, claimant separated from work for a disqualifying reason, Order No. 21-UI-170863 is reversed, and this matter is remanded.

DECISION: Order No. 21-UI-170863 is set aside, and this matter remanded for further proceedings consistent with this order.

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

DATE of Service: September 7, 2021

NOTE: The failure of any party to appear at the hearing on remand will not reinstate Order No. 21-UI-170863 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 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 دستور العمل موجود در پایان آن، از دادگاه تجدید نظر اورگان درخواست تجدید نظر کنید.

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