

EMPLOYMENT APPEALS BOARD DECISION
2021-EAB-0698

Reversed & Remanded

PROCEDURAL HISTORY: On November 16, 2020, 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 February 23, 2020 (decision # 114419). Claimant filed a timely request for hearing. On July 29, 2021, ALJ Kaneshiro conducted a hearing, and on July 30, 2021 issued Order No. 21-UI-171486 affirming decision # 114419. On August 18, 2021, claimant filed an application for review with the Employment Appeals Board (EAB).

WRITTEN ARGUMENT: EAB did not consider claimant’s written argument when reaching this decision because he did not include a statement declaring that he provided a copy of his argument to the opposing party or parties as required by OAR 471-041-0080(2)(a) (May 13, 2019).

The parties may offer new information such as the information contained in claimant’s written argument and other evidence, 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) Ace Tire-Axle West, LLC employed claimant as a tire technician in their tire department from January 30, 2020 until February 28, 2020. Claimant’s regular work hours were Monday through Friday from 7:00 a.m. to 3:30 p.m.

(2) On one occasion prior to February 25, 2020, claimant felt “unsafe” when he was directed to mount tires on wheels while applying a wet, black substance that a coworker told him was “corrosive to the skin.” Transcript at 15. The employer did not provide claimant any personal protective equipment to perform the task and claimant refused to do it. The shop supervisor later learned of the incident and told claimant that refusing to do the task was the correct decision.

(3) Also prior to February 25, 2020, claimant was involved in an incident where he accompanied a coworker on a drive to pick up parts and the coworker drove “really erratic.” Transcript at 34. During the drive, the coworker called claimant a “bitch” several times and tried to start a physical altercation with claimant. Transcript at 34.

(4) On February 25, 2020, claimant and his coworkers were unloading tires from a truck when a coworker used racial slurs. Claimant was “unnerv[ed]” by the comments. Transcript at 18. Claimant told the coworker not to talk to claimant like that, which caused the coworker to become upset and to “start[] launching tires . . . haphazardly” in an unsafe manner toward claimant and the other coworkers. Transcript at 18. Claimant informed the acting shop supervisor about the incident and they praised claimant for not starting a fight, but did not discipline the coworker who used the racial slurs.

(5) On February 26, 2020, claimant did not go to work due to his concern that the coworker who had used the racial slurs might try to hurt claimant, or try to engage claimant in a fight.

(6) Prior to February 28, 2020, claimant was hired to perform work for the United States Census Bureau.

(7) When claimant arrived at work on February 28, 2020, the acting shop supervisor told claimant to work in the axle department instead of the tire department. The supervisor also told claimant that they needed claimant to work until 10:00 p.m. so that claimant could travel with the owner’s son to Medford, Oregon to pick up axles for the employer, and that because working in the axle department would make claimant “dirty” and “greasy,” claimant would need to change his clothes before getting in the vehicle of the owner’s son. Transcript at 7. The change to claimant’s work schedule would have effected claimant’s plans to make personal, medical-related calls to the Veterans Administration (VA) at the conclusion of his normal shift. Claimant agreed to comply with the instructions but believed that the work assignments were in retaliation for complaining to management about workplace safety and the February 25, 2020 racist incident. During his 9:00 a.m. break, claimant went home with the intent of changing out of his dirty clothes, but decided not to return to work because he continued to feel unsafe due to the workplace safety issues he had experienced and because he believed the employer was retaliating against him.

CONCLUSIONS AND REASONS: Order No. 21-UI-171486 is reversed and this matter remanded for further development of the record.

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.

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. 21-UI-171486 concluded that claimant quit work without good cause because although he had plans to make health-related medical calls to the VA, he did not tell the employer of these commitments, agreed to work until 10:00 p.m., and failed to take advantage of the employer’s willingness to allow him to make his medical calls during his shift. Order No. 21-UI-171486 at 2. The record fails to support this conclusion.

As a preliminary matter, the record reflects that prior to claimant’s decision to quit, claimant had already been hired for a position with the U.S. Census Bureau. However, the record does not contain sufficient information to determine whether claimant quit his job with good cause due to an offer of other work. While claimant testified he would have quit his job with the employer regardless of the U.S. Census Bureau opportunity, this does not necessarily mean that U.S. Census Bureau opportunity was not part of the reason he quit or potentially the basis for good cause to quit. *See* Transcript at 15. On remand, further inquiry is needed addressing the requirements of OAR 471-030-0038(5)(a) to determine whether claimant may have good cause to quit his employment to accept the offer of work from the U.S. Census Bureau.

Further inquiry is also needed to determine whether claimant left work with good cause pursuant to OAR 471-030-0038(4). The record suggests that prior to his decision to quit, the employer may have subjected claimant to a hostile and unsafe working environment such that he faced a situation of such gravity that he had no reasonable alternative but to quit when he did. *McPherson v. Employment Division*, 285 Or 541, 591 P2d 1381 (1979) (claimants need not “sacrifice all other than economic objectives and, for instance, endure racial, ethnic, or sexual slurs or personal abuse, for fear that abandoning an oppressive situation will disqualify the work from unemployment benefits”; the law “does not impose upon the employee the one-dimensional motivation of Adam Smith’s ‘economic man’”).

Claimant’s testimony included his description of the February 25, 2020 incident where a coworker reacted to claimant’s requests that he stop his racist conduct by getting angry and throwing tires toward claimant. Claimant described how the situation, including the employer’s decision not to discipline the coworker, made claimant feel unsafe and contributed to his decision to quit. Likewise, the record evidence suggests that claimant’s decision to quit may have been influenced by personal abuse such as being called a “bitch” by his coworker, and safety concerns about the use of a corrosive substance in the workplace without adequate protective gear. Claimant believed that his complaints about some of these issues led the employer to retaliate against him on February 28, 2020, prior to claimant’s decision to quit. In sum, the record shows that claimant may have quit, at least in part, due to legitimate safety-related concerns and concerns about retaliation from the employer. However, further inquiry is needed to determine whether these concerns were each sufficient standing alone, or in their totality, to establish good cause for claimant’s decision to leave his employment.

On remand, the record must be developed regarding the circumstances surrounding the “erratic” driving incident with a coworker who called claimant a “bitch” multiple times. The questions should address when this incident occurred, whether other incidents occurred with this particular coworker, the

circumstances that precipitated the coworker using the foul language, whether claimant reported the incident, and what, if anything, the employer did in response to the incident(s). Inquiry should also address in more detail if and why claimant felt unsafe going on the work-related trip to Medford even though the record appears to show that claimant would not be travelling with the coworker who had previously used foul language toward claimant and driven erratically with claimant.

With respect to the February 25, 2020, incident, additional inquiry is also needed to address the circumstances surrounding why the employer did not discipline the coworker who used the racial slurs. Specifically, the record does not show how the employer addressed allegations of discrimination, or if they investigated such complaints. The record does not show if the employer investigated the February 25, 2020 incident. Similarly, the record does not show whether claimant witnessed other instances of discrimination and, if so, whether he brought those instances to the attention of the employer, and the employer's response, if any.

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 had good cause to voluntarily quit working for the employer, Order No. 21-UI-171486 is reversed, and this matter is remanded.

DECISION: Order No. 21-UI-171486 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: September 20, 2021

NOTE: The failure of any party to appear at the hearing on remand will not reinstate Order No. 21-UI-171486 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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