

EMPLOYMENT APPEALS BOARD DECISION
2021-EAB-0842

Reversed
No Disqualification

PROCEDURAL HISTORY: On April 30, 2021, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant refused an offer of suitable work without good cause and was disqualified from receiving unemployment insurance benefits effective March 28, 2021 (decision # 91109). Claimant filed a timely request for hearing. On September 27, 2021, ALJ Logan conducted a hearing, at which the employer failed to appear, and on September 29, 2021 issued Order No. 21-UI-175846 affirming decision # 91109. On October 16, 2021, claimant filed an application for review with the Employment Appeals Board (EAB).

WRITTEN ARGUMENT: Claimant's argument contained information that was not part of the hearing record, and did not show that factors or circumstances beyond claimant's reasonable control prevented her from offering the information during the hearing. Under ORS 657.275(2) and OAR 471-041-0090 (May 13, 2019), EAB considered only information received into evidence at the hearing when reaching this decision. EAB considered claimant's argument to the extent it was based on the record.

FINDINGS OF FACT: (1) Claimant customarily worked as a massage therapist. On March 17, 2020, claimant filed an initial claim for unemployment insurance benefits and thereafter began claiming benefits.

(2) On March 27, 2021, Soma Wellness Spa offered claimant work as a massage therapist, working from 3:00 p.m. to 8:30 p.m., 19 hours per week, with the days of the week she would work to be flexible, and a start date of April 1, 2021. The rate of pay of the offered work was \$35 per hour.

(3) The offered massage therapist work would have required claimant to provide massages in close quarters in the midst of the COVID-19 pandemic. At the time of the offer, the spa was not requiring patients to wear masks while receiving massages. The spa also was not testing patients for COVID-19. Also at the time of the offer, claimant's fiancé had not yet received the COVID-19 vaccine and was at high risk for complications from COVID-19 because he suffered from asthma, obesity, was previously a heavy smoker, and was pre-diabetic.

(4) Claimant's labor market area was the area including southwest Portland, Oregon and surrounding towns. The median rate of pay for massage therapists in claimant's labor market area was \$31.43 per hour. A rate of pay that is 90% of the median rate of pay for massage therapists in claimant's labor market area was \$27.99 per hour.

(5) On March 29, 2021, claimant refused the employer's offer of work.

CONCLUSIONS AND REASONS: Claimant did not fail without good cause to accept suitable work when offered because the offered work was not suitable.

ORS 657.176(2)(e) requires a disqualification from unemployment insurance benefits if an individual failed without good cause to accept suitable work when offered. In a job refusal case, the burden of proof is on claimant to establish that a valid offer of work made by an employer was not suitable, or that claimant had good cause to refuse the offer. *Vail v. Employment Department*, 30 Or App 365, 567 P2d 129 (1977) (a claimant who is unemployed and who refuses an offer of employment has the burden of showing that the work offered is not suitable). However, the employer must first establish that they made claimant a *bona fide* offer of suitable work and that claimant refused it, thus making a *prima facie* showing that claimant was not entitled to benefits. To establish that they made a "bona fide" offer of employment, the employer must show that claimant understood the "[t]he details of the job (type of work, duties, hours and days, rate of pay, start date, etc.)." Oregon Employment Department, UI Benefit Manual § 450 (Rev. April 1, 2010). Only if the employer meets that burden does the burden then shift to claimant to show the offer of work was not suitable, or to show claimant had good cause for refusing it.

The order under review concluded that the employer had made a bona fide offer of work to claimant, and that the work offered was suitable, but that claimant refused the offer without good cause. Order No. 21-UI-175846 at 2-3. The record supports that the employer's offer was bona fide. However, the record does not support that the offered work was suitable. As the record shows that the offered work was not suitable, the issue of whether claimant had good cause to refuse the offer need not be reached.

The offer of massage therapist work that the employer made on March 27, 2021 was a bona fide offer of work because the employer conveyed the details of the job. The record shows that claimant understood that the job was to entail working from 3:00 p.m. to 8:30 p.m., 19 hours per week, with the days of the week to be flexible, a start date of April 1, 2021, and a rate of pay of \$35 per hour. On March 29, 2021, claimant refused the employer's offer of work. The employer therefore established that the offer work was bona fide and that claimant refused it.

As such, the analysis proceeds to whether the offered work was suitable. Factors to consider when determining whether work is "suitable" include, in pertinent part, "the degree of risk involved to the health, safety and morals of the individual, the physical fitness and prior training, experience and prior earnings of the individual, the length of unemployment and prospects for securing local work in the customary occupation of the individual and the distance of the available work from the residence of the individual." ORS 657.190. These factors are non-exclusive, meaning that they may be considered "among other factors[.]" ORS 657.190.

Moreover, "no work is deemed suitable" that meets any of the conditions set forth under ORS 657.195(1). One such condition is 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.” ORS 657.195(1)(b). “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.” OAR 471-030-0037(1) (January 11, 2018).

Here, the offered work does not meet any of the conditions set forth under ORS 657.195(1) for unsuitable work. In particular, analyzing ORS 657.195(1)(b), the record shows that the rate of pay of the offered work was not substantially less favorable to claimant than that prevailing for similar work in her locality. This is because the rate of pay of the offered work was \$35 per hour, which is higher than \$31.43 per hour, the median rate of pay for massage therapists in claimant’s labor market area, and higher still than \$27.99 per hour, which is 90% of the median rate of pay for massage therapists in claimant’s labor market area. Accordingly, the record shows that the offered work does not meet ORS 657.195(1)(b) or any of the other conditions set forth under ORS 657.195(1) and therefore is not deemed unsuitable on the basis of fulfilling any of those conditions..

Nevertheless, the offered work was not suitable in light of the suitability factors set forth under ORS 657.190 as well as an additional factor appropriate to consider in this case. Specifically, considering “the degree of risk involved to the health, [and] safety” of claimant and the additional factor of the degree of risk involved to the health of claimant’s fiancé, the record shows, more likely than not, that the offered work was not suitable. This is because the offered work would have required claimant to work in close quarters during the COVID-19 pandemic, in an environment where patients were not required to wear masks while receiving massages and were not tested for COVID-19, and during a time when claimant’s fiancé was not vaccinated against COVID-19 and suffered from conditions that put him at high risk for complications from the virus. Given these factors, the preponderance of evidence shows that the massage therapist work offered by the employer on March 27, 2021 was not suitable work.

For these reasons, claimant did not fail without good cause to accept suitable work when offered because the offered work was not suitable. Claimant is not disqualified from receiving unemployment insurance benefits based on this work separation.

DECISION: Order No. 21-UI-175846 is set aside, as outlined above.

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

DATE of Service: November 18, 2021

NOTE: This decision reverses an order that denied benefits. Please note that payment of benefits, if any are owed, may take approximately a week for the Department to complete.

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.

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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

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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