

AMENDED EMPLOYMENT APPEALS BOARD DECISION
2021-EAB-0855-A

Reversed
No Disqualification

NOTE: This amended decision is being issued solely to correct a clerical error in the “DECISION” section of the decision. The correction appears in bold, below. Any party who disagrees with this decision has the right to appeal it to the Oregon Court of Appeals. A notice of appeal rights is included on page 4 of this decision.

PROCEDURAL HISTORY: On January 21, 2021, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that the employer discharged claimant for misconduct and claimant was disqualified from receiving unemployment insurance benefits effective June 28, 2020 (decision # 73411). Claimant filed a timely request for hearing. On October 6, 2021, ALJ Lucas conducted a hearing, and on October 12, 2021 issued Order No. 21-UI-176862, affirming decision # 73411 by concluding that claimant voluntarily quit work without good cause and was disqualified from receiving benefits effective June 28, 2020. On October 19, 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 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).

EVIDENTIARY MATTER: EAB has considered additional evidence when reaching this decision under OAR 471-041-0090(1) (May 13, 2019). The additional evidence consists of a thread of comments from a social media website that the employer proposed to admit as Exhibit 1 but which the ALJ did not

admit. This information is necessary to complete the record. This information has been marked as EAB Exhibit 1, and a copy provided to the parties with this decision. Any party that objects to our admitting EAB Exhibit 1 must submit such objection to this office in writing, setting forth the basis of the objection in writing, within ten days of our mailing this decision. OAR 471-041-0090(2). Unless such objection is received and sustained, the exhibit will remain in the record.

FINDINGS OF FACT: (1) Marshall Logging employed claimant as a logger from May 1, 2019 until July 2, 2020.

(2) Claimant's work for the employer involved working on logging crews operating a yarder, which is a piece of equipment that uses cables to move logs. The yarder claimant operated was equipped with a "talk[ie] t[oo]ter," a radio-operated device that communicated warnings and instructions to other loggers. Transcript at 27.

(3) In February 2020, the talkie tooter device on the yarder claimant operated began malfunctioning. Over the course of the next several months, claimant asked the employer to repair the talkie tooter several times but the employer did not do so, and the device remained in poor working order.

(4) On July 2, 2020 claimant was on a logging job operating the yarder with the malfunctioning talkie tooter device. Claimant was using the yarder to move a group of logs into a pile. While the logs were suspended from a skyline cable attached to the yarder, the yarder gave off a puff of "white powder" and the cable "clamped." Transcript at 13. The stuck cable was dangerous because it could have snapped and dropped its logs onto other loggers or turned the yarder onto its side, which could have injured claimant or others. Without the yarder's talkie tooter in good working order, claimant was not able to use the device to warn the other loggers about the condition of the cable. Claimant successfully unloaded the logs and moved the yarder out of the brush.

(5) The employer's owner got on a hand-held radio and stated to claimant and the other members of the crew with hand-held radios that the employer would have to shut down operations for two or three weeks to repair the talkie tooter device. He instructed claimant to move the yarder back into the brush to get another load of logs. Claimant thought the employer's instructions were dangerous, in light of the malfunctioning talkie tooter, but he complied and the cable became stuck again. Claimant got on the hand-held radio and stated, "we don't want to get anybody fucking hurt" and "[w]ell, do you want to keep running, why don't you get your fucking dumbass in here and run it yourself then." Transcript at 14. The owner responded, "Why don't you get the fuck out of the cab then?" Transcript at 14. Claimant then replied, "You come run it yourself," exited the cab of the yarder, and departed the job site. Transcript at 30.

(6) Shortly after claimant left the job site, the owner called claimant. The employer asked claimant why he left the job site and went home. Claimant stated, "I'm done working for you." Transcript at 31. The owner responded, "Turn in your two weeks and you're done." Transcript at 16.

(7) After claimant separated from work, the employer turned their faulty talkie tooter device in for repairs, rented one that worked properly while the repairs were being done, and continued operations.

CONCLUSIONS AND REASONS: Claimant voluntarily left work with good cause.

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). “Work” means “the continuing relationship between an employer and an employee.” OAR 471-030-0038(1)(a) (September 22, 2020).

The preponderance of evidence supports the conclusion that claimant voluntarily quit work on July 2, 2020. The record shows that on that date claimant was unwilling to continue working for the employer for an additional period of time because he left the employer’s job site entirely (after the owner had told him merely to exit the cab of the yarder) and in a subsequent telephone conversation with the owner stated, “I’m done working for you.” Transcript at 31. While the record indicates that the owner told claimant “[t]urn in your two weeks and you’re done” during the telephone conversation, which evinced an intent on the part of the owner to discharge claimant, the preponderance of the evidence shows that the owner made that statement only after claimant had already said, “I’m done working for you.” Transcript at 16. The record supports that this is the more likely order of events because at hearing the owner candidly testified that he did not know who made which statement first, while claimant testified that the owner communicated that claimant was discharged only after claimant had said, “I’m done working for you.” Transcript at 31, 40. For these reasons, the record shows that the work separation was a voluntary leaving that occurred on July 2, 2020.

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) (December 23, 2018). “[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.

At hearing, claimant testified that he quit working for the employer for two reasons. First, he did not want to continue to operate the yarder with the malfunctioning talkie tooter and “be responsible for getting somebody hurt.” Transcript at 27. Second, he thought the owner was a “hot head” and had a “bad attitude.” Transcript at 34-35. The former reason constitutes good cause to quit and therefore the latter reason need not be addressed.

Claimant established good cause for voluntarily leaving work based on his concern about continuing to operate the yarder with the faulty talkie tooter device. Claimant’s situation was grave because the record shows that the yarder’s cable was prone to becoming stuck, which posed a threat of injury or death to the other loggers and claimant and without a talkie tooter in good working order, it was not possible for claimant to warn the other loggers of danger. The record supports that claimant’s safety concerns were well founded. The record shows that claimant was knowledgeable about safety issues relating to the employer’s equipment given that the owner testified that he put claimant in charge of safety meetings. Transcript at 24. The owner also conceded that claimant understood how to operate the yarder better

than the owner, which supports an inference that the employer deferred to claimant's judgment regarding the yarder's safe operation and therefore gives additional weight to claimant's safety concerns. Transcript at 20-21.

The record further shows that claimant had no reasonable alternative but to leave work when he did. Claimant asked the employer to repair the talkie tooter device several times in the months preceding his resignation but the employer took no action. Although the owner mentioned over hand-held radio on July 2, 2020 that the employer would have to shut down operations for two or three weeks to repair the talkie tooter device, it is not evident that the owner meant to convey by this statement that he actually intended to halt operations and make the repairs. As such, it was reasonable for a prudent person in claimant's position to conclude that the owner would not have repaired the talkie tooter given that the faulty piece of equipment had gone unaddressed for months at that point and claimant was instructed to proceed. Although the employer used a rented talkie tooter device after claimant's resignation, claimant testified at hearing that he was unaware it was possible to rent the device. Transcript at 46. Further, the record evidence suggests that claimant's dedicated role on the logging crew was to operate the yarder. Therefore, the record does not support that it would have been possible to reassign claimant to a position on the logging crew that was less potentially dangerous to other loggers. The record also contains no evidence that a leave of absence was available to claimant or, if it was, that a reasonable person in claimant's position would believe the employer would repair all of the faulty equipment while claimant was on leave, given that the malfunctioning talkie tooter had gone unaddressed for months.

Accordingly, claimant quit work with good cause. Claimant is not disqualified from receiving unemployment insurance benefits based on the work separation.

DECISION: Order No. 21-UI-176862 is set aside, as outlined above.

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

DATE of Service: December 2, 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.

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.



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 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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