

**EMPLOYMENT APPEALS BOARD DECISION**  
**2021-EAB-0902**

*Reversed & Remanded*

**PROCEDURAL HISTORY:** On May 20, 2021, 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 September 20, 2020 (decision # 104230). Claimant filed a timely request for hearing. On October 8, 2021, ALJ Lucas conducted a hearing at which the employer failed to appear, and on October 12, 2021 issued Order No. 21-UI-176863, affirming decision # 104230. On October 29, 2021, claimant filed an application for review with the Employment Appeals Board (EAB).

The parties may offer new information into evidence at the remand hearing such as the information claimant included with her request for hearing, which was not considered in reaching this decision. 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) 24 Hour Fitness USA Inc. employed claimant as a general manager in training from February 24, 2020 until September 24, 2020.

(2) Claimant's compensation as a general manager in training was a salary of \$67,000 per year. Due to the COVID-19 pandemic, claimant last performed services for the employer on March 27, 2020. Before September 24, 2020, claimant had safety concerns about the employer's response to the COVID-19 pandemic and spoke with the employer's human resources department about those concerns.

(3) On September 24, 2020, claimant's supervisor called claimant and told her that the employer was eliminating her general manager in training position, but that she could return to work in an hourly sales position that paid less than her salary and at a different location that was "far from home." Audio Record at 9:15 to 9:35. When claimant asked about the rate of pay for the sales position, her supervisor

responded that she did not have that information, and that claimant would have to accept the position and then “figure it out.” Audio Record at 11:30 to 11:45.

(4) At the end of her call with the supervisor on September 24, 2021, claimant declined the position and quit work because she believed that the reduced compensation that she would be receiving in the sales position would not be worth the risk of contracting COVID-19 at work.

**CONCLUSIONS AND REASONS:** Order No. 21-UI-176863 is set aside and this matter is remanded for further development of the record.

ORS 657.176(2)(c) requires a disqualification from unemployment insurance benefits if a claimant voluntarily leaves 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) (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.

However, during a state of emergency declared by the Governor under ORS 401.165, the Department may waive, otherwise limit, or modify the requirements of OAR 471-030-0038. OAR 471-030-0071 (September 13, 2020). Paragraph (2)(b) of Oregon Employment Department Temporary Rule for Unemployment Insurance Flexibility (March 8, 2020), <http://records.sos.state.or.us/ORSOSWeb-Drawer/Recordpdf/7604239> [hereinafter OED Temporary COVID-19 Rule], provides that a person who quits work because of a COVID-19 related situation is not disqualified from receiving unemployment insurance benefits. Under OED Temporary COVID-19 Rule (1), a COVID-19 related situation includes the following:

\* \* \*

(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;

\* \* \*

(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.

The order under review concluded that claimant quit work without good cause, reasoning that the employer’s proposed reassignment of claimant to a sales position without disclosing the position’s rate of pay did not constitute a grave situation for claimant, and that claimant also had the reasonable alternative of pursuing clarifying information about the position’s rate of pay from the employer prior to quitting. Order No. 21-UI-176863 at 2-3. However, the record was not sufficiently developed to support

those conclusions, and there was no inquiry regarding the COVID-19 concerns that influenced claimant's decision to quit working for the employer.

Claimant testified that prior to quitting, her supervisor told her that the proposed sales position was "far from home," would pay less than her salaried position, that the supervisor had no other information about the rate of pay, and that claimant would have to accept the position and then "figure it out." However, the record fails to show how "far from home" the proposed work location was and whether that distance made the work unsuitable under ORS 657.190.<sup>1</sup> It also fails to show what sales possibilities that location offered and whether claimant would have been paid, in part, on commission, whether the employer would have limited claimant's work hours, and whether claimant was expected to make sales in person or otherwise. Without further inquiry into these matters, it cannot be determined whether the circumstances created for claimant by the employer's offer of reassignment were such that a reasonable and prudent person of normal sensitivity, exercising ordinary common sense would have declined the offer and quit work.

Claimant also testified that she had safety concerns about the employer's response to the COVID-19 pandemic and that she declined the proposed reassignment to the sales position and quit, in part, because she believed that the reduced compensation that she would be receiving in the sales position would not be worth the risk of contracting COVID-19 at work. Audio Record at 16:30 to 16:45; 11:30 to 12:30. On remand, the record should be developed to assess whether claimant quit work due to a COVID-19 related situation under subsections (c) or (g) of OED temporary COVID-19 rule (1). Here, the record fails to show whether a health care provider or public health official advised claimant to self-quarantine due to possible risk of exposure to, or spread of, the novel coronavirus. In this regard, the ALJ should inquire if claimant was so advised by a health care provider or public health official, and if so, when this advice was issued and what, specifically, any such advice entailed.

The record also should be developed to determine if claimant had health or safety concerns regarding the facility in which she would be working such as concerns regarding air ventilation, the employer's mask and social distancing policies—both while working or while in break areas—and whether the employer provided any personal protective equipment (PPE) such as masks for employees and customers or otherwise addressed her concerns in any way. The record also fails to show whether claimant's COVID-19 related health and safety concerns were the result of her having a pre-existing condition or susceptibility to the virus. Without further inquiry into these matters, it cannot be determined whether the circumstances created for claimant by the employer's offer of reassignment were so grave that a reasonable and prudent person of normal sensitivity, exercising ordinary common sense would have declined the offer and quit work.

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

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<sup>1</sup> 657.190 Suitable work; factors to consider. In determining whether any work is suitable for an individual, the Director of the Employment Department shall consider, among other factors, 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.

further development of the record is necessary for a determination of whether claimant voluntarily quit work with good cause, Order No. 21-UI-176863 is reversed, and this matter is remanded.

**DECISION:** Order No. 21-UI-176863 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: December 6, 2021**

**NOTE:** The failure of any party to appear at the hearing on remand will not reinstate Order No. 21-UI-176863 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 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 باتباع 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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