

EMPLOYMENT APPEALS BOARD DECISION
2021-EAB-0916

Reversed & Remanded

PROCEDURAL HISTORY: On July 9, 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 September 27, 2021 (decision # 82157). Claimant filed a timely request for hearing. On August 16, 2021, the Department served notice of an amended administrative decision vacating and replacing the July 9, 2021 administrative decision, and concluding that the employer discharged claimant for misconduct and claimant was disqualified from receiving unemployment insurance benefits effective September 27, 2020 (also decision # 82157).¹ Claimant filed a timely request for hearing. On October 21, 2021, ALJ Micheletti conducted a hearing at which the employer failed to appear, and on October 25, 2021 issued Order No. 21-UI-177896, affirming decision # 82157.² On November 1, 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).

FINDINGS OF FACT: (1) Skyhop Global LLC employed claimant as a driver from 2019 to October 1, 2020. The employer's business consisted of providing transportation for flight crews from the Portland International Airport (PDX) to local hotels and then back to the airport.

¹ The Department's August 16, 2021 administrative decision amended their July 9, 2021 administrative decision, in pertinent part, by changing the effective date of the denial of benefits from September 27, 2021 to September 27, 2020. The Department's August 16, 2021 administrative decision retained the same decision number, decision # 82157, from their earlier July 9, 2021 administrative decision. The ALJ construed claimant's request for hearing on the July 9, 2021 administrative decision to apply to the August 16, 2021 administrative decision.

² The order under review stated that it modified amended decision # 82157. Order No. 21-UI-177208 at 2. However, the order under review affirmed amended decision # 82157, because the order under review did not change the result of amended decision # 82157, only the reasoning leading to the result.

(2) Prior to Mid-September 2020, the COVID-19 pandemic caused commercial airlines to reduce the number of flights arriving and departing PDX. As a result of this reduction in flights, the employer incurred a reduction in the number of required daily flight crew pickups. Claimant's average daily pickups went from approximately 20 pickups per day down to two or three. On some days claimant had no pickups at all. Claimant decided to "throw[] in the towel" and seek other work due to his "erratic schedul[e]." Audio Record at 23:00 to 23:14.

(3) On September 25, 2020, claimant walked into the employer's ready room and overheard a manager say to another individual during a phone call, "I can't just fire him . . . I need to . . . build a case." Audio Record 34:38. When the manager saw claimant after making this statement, the manager "froze" and hung up the telephone. Audio Record at 34:54. At that point, claimant decided he needed to leave the employer and continue to seek other work.

(4) On October 1, 2020, claimant left the employer. At the time of his departure, claimant had applied for 10 to 20 jobs but had not yet received an offer of other work.

CONCLUSIONS AND REASONS: Order No. 21-UI-164483 is reversed and this matter is 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 due to a reduction in hours "has left work without good cause unless continuing to work substantially interferes with return to full time work or unless the cost of working exceeds the amount of remuneration received." OAR 471-030-0038(5)(e). Per OAR 471-030-0038(5)(b), leaving work without good cause includes:

(A) Leaving suitable work to seek other work; [and]

* * *

(F) Resignation to avoid what would otherwise be a discharge for misconduct or potential discharge for misconduct[.]

The order under review concluded that because claimant's "dissatis[faction] with his employment" caused him to quit his job to seek other work, claimant did not have good cause to quit work per OAR 471-030-0038(5)(b)(A). Order No. 21-UI-177896 at 2. While the record supports the conclusion that claimant was seeking other work at the time he quit his job, the record suggests that this may not have been the primary reason he quit his job. Further development of the record is needed on remand to determine the primary reason claimant left work and whether claimant's reason for leaving work constituted good cause.

The record shows that prior to his decision to seek other work claimant became dissatisfied with the erratic scheduling he was experiencing at work due to a reduction in the number of daily pickups he received. This evidence raises the possibility that claimant's primary reason for quitting work was due to a reduction in hours, with his decision to seek other work only occurring after he had already decided to quit due to a reduction in hours. Because, under certain circumstances, a reduction in hours can provide good cause to quit work, and because the record suggests that claimant may have quit work due to a reduction in hours, further inquiry is needed to determine whether claimant actually experienced a reduction in hours at work and, if so, whether this was the primary reason why he quit. If claimant did experience a reduction in hours, and if the reduction in hours was the primary reason he quit work, the record should be further developed to determine whether the reduction in hours constituted good cause to quit work because it substantially interfered with claimant's return to full time work or created a situation where his costs of working exceeded the amount of remuneration he received.

However, the record also shows that at or near the time that claimant decided to quit, the employer may have contemplated discharging claimant. This evidence raises a question whether claimant's primary reason for leaving work was to avoid a potential discharge. Because quitting work to avoid a discharge for misconduct does not constitute good cause to quit work, and because the record suggests that claimant may have quit work to avoid a discharge, further inquiry is needed on remand to determine whether claimant's primary reason for quitting work was to avoid a discharge and, if so, whether the employer's contemplated discharge was based on misconduct as that term is defined in OAR 417-030-0038(3)(a).³

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 the nature of claimant's work separation and whether claimant's work separation was disqualifying for purposes of unemployment insurance benefits, Order No. 21-UI-177896 is reversed, and this matter is remanded.

DECISION: Order No. 21-UI-177896 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

³ "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).

NOTE: The failure of any party to appear at the hearing on remand will not reinstate Order No. 21-UI-177896 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 ໂດຍປະຕິບັດຕາມຄໍາແນະນໍາທີ່ບອກໄວ້ຢູ່ຕອນຫ້າຍຂອງຄໍາຕັດສິນນີ້.

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 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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