

EMPLOYMENT APPEALS BOARD DECISION
2021-EAB-0969

Reversed
No Disqualification

PROCEDURAL HISTORY: On January 27, 2021, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that the employer discharged claimant for misconduct, disqualifying claimant from receiving unemployment insurance benefits effective December 13, 2020 (decision # 130926). Claimant filed a timely request for hearing. On October 28, 2021, ALJ Ramey conducted a hearing, and on November 5, 2021 issued Order No. 21-UI-179159, modifying decision # 13026 by concluding that claimant quit work without good cause and was disqualified from receiving benefits effective December 13, 2020. On November 15, 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).

FINDINGS OF FACT: (1) HNS Inc. employed claimant from December 10, 2020 until December 16, 2020. The employer hired claimant as an equipment operator.

(2) Between December 10, 2020 and December 15, 2020, the employer's owner required claimant to work four days as a laborer at a worksite near claimant's residence in Hermiston, Oregon. During those four days, claimant did not work with the owner. On December 15, 2020, the owner told claimant that beginning the next day, claimant was to work at a work site located approximately five hours from Hermiston.

(3) On December 16, 2020, claimant left his residence at approximately 2:30 a.m. and drove more than four hours to the work site. That day, the owner was at the work site and required claimant to work the whole day as a laborer shoveling holes and climbing up and then down a hill several times. The owner did not allow claimant or the other workers to take a lunch break or any other breaks during the day. The

owner was operating a drill rig “and every five minutes . . . he [got] off . . . and scream[ed] at people. . . it was very disturbing . . . [H]e was verbally abusive.” Transcript at 24. At one point during that day, the owner told claimant “I don’t like you very much.” Transcript at 32. At 4:00 p.m., the owner wanted claimant to continue to work that day and thereafter at the site, but had not offered claimant housing for that night or while working there. Claimant “was beat” and concluded “I can’t be yelled at anymore.” Transcript at 33. Claimant told the owner “I quit.” Transcript at 24.

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

As a preliminary matter, claimant and the employer’s witness, their office manager, disagreed regarding what occurred at the worksite on December 16, 2020. The employer’s witness was not at the worksite that day, had no personal knowledge of what had occurred at the site, and testified based only on what the owner had told her. Because the owner did not appear at hearing, claimant was the only firsthand witness to the events of that day that testified under oath regarding the facts at issue. For that reason, claimant’s testimony has more probative value than the employer’s hearsay evidence, and where the evidence conflicted, facts were found in accordance with claimant’s testimony.

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).

The parties disagreed on the nature of the work separation. The office manager asserted that the owner told her that on December 16, 2020 the owner had discharged claimant. Transcript at 10. Claimant asserted that he quit on that day. Transcript at 24. Claimant’s firsthand evidence was more persuasive than the employer’s hearsay and showed that claimant could have continued to work for the employer after December 16, 2020 but chose not to do so. Therefore, the work separation was a voluntary leaving that occurred on that day.

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) (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.

Order No. 21-UI-179159 concluded that claimant quit work without good cause, reasoning that his circumstances were not so grave that he could not have pursued the alternatives of discussing his concerns about his work situation with the owner or filed a complaint against the employer with the Oregon Bureau of Labor & Industries. Order No. 21-UI-179159 at 3. However, the record does not support the order’s reasoning or conclusion that claimant quit without good cause.

The owner's offer of continuing work at the work site in question with its lengthy commute itself was such that a reasonable and prudent person of normal sensitivity, exercising ordinary common sense, would quit work if there were no reasonable alternative. Per OAR 471-030-0038(5)(b), leaving work without good cause includes leaving suitable work to seek other work. By logical extension of that principal, leaving work with good cause under OAR 471-030-0038(4) may include leaving unsuitable work to seek other work. In determining whether any work is suitable, the factors to be considered include "the distance of the available work from the residence of the individual." ORS 657.190. Here, the record shows that the distance to the work site on December 16, 2020 from claimant's residence was likely over 200 miles as a one-way commute from claimant's residence and to the site took over four hours. The record also fails to show that the owner offered claimant overnight housing at the work site while the job was ongoing. Under those circumstances, viewed objectively, a commute of over 400 miles and eight hours per day to and from claimant's Hermiston residence to the work site made the work unsuitable under ORS 657.190.

The owner's failure to allow claimant any breaks during his nine-hour workday also was such that a reasonable and prudent person of normal sensitivity, exercising ordinary common sense, would quit work if there were no reasonable alternative. OAR 839-020-0050(2)(a) (July 19, 2018) provides that an employer must, for each work period of between six to eight hours, provide to an employee a meal break of thirty continuous minutes "during which the employee is relieved of all duties." OAR 839-020-0050(6)(a) states that an employer must, for each four hour segment of work, provide an employee a rest period of not less than ten minutes "during which the employee is relieved of all duties." Claimant presented firsthand evidence that the owner did not allow claimant and others to take any breaks during the workday. The record therefore shows that claimant did not have breaks that were continuous in which claimant was relieved of all job duties, which was a violation of Oregon labor law.

The order under review concluded that claimant could have pursued the alternatives of discussing his work concerns with the employer or filing a complaint against the employer with the Oregon Bureau of Labor and Industries (BOLI) instead of quitting when he did. However, given the owner's "verbally abusive" conduct toward claimant and the other workers on the site during the day in question, which itself contributed to the gravity of claimant's situation, asking the owner to refrain from such behavior in the future more likely than not would have been futile. Further, although claimant could have filed a complaint against the employer with BOLI, that alternative likely would have been futile or impractical given the urgency of claimant's concerns about the work situation.

For all of these reasons, claimant quit work with good cause and is not disqualified from receiving unemployment insurance benefits based on the work separation.

DECISION: Order No. 21-UI-179159 is set aside, as outlined above.

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

DATE of Service: December 23, 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 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 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 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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