

EMPLOYMENT APPEALS BOARD DECISION
2021-EAB-0993

Reversed & Remanded

PROCEDURAL HISTORY: On January 19, 2021, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant voluntarily quit work with good cause and was not disqualified from receiving unemployment insurance benefits based on the work separation (decision # 62706). The employer filed a timely request for hearing. On November 4, 2021, ALJ Ramey conducted a hearing, and on November 12, 2021 issued Order No. 21-UI-179590, reversing decision # 62706 by concluding that claimant voluntarily quit work without good cause and was disqualified from receiving benefits effective December 13, 2020. On November 26, 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 she did not include a statement declaring that she provided a copy of her argument to the opposing party or parties as required by OAR 471-041-0080(2)(a) (May 13, 2019).

FINDINGS OF FACT: (1) Fred Meyer Stores Inc. employed claimant from March 14, 2020 until December 16, 2020.

(2) Prior to working for the employer, claimant developed diabetes and hypertension. Claimant also had a son who was born premature.

(3) On March 14, 2020, claimant began working for the employer as a cashier. Claimant earned \$13 per hour and usually worked 12 to 16 hours per week working for the employer.

(4) Between March 14, 2020 and the beginning of December 2020, claimant became aware of approximately three instances of someone becoming infected with COVID-19 at the employer's store.

(5) The COVID-19 infections at the store concerned claimant. The employer took safety precautions, which included offering hand sanitizer and gloves to workers, requiring workers and customers to wear masks, escorting customers who refused to wear masks out of the store, using a cleaning crew to sanitize the store at night, and using contact tracing when a positive case was reported in the store. Despite these

measures, claimant believed she was at a higher risk of exposure to COVID-19 because as a cashier, she frequently interacted with customers. She also believed she was at higher risk of complications if infected with COVID-19 because of her diabetes and hypertension conditions.

(6) Each time claimant learned of an infection in the store, she raised her concerns that she was at higher risk of exposure to COVID-19 with the employer. On each occasion, she also raised that she believed she was at higher risk of complications if infected with COVID-19 because she had underlying health conditions, although she did not reveal that her underlying conditions were diabetes and hypertension. She conveyed her concerns to the employer by expressing them to lead workers, an assistant manager, and the store's human resources manager. The human resources manager directed claimant to raise her concerns with claimant's direct manager. Claimant did not raise her concerns with her direct manager because she rarely worked shifts when her direct manager was present. Each time claimant raised her concerns about COVID-19, she felt they "were just blown off." Transcript at 7.

(7) On the occasions claimant raised her concerns to the employer about COVID-19, the employer had some non-cashier positions available in the store. These positions were such that the job duties did not involve interacting with customers. However, when claimant raised her concerns to the employer about exposure to COVID-19, she did not request a transfer to a different position.

(8) On or about December 2, 2020, a temporary agency offered claimant a new job. The temporary agency job was not contingent on any background check or test, was to pay \$21 per hour, with claimant working 40 hours per week, and was scheduled by the temporary agency to begin December 14, 2020 and to end after six months.

(9) On December 2, 2020, claimant accepted the temporary agency job and gave notice of her intent to resign from the employer effective December 16, 2020. On December 14, 2020, claimant began working for the temporary agency. She quit working for the employer as planned on December 16, 2020. Although claimant announced her intention to quit only after accepting the temporary agency job, she would have quit on December 16, 2020 in any event because of her concerns about her higher risk of exposure to and complications from COVID-19.

CONCLUSIONS AND REASONS: Order No. 21-UI-179590 is reversed and the matter 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 to accept an offer of other work "has left work with good cause only if the offer is definite and the work is to begin in the shortest length of time as can be deemed reasonable

under the individual circumstances. Furthermore, the offered work must reasonably be expected to continue, and must pay [either] an amount equal to or in excess of the weekly benefit amount; or an amount greater than the work left.” OAR 471-030-0038(5)(a).

At hearing, claimant testified that she quit working for the employer to accept the offer of other work with the temporary agency and because she believed working for the employer placed her at higher risk of exposure to and complications from COVID-19. Transcript at 5, 7-8. As to the former reason for claimant leaving work, the order under review concluded that claimant quit work without good cause because claimant’s work for the temporary agency was temporary and therefore not reasonably expected to continue. Order No. 21-UI-179590 at 3. The record supports this conclusion.

The record evidence shows that the terms of the temporary agency job, such as rate of pay and hours of work per week, were definite and the job offer was not subject to any contingency. The record supports that the December 14, 2020 start date was the shortest length of time for the work to begin, as the job was offered on December 2, 2020 and the record supports the inference that it was not possible for the work to start before December 14, 2020 (given that the temporary agency scheduled the start date of the job). The record also shows that the temporary agency job paid an amount greater than claimant’s work for the employer because the temporary agency job paid \$21 per hour and was a 40 hour per week job, whereas claimant’s work for the employer paid \$13 per hour and claimant typically worked 12 to 16 hours per week. Nevertheless, because the record shows that the temporary agency job was scheduled to end after six months, the work offered by the temporary agency was not reasonably expected to continue. Therefore, under OAR 471-030-0038(5)(a), to the extent claimant quit work for the employer to accept the offer of other work with the temporary agency, she quit without good cause.

Remand is necessary, however, because the record was not sufficiently developed to determine whether claimant quit with good cause to the extent she quit work due to her COVID-19 concerns, a basis for leaving work that the order under review did not address. On remand, the ALJ should inquire why claimant believed her diabetes and hypertension conditions placed her at higher risk of complications from COVID-19 and whether those conditions were long-term or permanent impairments. The ALJ should develop the record as to whether and to what extent claimant’s risk of exposure to COVID-19 posed a danger to claimant’s son who was born premature. The ALJ should also develop the record to determine why claimant did not request a transfer to another position with the employer before she quit. This should include an inquiry into whether claimant knew, or reasonably should have known, that she could have requested a transfer to a position with the employer that did not involve interacting with customers.

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 whether claimant voluntarily quit work with good cause, Order No. 21-UI-179590 is reversed, and this matter is remanded.

DECISION: Order No. 21-UI-179590 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: January 4, 2022

NOTE: The failure of any party to appear at the hearing on remand will not reinstate Order No. 21-UI-179590 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 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 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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