

EMPLOYMENT APPEALS BOARD DECISION
2022-EAB-0379

Reversed & Remanded

PROCEDURAL HISTORY: On July 9, 2021, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant was denied unemployment insurance benefits from June 20, 2021 through September 4, 2021 (weeks 25-21 through 35-21), a school recess period, because she was likely to return to work for the employer after the break if claimant had not quit her job without good cause (decision # 143528). Claimant filed a timely request for hearing. On October 27, 2021, ALJ Frank conducted a hearing at which the employer failed to appear, and on November 4, 2021 issued Order No. 21-UI-179056, affirming decision # 143528. On November 8, 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) Salem Keizer Public Schools (SKPS) employed claimant from May 2017 until April 12, 2021. SKPS is an educational employer.

(2) Claimant worked for SKPS during the 2020-2021 school year in a non-instructional capacity, dispersing disinfectant and driving a school bus. During the weeks that SKPS scheduled claimant to work during the 2020-2021 school year, claimant worked 40 hours per week.

(3) On April 12, 2021, claimant quit work with SKPS to accept an offer of other work with Oregon Child Development Coalition (OCDC). Exhibit 1. On April 14, 2021, claimant began work with OCDC. Claimant's starting wage with OCDC was \$17.33 per hour. Exhibit 1 at 2. In April 2021 and May 2021, claimant earned more than \$175 per week at OCDC. On June 1, 2021, claimant began working on a "stand by" basis for OCDC, working only if OCDC called her needing a bus driver. Audio Record at 22:11. Claimant worked for OCDC on several occasions during the summer when they needed a driver. See Exhibit 1.

(4) On June 1, 2021, claimant filed an initial claim for unemployment insurance benefits, establishing a base year from January 1, 2020 through December 31, 2020 and a weekly benefit amount of \$175.

(5) SKPS was the only employer that reported wages for claimant during claimant's base year.

(6) The recess period dividing the 2020-2021 and 2021-2022 SKPS academic years was June 18, 2021 through September 3, 2021. The recess period approximately corresponds with the period of June 20, 2021 through September 4, 2021 (weeks 25-21 through 35-21) on the Department 2021 claim calendar.

(7) Claimant claimed benefits for the weeks from June 20, 2021 through August 21, 2021 (weeks 25-21 through 33-21).

CONCLUSIONS AND REASONS: Order No. 21-UI-179056 is reversed and this matter remanded for further development of the record.

School Recess. ORS 657.221(1)(a) prohibits benefits based upon services for an educational institution performed by a non-educational employee from being paid "for any week of unemployment that commences during a period between two" terms "if the individual performs such services in the first academic term" and "there is a reasonable assurance that the individual will perform any such services in the second" term. That law applies when the individual claiming benefits "was not unemployed," as defined at ORS 657.100, during the academic term prior to the term break, regardless whether claimant's position observed between-term recess periods. In sum, the conditions that must be met for the between-terms school recess denial to apply to claimant are these: (1) the weeks claimed must commence during a period between two academic terms; (2) claimant must not have been "unemployed" during the term prior to the recess period at issue; and (3) there is reasonable assurance of work during the term following the recess period at issue.

ORS 657.100 provides that an individual is "unemployed" if there are no earnings, or the earnings are less than the individual's weekly benefit amount. OAR 471-030-0074(3) (January 5, 2020) provides:

(3) ORS 657.167 and 657.221 apply when the individual claiming benefits was not unemployed, as defined by ORS 657.100, during the relevant period in the preceding academic year or term. The relevant period is:

(a) The week prior to the holiday or vacation period when the week(s) claimed commenced during a holiday or vacation period.

(b) The prior academic year or term when the week(s) claimed commenced during a customary recess period between academic terms or years, unless there is a specific agreement providing for services between regular, but not successive terms.

(c) The last academic year or term when the week(s) claimed commenced during a recess between non-consecutive academic terms or years when there is a specific agreement providing for services between regular, but not successive terms.

OAR 471-030-0075 (April 29, 2018) states:

(1) The following must be present before determining whether an individual has a contract or reasonable assurance:

(a) There must be an offer of employment, which can be written, oral, or implied. The offer must be made by an individual with authority to offer employment.

(b) The offer of employment during the ensuing academic year or term must be in the same or similar capacity as the service performed during the prior academic year or term. The term 'same or similar capacity' refers to the type of services provided: i.e., a 'professional' capacity as provided by ORS 657.167 or a 'nonprofessional' capacity as provided by ORS 657.221.

(c) The economic conditions of the offer may not be considerably less in the following academic year, term or remainder of a term than the employment in the first year or term. The term 'considerably less' means the employee will not earn at least 90% of the amount, excluding employer paid benefits, than the employee earned in the first academic year or term, or in a corresponding term if the employee does not regularly work successive terms (i.e. the employee works spring term each year).

(2) An individual has a contract to perform services during the ensuing academic year, term, or remainder of a term when there is an enforceable, non-contingent agreement that provides for compensation for an entire academic year or on an annual basis.

(3) An individual has reasonable assurance to perform services during the ensuing academic year, term, or remainder of a term when:

(a) The agreement contains no contingencies within the employer's control. Contingencies within the employer's control include, but are not limited to, the following:

* * *

(B) Decisions on how to allocate available funding;

* * *

(D) Program changes;

(E) Facility availability; and

(F) Offers that allow an employer to retract at their discretion.

(b) The totality of circumstances shows it is highly probable there is a job available for the individual in the following academic year or term. Factors to determine the totality of the circumstances include, but are not limited to:

(A) Funding, including appropriations;

(B) Enrollment;

* * *

(D) The employee's seniority;

(E) Budgeting and assignment practices of the school[.]

* * *

(c) It is highly probable any contingencies not within the employer's control in the offer of employment will be met.

(4) An individual who voluntarily leaves work for good cause, as defined under OAR 471-030-0038, does not have reasonable assurance with the employer from whom the person left work.

Order No. 21-UI-179056 concluded that claimant worked for an educational employer in a non-instructional capacity during her base year, and that claimant was not "unemployed" during the applicable period preceding the summer recess. Order No. 21-UI-179056 at 3. The preponderance of the evidence supports those conclusions. However, the order also concluded that claimant had reasonable assurance of work during the term following the recess period, and therefore was not eligible for benefits during Salem Keiser Public School's (SKPS) summer recess period. Order No. 21-UI-179056 at 4-5. Claimant quit working for SKPS on April 12, 2021 to accept an offer of other work with Oregon Child Development Coalition (OCDC). The order under review did not address whether claimant had good cause to quit work when she did to accept an offer of other work. If claimant left work for good cause, she did not have reasonable assurance. OAR 471-030-0075(4). Further development of the record is necessary regarding whether claimant had reasonable assurance of work with SKPS during the 2021-2022 academic year because the record was not sufficiently developed to determine whether claimant quit work with SKPS with good cause based on an offer of other work, or otherwise.

Voluntary Quit. 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).

The record evidence shows that claimant began work with OCDC two days after she quit working with SKPS, which was, more likely than not, the shortest length of time as can be deemed reasonable under the circumstances. The record also shows that claimant earned more than her weekly benefit amount of \$175 working for OCDC during April and May 2021. However, the record does not show if the offer of work from OCDC was definite or reasonably expected to continue. Therefore, remand is necessary because the record was not sufficiently developed to determine whether claimant quit with good cause to accept an offer of other work under OAR 471-030-0038(5)(a).

Even if claimant quit work without good cause, making OAR 471-030-0075(4) inapplicable to her situation, the record is insufficient to show that claimant had reasonable assurance of work with SKPS during the 2021-2022 academic year. Claimant testified that had she not quit, she would have returned to work at SKPS as a school bus driver during SKPS’s 2021-2022 academic year. Audio Record at 20:35. However, the record must be developed to show what assurances claimant received from SKPS by April in prior years, and what assurances claimant received from SKPS before she quit work on April 12, 2021. The record should also be developed to show other factors regarding reasonable assurance pursuant to OAR 471-030-0075(1), (2), and (3), including but not limited to whether claimant had a contract for the 2021-2022 academic year, contingencies within the employer’s control, and other factors such as SKPS funding, enrollment, and claimant’s seniority status, if relevant.

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 quit working for with SKPS with good cause, or otherwise did not have reasonable assurance of working for SKPS during the 2021-2022 academic year, Order No. 21-UI-179056 is reversed, and this matter is remanded.

DECISION: Order No. 21-UI-179056 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: March 30, 2022

NOTE: The failure of any party to appear at the hearing on remand will not reinstate Order No. 21-UI-179056 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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