

**EMPLOYMENT APPEALS BOARD DECISION**  
**2022-EAB-0816**

*Reversed & Remanded*

**PROCEDURAL HISTORY:** On May 24, 2022, 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 April 17, 2022 (decision # 105316). Claimant filed a timely request for hearing. On July 5, 2022, ALJ Lucas conducted a hearing, and on July 8, 2022 issued Order No. 22-UI-197795, reversing decision # 105316 by concluding that claimant remained in an employment relationship as of the date decision # 105316 was issued and was not disqualified from receiving benefits because there had been no work separation. On July 22, 2022, the employer filed an application for review with the Employment Appeals Board (EAB).

**WRITTEN ARGUMENT:** EAB considered the employer's argument when reaching this decision. Claimant submitted written arguments on August 14, 2022 and August 20, 2022. Claimant's August 14, 2022 argument contained information that was not part of the hearing record, and did not show that factors or circumstances beyond claimant's reasonable control prevented her from offering the information during the hearing. Under ORS 657.275(2) and OAR 471-041-0090 (May 13, 2019), EAB considered only information received into evidence at the hearing when reaching this decision. EAB considered claimant's August 14, 2022 argument to the extent it was based on the record. Because claimant's August 20, 2022 argument was not received by EAB within the time period allowed under OAR 471-041-0080(1) (May 13, 2019), it was not considered by EAB when reaching this decision. OAR 471-041-0080(2)(b).

The parties may offer new information into evidence at the remand hearing, such as a copy of claimant's April 23, 2022 resignation email. 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) Shilo Management Corporation employed claimant beginning on August 8, 2018. Claimant was director of Human Resources (H.R.) for the employer.

(2) At some point prior to February 14, 2022, the employer retained a lawyer to assist with employment law matters. The lawyer worked closely with claimant due to claimant's H.R. and payroll responsibilities. Claimant believed that the lawyer subjected her to sexual harassment. On February 14, 2022, claimant sent an email to the employer alleging that the lawyer had been sexually harassing her. On February 15, 2022, the employer conferred with the lawyer, and although the lawyer denied the allegations of harassment, the employer and the lawyer agreed that the lawyer should resign. The lawyer did so on February 15, 2022.

(3) Claimant believed the lawyer continued to try to contact claimant by dining at the employer's restaurant and/or staying as a guest at the employer's hotel. At some point in February or March 2022, claimant raised with the employer her perception that the lawyer was continuing to try to contact her. The employer's general counsel informed claimant that she may have legal options she could pursue against the lawyer but that the matter was beyond the employer's control.

(4) On or about April 21, 2022, claimant saw the lawyer's wife at the employer's restaurant. Around the same time, claimant perceived that her manager had unfairly criticized her in front of the employer's executive team. Claimant believed there remained a friendly relationship between the lawyer and the employer. Claimant also believed her manager had humiliated her and that the employer had been spreading false rumors about her in retaliation for her sexual harassment allegations.

(5) On Saturday, April 23, 2022, claimant sent the employer an email in which she stated, "I'm officially resigning from [the employer] for continued retaliation attacks on my reputation[.]" Transcript at 21. In the email, claimant described the alleged retaliation claimant experienced, then mentioned a coworker, S.M., and stated that "[S.M.] may contact me Monday to arrange to pick up my things and final check." Transcript at 21.

(6) S.M. instead called claimant on Sunday April 24, 2022. During the conversation, S.M. told claimant that the employer did not have anyone to perform claimant's H.R. functions. Claimant then continued working for the employer on Monday April 25, 2022, Tuesday April 26, 2022, and Wednesday April 27, 2022.

(7) In the afternoon of April 27, 2022, S.M. called claimant and asked her to continue as a "contract employee" handling H.R. matters until the employer had someone else onboard to take over that role. Transcript at 31. Claimant asked S.M. to "be paid out" her accrued vacation time, and S.M. responded that the employer's owner approved of the payout. Transcript at 32. Following the April 27, 2022 conversation, claimant agreed to continue performing her H.R. functions for the employer until someone else took over the role.

(8) In her role with the employer following the April 27, 2022 conversation, the employer directed claimant to train new H.R. hires and what to train them on. Claimant performed the work from home in a home office located in a living area that was not primarily used for business. Claimant and the employer did not enter into a written contract, claimant did not provide warranties for her services, or purchase any liability insurance or performance bonds. Claimant did not provide contracted services for

anyone else at the time, did not engage in any business advertising, or make any significant investment in equipment or otherwise to provide her H.R. services.

(9) On May 6, 2022, the employer informed claimant that they still needed her help, but their arrangement would be ending soon. On May 23, 2022, claimant was hired as an employee by a different company and continued performing H.R. functions for the employer, a couple of hours per day. On June 13, 2022, the employer “just stopped asking questions” and claimant stopped performing any services for the employer. Transcript at 14.

**CONCLUSIONS AND REASIONS:** Order No. 22-UI-197795 is set aside, and this matter remanded for further proceedings consistent with this order.

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). “Work” means “the continuing relationship between an employer and an employee.” OAR 471-030-0038(1)(a). The date an individual is separated from work is the date the employer-employee relationship is severed. OAR 471-030-0038(1)(a)

The order under review concluded that claimant remained in an employment relationship as of the date decision # 105316 was issued (May 24, 2022), and that claimant was therefore not disqualified from receiving benefits because there had been no work separation. Order No. 22-UI-197795 at 2-3. The record as developed does not support this conclusion, and requires further development to determine whether claimant voluntarily quit working for the employer in April 2022, or whether the employment relationship continued until June 13, 2022.

It is possible that claimant quit on April 23, 2022. Claimant announced in an email to the employer on Saturday April 23, 2022 that she was “officially resigning,” but it is unclear whether this was meant to convey an intent to immediately sever the employment relationship, as no effective date was mentioned, and claimant also stated an intent to pick up her “final check” on the Monday to follow. Transcript at 21. In the interim, S.M. called claimant on Sunday April 24, 2022 and, at hearing, claimant testified that she continued working from Monday April 25, 2022 through Wednesday April 27, 2022 because S.M. “said they didn’t have anybody[.]” Transcript at 31. The fact that claimant chose to work for those three days suggests that the employment relationship may have continued at that point, rather than ending on April 23, 2022, but more development of the record is required to determine if it did. On remand, the ALJ should ask questions to determine whether claimant was typically scheduled to work Monday through Friday and, if not, whether she missed scheduled work on April 23 or 24, 2022 after sending her resignation email, but before working on April 25 through 27, 2022. The ALJ should also inquire into what specifically claimant and S.M. discussed during the April 24, 2022 phone call. The ALJ should ask whether claimant and S.M. agreed that claimant would continue working in her current role or whether the two understood that her employment had ended, and that claimant was agreeing to start a new employment relationship beginning Monday April 25, 2022. If the former, the ALJ should ask whether continuing in her current role was intended to be indefinite, or for a few days longer and then ending in a definite work separation.

It is also possible that claimant quit on April 27, 2022. On the afternoon of that day, S.M. called claimant and offered her to continue as a “contract employee” handling H.R. matters until the employer had someone else onboard to take over that role. Transcript at 31. At hearing, claimant testified that S.M. asked her “to do the contract” and claimant replied, “I hadn’t had vacation in almost four years, especially through COVID, and I asked that that be paid out,” which S.M. said the employer had approved. Transcript at 32. This suggests it was possible that the parties regarded the employment relationship as severed and then started anew on April 27 because claimant agreed to perform her H.R. functions for the employer beginning April 27 in exchange for a vacation pay out. However, the employer’s witness testified, inconsistently, that as a response to claimant’s April 23, 2022 resignation email (rather than because of any arrangement made on April 27, 2022), the employer paid claimant “the rest of her payroll” through Sunday April 24, 2022 “and also for her accrued vacation time.” Transcript at 23-24. On remand, the ALJ should inquire into what specifically claimant and S.M. discussed during the conversation in the afternoon of April 27, 2022. The ALJ should ask questions to determine when the employer paid claimant for her last day worked and vacation time, and whether the vacation pay out was tied to the April 23, 2022 resignation email or to S.M.’s offer made on the afternoon of April 27, 2022. The ALJ should inquire whether the employer’s payment to claimant extended only to Sunday April 24, 2022 or also encompassed her work on April 25, 26, and 27, 2022. If the pay did not include the work claimant did on April 25 and 26, 2022, and on April 27, 2022 before claimant and S.M. spoke that afternoon, the ALJ should inquire whether the employer retroactively treated claimant’s work on those days as part of the “contract employee” arrangement that was made on April 27, 2022.

If the record on remand shows that claimant quit working for the employer, the ALJ should ask questions to develop whether claimant’s reasons for quitting relating to alleged employer retaliation were grave, and whether she had no reasonable alternative but to quit when she did.

Finally, to the extent it is relevant on remand, although claimant characterized herself at hearing as a “contract employee” following her April 27, 2022 conversation with S.M., the record evidence raises doubts that claimant ever became an independent contractor as the applicable authorities define that concept.<sup>1</sup> Transcript at 31. The record shows that in her role with the employer after the April 27, 2022 conversation, the employer directed claimant to train new H.R. hires and what to train them on. Furthermore, claimant performed the work from home in a home office located in a living area that was not primarily used for business. Claimant and the employer did not enter into a written contract, and claimant did not provide warranties for her services or purchase any liability insurance or performance bonds. Claimant did not provide contracted services for anyone else at the time, did not engage in any business advertising, or make any significant investment in equipment or otherwise to provide her H.R. services. This evidence calls into question that claimant became an independent contractor beginning April 27, 2022. Nevertheless, on remand, the ALJ should ask any questions necessary to develop the record on this issue, if the record on remand shows it is material.

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 claimant voluntarily quit working

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<sup>1</sup> See ORS 657.040(1); ORS 670.600(2) & (3); OAR 471-031-0181(3) (February 1, 2007).

for the employer with or without good cause in April 2022, or whether the employment relationship continued until June 13, 2022, Order No. 22-UI-197795 is reversed, and this matter is remanded.

**DECISION:** Order No. 22-UI-197795 is set aside, and this matter remanded for further proceedings consistent with this order.

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

**DATE of Service:** October 27, 2022

**NOTE:** The failure of any party to appear at the hearing on remand will not reinstate Order No. 22-UI-197795 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**

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**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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