

EMPLOYMENT APPEALS BOARD DECISION
2022-EAB-1170

Reversed & Remanded

PROCEDURAL HISTORY: On May 25, 2022, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant voluntarily quit work without good cause and was disqualified from receiving unemployment insurance benefits effective May 1, 2022 (decision # 134245). Claimant filed a timely request for hearing. On November 10, 2022, ALJ Frank conducted a hearing, and on November 17, 2022 issued Order No. 22-UI-207661, affirming decision # 134245. On November 28, 2022, 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 as required by OAR 471-041-0080(2)(a) (May 13, 2019).

FINDINGS OF FACT: (1) Mt. Scott Care Home employed claimant as a cook at a residential facility from August 16, 2021 until May 1, 2022.

(2) Prior to March 2, 2022, claimant typically worked 21 to 24 hours per week at a wage of \$16.00 per hour. During this time, he had concerns about being left alone to care for residents without being qualified to do so, observing other employees using marijuana on the premises, and residents having access to dangerous items that could be used to harm themselves or others.

(3) On March 3, 2022, claimant requested and was placed on indefinite unpaid medical leave because he was unable to perform his job duties due to a foot injury that required surgery. Claimant was instructed by his doctor to keep off the foot entirely for a period of time, then wear a medical boot occasionally thereafter. Claimant did not perform work for the employer again.

(4) In late April 2022, claimant was offered a receptionist job by another employer, contingent on passing a drug test and background check. The position offered 15 hours per week at a wage of \$14.75 per hour, and was to start on May 5, 2022. Claimant sought the job because he could perform the duties despite his physical limitations.

(5) On May 1, 2022, claimant notified the employer that he was resigning, effective immediately. Claimant had not yet submitted to the drug test for the new job.

(6) On May 5, 2022, claimant began the new job as expected.

CONCLUSIONS AND REASONS: Order No. 22-UI-207661 is set aside and this 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 with a permanent or long-term “physical or mental impairment” as defined at 29 CFR §1630.2(h) who quits work must show that no reasonable and prudent person with the characteristics and qualities of an individual with such an impairment 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). In pertinent part, the Department does not consider a job offer to be definite “if [it] is contingent upon . . . [such things as] passing a drug test, background check, credit check, and/or an employer receiving a contract.” Oregon Employment Department, UI Benefit Manual §442 (Rev. 04/01/10).

The order under review concluded that claimant quit work without good cause because he quit to accept another offer of work that did not meet the criteria set forth in OAR 471-030-0038(5)(a). Order No. 22-UI-207661 at 3. However, the order did not consider that claimant had additional reasons for quitting when he did; did not assess all of his reasons for quitting under the general good cause analysis required by OAR 471-030-0038(4); and did not determine whether claimant had a permanent or long-term physical impairment or apply the impairment standard to that analysis if he had one. Further development of the record is needed to address these considerations.

Claimant began an indefinite medical leave beginning March 3, 2022, because he was unable to perform his job duties due to a foot injury. Claimant sought other work, at least in part, because this condition physically limited the types of work tasks he could perform. The new job offer he received was contingent on a background check and drug test. It is unclear when the background check was completed, but claimant apparently submitted to the drug test sometime between May 1, 2022, and May 5, 2022. Transcript at 8. Therefore, the job offer could not be considered “definite” at the time of claimant’s resignation on May 1, 2022. To the extent that claimant quit his job at that time for that reason, he did not have good cause under OAR 471-030-0038(5)(a).

Nonetheless, claimant may have had good cause to quit under OAR 471-030-0038(4) if claimant's physical limitations and the employer's inability to accommodate them would likely have continued to prevent claimant from performing work for the employer. The record is unclear as to whether claimant's condition qualified as a "permanent or long-term" impairment, however. It is also unclear whether the employer would have been able to modify claimant's work duties to accommodate his physical limitations. Claimant testified that there was no modified work available from the employer. Transcript at 4-5. However, the employer's witness testified they had no request for modified duty and no information about claimant's condition after March 2, 2022. Transcript at 19-20. If there was no reasonable expectation claimant could return to work for the employer, either by regaining his ability to perform his customary duties or by the employer modifying claimant's duties, remaining on unpaid medical leave for any length of time would not have constituted a reasonable alternative to quitting when he did. *See Sothras v. Employment Division*, 48 Or App 69, 616 P2d 524 (1980) (despite being on an unpaid leave of absence for more than a month claimant remained unable to return to work; the court held that "a protracted, unpaid leave of absence is not a 'reasonable alternative' to leaving work and being unemployed; indeed it is not an alternative at all") Further development of the record is therefore needed to determine if claimant's condition met the durational requirements to be considered a physical impairment under 29 CFR §1630.2(h) and whether claimant would have been able to return to work for the employer, with or without modification to his duties.

Further, claimant alleged that he quit on May 1, 2022, rather than waiting for the new offer of employment to become definite, because of concerns over working conditions he felt were unsafe. Transcript at 9-10. If claimant chose not to continue the employment relationship for an additional period of time because of these concerns this reason must be evaluated for good cause under OAR 471-030-0038(4). The record does not show that the parties had a full opportunity to present evidence with regard to claimant's concerns, and the order under review did not assess whether they constituted a situation of such gravity that claimant had no reasonable alternative but to leave work when he did. Additional development of the record is therefore required.

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 left work with good cause, Order No. 22-UI-207661 is reversed and this matter is remanded.

DECISION: Order No. 22-UI-207661 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: January 27, 2023

NOTE: The failure of any party to appear at the hearing on remand will not reinstate Order No. 22-UI-207661 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 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 ໄດ້ໂດຍປະຕິບັດຕາມຄຳແນະນຳທີ່ບອກໄວ້ຢູ່ຕອນທ້າຍຂອງຄຳຕັດສິນນີ້.

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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