

EMPLOYMENT APPEALS BOARD DECISION
2022-EAB-1216

Reversed
No Disqualification

PROCEDURAL HISTORY: On November 1, 2021, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant voluntarily quit work without good cause and was therefore disqualified from receiving unemployment insurance benefits effective May 17, 2020 (decision # 111911). Claimant filed a timely request for hearing. On November 15, 2022, ALJ D. Lee conducted a hearing, and on November 23, 2022, issued Order No. 22-UI-208186, modifying¹ decision # 111911 by concluding that claimant quit work without good cause and was disqualified from receiving benefits effective April 19, 2020. On December 7, 2022, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Omar's Inc. employed claimant as a bartender from March 17, 2008 until April 19, 2020.

(2) Claimant received training as a bartender and worked as a bartender for over 12 years. Claimant's hourly wage from the employer was \$11.75. In 2019, claimant earned more in tips than he earned from his hourly wage. Exhibit 1 at 17.

(3) On March 16, 2020, the employer's owner notified claimant that the employer would be temporarily ceasing all operations because of a mandatory stay-at-home order due to the COVID-19 pandemic. Transcript at 6. As a result, the employer did not have work for claimant, and did not know when the business would be able to reopen.

(4) On April 19, 2020, the owner texted claimant to determine if he was willing to return to work full time for the employer in May 2020. Claimant asked if the bar was reopening, and the owner stated that it was not. Claimant stated that he "couldn't justify" returning to the employer because of the decrease in pay. Transcript at 9-11. The owner did not specify the rate of pay claimant would receive, but claimant's

¹ Although Order No. 22-UI-208186 stated that it affirmed decision # 111911, it modified that decision by changing the effective date of the disqualification from May 17, 2020 to April 19, 2020. Order No. 22-UI-208186 at 4.

text message calculated his weekly rate using his prior hourly wage, did not include tip income, and stated, “I have relied on tips for too long.” Exhibit 1 at 11.

(5) On April 21, 2020, claimant texted the owner to inquire into whether the bar would be reopening on May 15, 2020.

(6) In May 2020, the employer’s establishment remained closed to customers. The employer remodeled their establishment and had employees assist with demolition, remodeling and deep cleaning the establishment. Throughout this month, claimant periodically texted the owner to determine when the bar would be reopening.

(7) On May 7, 2020, claimant texted the owner to inquire if he could work as a delivery driver. The owner responded that he might be able to, but she would need to check with the workers who had been willing to come back on April 19, 2020 first. Transcript at 31-32.

(8) On May 30, 2020, the owner texted claimant “I will not be bringing you back. There is no need to keep checking in.” Transcript at 25.

CONCLUSION AND REASONS: Claimant quit work with good cause.

Nature of 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). “Work” means “the continuing relationship between an employer and an employee.” OAR 471-030-0038(1)(a) (September 22, 2020).

The record shows that the work separation was a voluntary leaving that occurred on April 19, 2020. On that date, the employer’s owner sent claimant a text message inquiring if he was willing to work for the employer in May 2020. Claimant responded to this text by asking if the bar was reopening. When the owner stated that it was not, claimant responded by stating that he “couldn’t justify” returning. Transcript at 11. While the record shows that claimant continued to text the employer regarding returning to work until the owner specifically stated she would not be bringing him back, this occurred after claimant had shown that he was unwilling to continue to work for an additional period of time by rejecting the offer of work on April 19, 2020. The record therefore shows that the employer was willing to allow claimant to work for an additional period of time, but that claimant was not willing to do so. Therefore, the work separation was a voluntary leaving that occurred on April 19, 2020.

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), leaving work without good cause includes leaving suitable work to seek other work. OAR 471-030-0038(5)(b)(A). 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.

The order under review found that claimant's "circumstance was not so grave that a reasonable and prudent person could have had no reasonable alternative but to quit." Order No. 22-UI-208186 at 4. The record does not support this conclusion.

To assess whether claimant quit work for a reason of such gravity that he had no reasonable alternative but to do so, it is necessary to consider whether the work offered to him on April 19, 2020 was suitable work. The factors to consider when determining whether work is suitable include, among other factors, "the degree of risk involved to the health, safety and morals of the individual, the physical fitness and prior training, experience and prior earnings of the individual, the length of unemployment and prospects for securing local work in the customary occupation of the individual and the distance of the available work from the residence of the individual." ORS 657.190.

Though claimant and the owner did not discuss the specific duties that claimant would be performing, the record shows that the employer was looking for employees to assist with demolition, remodeling and deep cleaning the employer's establishment. The record does not suggest that this work posed a significant risk to claimant's health, safety, and morals, nor does it suggest that claimant lacked the physical fitness to perform the work. The location of the work was the same as claimant's previous position, therefore the record also shows that the distance from claimant's residence did not make the work unsuitable.

However, claimant's prior training and experience were in bartending, which aside from cleaning the bar area, were not related to construction work or deep cleaning. Claimant trained as a bartender and worked in this position for over 12 years. While the owner testified that claimant was required to do cleaning in his position as a bartender, the record does not show that the offered work was the same type of cleaning a bartender would undertake, rather than the type of deep cleaning needed during a demolition and remodel. Transcript at 41. This was different from his prior role and would not utilize the training and experience that claimant had developed tending bar. Therefore, this factor weighs in favor of the deep cleaning work being unsuitable.

As to prior earnings, claimant and the employer did not discuss the pay rate that claimant would receive as a deep cleaner but it is reasonable to conclude that he would make the same hourly wage that he made prior to the establishment's closure. The owner did not show that she would be raising claimant's hourly rate. Additionally, when claimant texted the owner calculating his weekly pay using his prior hourly rate, the owner did not correct him or respond that she would be changing his hourly rate. Exhibit 1 at 11. Given that the majority of claimant's income from 2019 came from tips, and that the bar would remain closed to customers during the remodel, it is reasonable to conclude that claimant would have earned substantially less, even half as much, as a deep cleaner. Therefore, the lower potential earnings also weighs in favor of the work being unsuitable. Weighing the suitability factors, the preponderance of the evidence shows that the deep cleaning work was not suitable based on claimant's prior training, experience, and earnings.

Given that the deep cleaning work was not suitable for claimant, claimant quit work with good cause under OAR 471-030-0038(4) because his reason for quitting work was of such gravity that he had no

reasonable alternative but to leave work when he did. Claimant faced a grave situation because he was only permitted to work in a position that was different from his training and prior longstanding work as a bartender, and that likely would have paid him substantially less than his prior earnings. On these facts, a reasonable and prudent person of normal sensitivity, exercising ordinary common sense would quit work rather than accept unsuitable work.

Claimant did not have reasonable alternatives because the owner of the employer would not allow claimant to return to suitable work if he did not first return to perform the unsuitable deep cleaning work. The record shows that claimant continued to text the owner regarding other work, but the owner would not allow him to return to these positions, because he refused to do the unsuitable work on April 19, 2020. Though claimant's other contacts occurred after the work separation, they show that the owner would not allow claimant to perform work other than the unsuitable deep cleaning work. Further, because claimant was communicating with the owner of the employer, and the owner was insistent that the only work available was unsuitable deep cleaning work, the record shows that requesting suitable work from a different agent of the employer would have been futile. Therefore, claimant faced a grave situation and had no reasonable alternative but to quit. Claimant thus established that he voluntarily left work with good cause, and is not disqualified from receiving benefits because of the work separation.

DECISION: Order No. 22-UI-208186 is set aside, as outlined above.

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

DATE of Service: February 10, 2023

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.

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.

Please help us improve our service by completing an online customer service survey. To complete the survey, please go to <https://www.surveygizmo.com/s3/5552642/EAB-Customer-Service-Survey>. You can access the survey using a computer, tablet, or smartphone. If you are unable to complete the survey online and need a paper copy of the survey, please contact our office.



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

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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