EO: 200
BYE: 202110

State of Oregon
Employment Appeals Board
875 Union St. N.E.
Salem, OR 97311

124
VQ 005.00

EMPLOYMENT APPEALS BOARD DECISION
2022-EAB-1249

Affirmed
Request for Hearing Allowed
Disqualification

PROCEDURAL HISTORY: On April 29, 2022, 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 January 10, 2021 (decision # 65119). On May 19, 2022, decision # 65119 became final without claimant having filed a request for hearing. On October 3, 2022, claimant filed a late request for hearing on decision # 65119. On November 30, 2022, the Department served notice of an administrative decision which vacated and replaced decision # 65119, and similarly concluded that claimant voluntarily quit work without good cause and was therefore disqualified from receiving benefits effective January 10, 2021 (decision # 135643). On December 5, 2022, ALJ Lewis conducted a hearing, and on December 9, 2022 issued Order No. 22-UI-209434, allowing claimant's late request for hearing and affirming decision # 135643.[1] On December 18, 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) Ghost Ship Inc. employed claimant as a bartender at one of their taverns from approximately August 2019 through January 14, 2021.

[1] The order under review stated that it modified the administrative decision mailed April 29, 2022 (decision # 65119). Order No. 22-UI-209434 at 6. However, that administrative decision was no longer in force after having been replaced by decision # 135643 prior to the hearing, and claimant's request for hearing on decision # 65119 was therefore moot. Because Order No. 22-UI-209434 concluded that claimant was disqualified from receiving benefits effective January 10, 2021 based on the work separation, it affirmed the conclusions of decision # 135643.

(2) Prior to January 14, 2021, claimant was scheduled to work Tuesday through Thursday of each week, but could seek additional shifts through the employer's scheduling app. The employer operated several other similar establishments nearby at which the claimant could request to work additional shifts.

(3) On Thursday, January 14, 2021, claimant's manager, who had just begun working at the establishment, told claimant that he would no longer be working on Thursdays, effective the following week, so that the manager could have that shift. The manager intended to make an alternate shift available to claimant but the details had not been determined. Claimant became upset because he felt it was his most lucrative shift, but did not complain to superior members of management about this. Instead, he yelled at the manager using foul language. Claimant then left work without seeking permission at 5:36 p.m., though he was scheduled to work until 11:30 p.m. Claimant intended to work his next scheduled shift on Tuesday, January 19, 2021.

(4) On Saturday, January 16, 2021, the employer texted claimant, "We need your address to send a check today." Transcript at 44. Claimant responded with his address and received a final paycheck.

(5) Because the employer had not heard from claimant after he left his shift early on January 14, 2021, the employer assumed claimant had quit, prompting them to prepare claimant's final check and send the text message. As claimant intended to continue working for the employer, claimant understood the text to mean that the employer had discharged him for his conduct on January 14, 2021. Neither party attempted to communicate with the other about the status of claimant's employment before or after the text message. Claimant did not work for the employer thereafter.

(6) On April 29, 2022, the Department mailed decision # 65119 to claimant's address on file with the Department. Decision # 65119 stated, "You have the right to appeal this decision if you do not believe it is correct. Your request for appeal must be received no later than May 19, 2022." Exhibit 1 at 4.

(7) On May 19, 2022, decision # 65119 became final without claimant having filed a request for hearing.

(8) On October 3, 2022, claimant filed a late request for hearing on decision # 65119.

(9) On November 30, 2022, the Department issued decision # 135643, which invalidated decision # 65119, but was otherwise identical in substance to decision # 65119. Claimant was given 20 days from November 30, 2022, to file a timely request for hearing on decision # 135643.

(10) On December 5, 2022, claimant participated in a hearing in which the merits of decision # 135643 were decided.

CONCLUSIONS AND REASONS: Claimant's request for hearing was timely. Claimant voluntarily quit work without good cause.

Late request for hearing. ORS 657.269 provides that the Department's decisions become final unless a party files a request for hearing within 20 days after the date the decision is mailed. ORS 657.875 provides that the 20-day deadline may be extended a "reasonable time" upon a showing of "good cause." OAR 471-040-0010 (February 10, 2012) provides that "good cause" includes factors beyond an

applicant's reasonable control or an excusable mistake, and defines "reasonable time" as seven days after those factors ceased to exist.

The request for hearing on decision # 65119 was due by May 19, 2022. Because claimant did not file his request for hearing until October 3, 2022, the request was late. However, the Department vacated decision # 65119 and replaced it with decision # 135643 prior to the scheduled hearing. Claimant's request for hearing on decision # 65119 was therefore moot. Nevertheless, the Office of Administrative Hearings (OAH) conducted a hearing on the merits of decision # 135643, which was substantially identical to the merits of decision # 65119. The record shows the parties had a full and fair opportunity to be heard on the merits of decision # 135643. Under the circumstances, claimant's participation in that hearing, which took place within 20 days of the issuance of decision # 135643, is properly construed as a timely request for hearing on decision # 135643. Therefore, claimant's request for hearing is allowed.

Nature of work separation. If an 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 parties disputed the nature of the work separation. On January 14, 2021, claimant left his shift without authorization approximately six hours before it was scheduled to end. He yelled at his manager using foul language just prior to leaving. Though claimant testified he wished to maintain his job and intended to report for his next shift, claimant did not contact the employer to explain his actions of January 14, 2021. The employer interpreted these actions and lack of communication from claimant to mean that he had quit the employment by walking out on January 14, 2021. The January 16, 2021 text message the employer sent to claimant asking for an address to send "a check" was vague as to claimant's employment status. It caused claimant to believe he had been discharged, since he had not desired to quit, but understood his actions might have caused the employer to discharge him. Due to a lack of communication, each party thought the other had severed the employment relationship on or before January 16, 2021. However, since claimant should have been aware that walking out on a shift under such circumstances could reasonably be construed as a resignation, it was within claimant's control to preserve the employment relationship by notifying the employer that his intention was to remain employed. His response to the January 16, 2021 text, in which he merely provided his address rather than questioned whether he was being discharged, or stated a desire to continue working for the employer, further supports the conclusion that claimant was not willing to continue the employment relationship. Therefore, the preponderance of the evidence shows that, more likely than not, the separation is properly characterized as a voluntary leaving which occurred on January 14, 2021.

Voluntary leaving. 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). "[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 leaves work due to a reduction in hours "has left work without good cause unless continuing to work substantially interferes with return to full time work or unless the cost of working exceeds the amount of remuneration received." OAR 471-030-0038(5)(e). OAR 471-030-0038(5)(d) provides, in pertinent part, " If an individual leaves work due to a reduction in the rate of pay, the individual has left work without good cause unless the newly reduced rate of pay is ten percent or more below the median rate of pay for similar work in the individual's normal labor market area."

> * * *
>
> (A) This section applies only when the employer reduces the rate of pay for the position the individual holds. It does not apply when an employee's earnings are reduced as a result of transfer, demotion or reassignment.
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> * * *

Claimant's mistaken belief that he had been discharged by the employer's January 16, 2021 text did not constitute a reason of such gravity that claimant had no reasonable alternative but to quit. A communication from an employer that they were sending an employee what was likely their final check, without explanation, would have caused a reasonable and prudent person of normal sensitivity, exercising ordinary common sense, to advise the employer of their intention to keep working and clarify what was meant by the text message, instead of merely replying with the address to which the check should be sent. By his conduct on January 14, 2021, claimant set in motion the series of events leading to the text message and the uncertainty of both parties about the state of the employment relationship. It was therefore incumbent on claimant to resolve this uncertainty, and had he done so, more likely than not, the employer would have allowed him to continue working. Claimant therefore did not face a grave situation to the extent he failed to preserve the employment relationship over this uncertainty. Similarly, the situation claimant faced which prompted his actions on January 14, 2021, and led to the uncertainty regarding his employment, was not a situation of such gravity that he had no reasonable alternative but to quit. Claimant yelled at his manager using foul language and walked out of an eight hour shift after approximately two hours, without authorization, then failed to advise the employer that he did not intend to abandon his job by doing this. Claimant acted out of anger because his manager had told him that she would be taking over his Thursday shifts, which claimant felt were his most lucrative for tips. While claimant was upset about the fairness of a manager with less seniority than claimant unilaterally taking what he considered to be his most lucrative shift, and claimant's actions in response then caused uncertainty over his employment status, a reasonable and prudent person would not have determined that they had no reasonable alternative but to quit under these circumstances.

Claimant testified that when he was informed that his Thursday shift was being taken away, the manager "was ambiguous about what day [claimant] would get in return." Transcript at 27. The expectation that claimant would continue to be offered similar work hours, but on a different day, did not establish a reduction in pay under OAR 471-030-0038(5)(d)(A), because any potential change in his earnings from tips was merely speculative since claimant did not know the details of the new schedule. Similarly, because the employer expected to change only the day claimant worked, not necessarily the overall

amount of hours offered, claimant did not suffer a reduction in hours as contemplated by OAR 471-030-0038(5)(e). Even if some reduction of hours occurred in the new schedule, claimant has not established that his cost of working under the new schedule would have exceeded his earnings.

Even if the situation claimant faced was grave, claimant had reasonable alternatives to quitting. At a minimum, claimant could have attempted to make known his desire to keep working and determine whether the employer was discharging him or incorrectly thought he had resigned upon receiving the January 16, 2021 text from the employer. Instead of walking out on his shift, claimant could have finished discussing with the manager what shift she was offering him to replace the Thursday shift. He also could have appealed to his manager's superiors to attempt to resolve the conflict over the schedule. If claimant remained dissatisfied, he could have used the employer's app to attempt to secure more work hours, or asked the employer for a Thursday shift in one of their other establishments. Claimant did not avail himself of these alternatives, and therefore failed to seek reasonable alternatives to quitting.

For the above reasons, claimant voluntarily quit without good cause, and therefore is disqualified from receiving benefits effective January 10, 2021.

DECISION: Order No. 22-UI-209434 is affirmed.

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

DATE of Service: February 13, 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.

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 – 本判决会影响您的失业救济金。 如果您不明白本判决， 请立即联系就业上诉委员会。 如果您不同意此判决，您可以按照该判决结尾所写的说明，向俄勒冈州上诉法院提出司法复审申请。

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 فورا، 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 دستورالعمل موجود در پایان آن، از دادگاه تجدید نظر اورگان درخواست تجدید نظر کنید.

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