

EMPLOYMENT APPEALS BOARD DECISION
2023-EAB-0012

Reversed
No Disqualification

PROCEDURAL HISTORY: On October 28, 2022, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant voluntarily quit working for the employer without good cause and was disqualified from receiving unemployment insurance benefits effective September 25, 2022 (decision # 85020). Claimant filed a timely request for hearing. On December 6, 2022, ALJ Sachet-Rung conducted a hearing at which the employer failed to appear, and on December 12, 2022 issued Order No. 22-UI-209580, affirming decision # 85020. On December 21, 2022, claimant filed an application for review with the Employment Appeals Board (EAB).

WRITTEN ARGUMENT: Claimant did not declare 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). The argument also 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 as required by OAR 471-041-0090 (May 13, 2019). EAB considered only information received into evidence at the hearing when reaching this decision. *See* ORS 657.275(2).

FINDINGS OF FACT: (1) Better Real Estate, LLC employed claimant as a real estate agent from October 21, 2021 until September 29, 2022.

(2) The employer paid claimant a yearly salary of \$77,000. The employer paid for all expenses needed to generate the real estate leads they provided to their employees, which was a standard arrangement in the industry for salaried real estate agents.

(3) On September 2, 2022, the employer informed claimant that they were making several changes to the terms of her employment. Claimant would be required to call a minimum of 40 potential customers per day. Claimant would also be responsible for paying any expenses to generate leads for the employer's business. Effective November 1, 2022, claimant's yearly salary would be reduced to \$45,000, without any corresponding reduction in work hours or duties.

(4) Claimant felt it was impossible to meet the new minimum call requirements because she only had contact information for approximately 120 potential customers. She would therefore be forced under the new policy to call the same potential customers several times per week to solicit business, even if they had already declined the employer's services that week. Claimant was dissatisfied with having to pay the employer's lead generation expenses and with having her salary substantially reduced.

(5) On September 28, 2022, claimant submitted her resignation because of the announced changes, and offered to work a two-week notice period.

(6) On September 29, 2022, the employer and claimant agreed that claimant would be paid for the notice period without needing to work it, and her resignation took immediate effect.

CONCLUSIONS AND REASONS: Claimant quit work with good cause.

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. 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. The median rate of pay in the individual's labor market shall be determined by employees of the Employment Department adjudicating office using available research data compiled by the department.

* * *

(D) If the Employment Department cannot determine the median rate of pay, the provisions of OAR 471-030-0038(4) apply.

The order under review concluded that claimant quit without good cause because she was dissatisfied with a reduction in pay, and the reduced rate of pay was not at least ten percent below the median rate of pay for similar work in claimant's normal labor market area as determined by the Department. Order No. 22-UI-209580 at 3. However, the record does not support these conclusions.

Claimant quit working for the employer because the employer announced changes to the terms of her employment. Claimant was most concerned about a reduction in her yearly salary from \$77,000 to \$45,000, a difference of more than 41 percent, at the same time her workload increased. The Department did not appear at the hearing or introduce into evidence their determination of the median rate of pay for

similar work in claimant's normal labor market area.¹ Thus, the record does not show that the Department could determine the median rate of pay as required under OAR 471-030-0038(5). Accordingly, OAR 471-030-0038(4) must be used to determine if the salary reduction constituted good cause for quitting. A reasonable and prudent person, of normal sensitivity, exercising ordinary common sense, would leave work if told they were expected to continue performing at least the same amount of work for 41 percent less pay.

In addition to the salary reduction, the employer informed claimant that she would be responsible for paying the costs of new customer leads, which the employer had previously paid. It is reasonable to infer from the record that obtaining customer leads is an essential part of a real estate agency's business. It may be logical and appropriate for a real estate agent in an independent contractor relationship with a real estate agency to bear the risk of this expense because it can potentially increase the agent's overall customer base and compensation. However, claimant was a salaried employee, and any additional profit generated by this expense would have accrued only to the employer, since the record does not show that claimant was paid any commission. Therefore, a reasonable and prudent salaried real estate agent would find it unreasonable for the employer to shift responsibility for such an expense to an employee who is not considered an independent contractor as defined by ORS 670.600. The employer's directive that claimant begin to pay this expense, coupled with the substantial reduction in salary, compounded the gravity of the situation such that a reasonable and prudent person would have left work rather than assent to paying such an expense.

Further, the employer's directive that claimant make 40 calls per day to prospective customers, without providing that number of leads for claimant to call, made claimant's job impractical, if not impossible. Claimant was left with the prospect of either disobeying the employer or calling the same uninterested potential customers every few days. Alienating the customers in this way likely would have negatively affected the employer's business, as well as claimant's prospects of future work in the real estate industry. Therefore, this directive also contributed to the gravity of the situation claimant faced which caused her to quit work.

A reasonable and prudent person would have concluded that the combined effect of these changes were a reason of such gravity that they had no reasonable alternative but to leave work. The record does not demonstrate that claimant had an opportunity to negotiate or dispute the changes to the terms of her employment imposed by the employer. Claimant therefore had no control over the reduction in her salary, and merely complaining to the employer about it would likely have been futile. Similarly, claimant's objections to having to make excessive and repetitive calls to customers who were uninterested in the employer's services, or to paying for new customer leads herself, would have been futile. An employee is expected to follow the instructions of the employer, and they would objectively fear that refusal to perform their work as instructed would constitute insubordination and subject them to dismissal for misconduct, making such a refusal an unreasonable alternative to quitting. *See Campbell v. Employment Department*, 245 Or. App. 573, 581 (Or. Ct. App. 2011). Accordingly, claimant voluntarily quit work for a reason of such gravity that she had no reasonable alternative but to leave work.

¹ The order under review took official notice that \$21.14 was the "median wage" for a real estate agent in Portland, but failed to note the source of this information beyond being "contained in the Employment Department's records." Order No. 22-UI-209580 at 2. Because OAR 471-030-0038(5)(d) requires that an employee of the adjudicating office of the Department determine the median rate of pay, this is not a judicially cognizable fact from which official notice may be taken pursuant to OAR 471-040-0025(7).

Therefore, claimant quit work with good cause and is not disqualified from receiving unemployment insurance benefits based on the work separation.

DECISION: Order No. 22-UI-209580 is set aside, as outlined above.

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

DATE of Service: February 24, 2023

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.

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.

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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

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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