

EMPLOYMENT APPEALS BOARD DECISION
2023-EAB-1182

Late Application for Review Allowed
Affirmed – Request to Reopen Allowed, Disqualification

PROCEDURAL HISTORY: On September 27, 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 February 23, 2020 (decision # 133603). Claimant filed a timely request for hearing. On January 4, 2023, ALJ Lewis conducted a hearing at which the employer failed to appear. On January 5, 2023, ALJ Lewis issued Order No. 23-UI-211672, reversing decision # 133603 by concluding that the employer discharged claimant, but not for misconduct, and claimant was not disqualified from receiving benefits based on the work separation. On January 25, 2023, the employer filed a timely request to reopen the January 4, 2023 hearing.

On September 25, 2023, ALJ Kaneshiro conducted a hearing, and on September 26, 2023 issued Order No. 23-UI-236803, allowing the employer's request to reopen, cancelling Order No. 23-UI-211672, and modifying decision # 133603 by concluding that claimant voluntarily quit work without good cause and was disqualified from receiving benefits effective March 1, 2020.¹ On October 16, 2023, Order No. 23-UI-236803 became final without claimant having filed an application for review with the Employment Appeals Board (EAB). On October 23, 2023, claimant filed a late application for review with EAB.

EVIDENTIARY MATTER: EAB has considered additional evidence when reaching this decision under OAR 471-041-0090(1) (May 13, 2019). The additional evidence is claimant's written statement subsequently offered by claimant's attorney to be included with claimant's late application for review, which described the circumstances that prevented a timely filing. The written statement has been marked

¹ Although Order No. 23-UI-236803 stated that it affirmed decision # 133603, it modified that decision by changing the effective date of the disqualification from February 23, 2020 to March 1, 2020. Order No. 23-UI-236803 at 6-7.

as EAB Exhibit 1, and a copy provided to the parties with this decision. Any party that objects to our admitting EAB Exhibit 1 must submit such objection to this office in writing, setting forth the basis of the objection in writing, within ten days of our mailing this decision. OAR 471-041-0090(2). Unless such objection is received and sustained, the exhibit will remain in the record.

Based on a *de novo* review of the entire record in this case, and pursuant to ORS 657.275(2), the portion of the order under review allowing the employer's request to reopen is **adopted**. The remainder of this decision relates to claimant's late application for review and work separation from the employer.

FINDINGS OF FACT: (1) Tony White Insurance Agency, Inc., a business that offered insurance products through State Farm Insurance Company, employed claimant as an office team member from February 27, 2020 until March 1, 2020.

(2) On or about Wednesday February 26, 2020, claimant heard through a friend that the employer might be hiring. Claimant inquired with the employer's owner via email, the parties arranged for claimant to interview, and an interview took place during the afternoon of February 26, 2020. During the interview, the owner explained that the job would likely pay \$12 per hour with 20 to 30 hours of work per week. The owner stated that the job entailed work at the front desk such as answering phones, filing claims, and billing, and could progress to the employee becoming a licensed insurance agent. The owner explained that he did not "require somebody to come in and be an agent right off the bat" but if licensing was pursued, the owner expected the employee to pay for the licensing exam, with the owner reimbursing that cost after the employee passed the test. September 25, 2023 Transcript at 46. At the conclusion of the interview, the employer offered claimant the job and claimant stated that she wanted to think about it.

(3) On February 27, 2020, at 7:18 a.m., claimant emailed the owner that she would not be able to accept the position at \$12 per hour for 20 to 30 hours per week of work. About ten minutes later, the owner emailed claimant back and inquired whether it would make a difference if he paid claimant \$14 per hour for full-time work. Claimant replied, "Yes that would be a lot better" and asked if that was the employer's offer. Exhibit 2 at 4. The owner responded that he would start claimant at \$14 per hour, stated "if you need full time I can work with that" and asked "Does that work?" Exhibit 2 at 4. Claimant responded, "I will see you soon and we can talk this through . . . I was a little discouraged when I saw the [\$12] wage." Exhibit 2 at 5. The employer replied, "Sounds good." Exhibit 2 at 5.

(4) Thereafter, at about 9:00 a.m. on February 27, 2020, claimant arrived at the employer's office. Claimant and the owner discussed increasing the pay from \$12 per hour to \$14 per hour and providing claimant with full-time hours. Claimant completed a W-4 form, provided a copy of her driver's license, and signed an acknowledgement that she had no felony convictions on her record. The employer entered claimant's information into their payroll system and began filling out an I-9 form for claimant when claimant discovered she did not have her Social Security card. Claimant stated she would look for the card at home that day during lunch.

(5) Claimant then spent three hours shadowing the employer's front desk worker, taking notes and becoming familiar with the office's computer programs. Claimant considered her activities in the office on February 27, 2020 to be a working interview and she initially intended to decline to be paid. However, claimant later decided that she would accept payment. At noon on February 27, 2020,

claimant went home to look for her Social Security card. The owner and claimant agreed to meet again at the office on Monday March 2, 2020 at 9:00 a.m.

(6) That afternoon, claimant emailed the owner that she had not yet found the Social Security card. The owner responded that if claimant did not make it back in the office that day, he would see her on Monday March 2, 2020. The owner did not intend for claimant to work on Friday February 28, 2023, because the owner was going to be out of the office that day.

(7) On February 28, 2023, claimant went to the employer's office and dropped off a copy of her Social Security card with the office staff.

(8) At some point over the weekend of February 28 and 29, 2020, a different employer offered claimant work. The work offered by the different employer involved social work, an area in which claimant had significant experience. Claimant accepted the offer of work from the different employer.

(9) On the evening of Sunday March 1, 2020, claimant emailed the owner advising that she was "thankful for the opportunity" the employer provided but had been offered a job over the weekend that she could not turn down and that was "more in-line with [her] professional goals." Exhibit 2 at 9.

(10) Claimant understood from conversations with the owner that the employer would eventually require her to become a licensed insurance agent and that she would be responsible for paying the cost of the licensing exam. The cost of the licensing exam was a factor in claimant deciding not to continue working for the employer.

(11) On Monday March 2, 2020, the employer advised claimant that a paycheck for the work claimant performed on February 27, 2020 was available for claimant to pick up. Exhibit 2 at 10. Claimant later obtained the check from the employer. Claimant was paid a total of \$42 for three hours of work at \$14 per hour.

(12) On September 26, 2023, the Office of Administrative Hearings (OAH) mailed Order No. 23-UI-236803 to claimant's address on file with OAH. Order No. 23-UI-236803 stated, "You may appeal this decision by filing the attached form Application for Review with the Employment Appeals Board within 20 days of the date that this decision is mailed." Order No. 23-UI-236803 at 7. Order No. 23-UI-236803 also stated on its certificate of mailing that "Any appeal from this Order must be filed on or before October 16, 2023 to be timely."

(13) Claimant was represented by an attorney. At hearing, the attorney provided her updated address to the ALJ. September 25, 2023 Audio Record at 1:50. However, claimant's attorney was not listed on the certificate of mailing of Order No. 23-UI-236803 and the order was not mailed to her. On October 19, 2023, claimant informed her attorney that claimant "had received documents." EAB Exhibit 1 at 2. The attorney tried to obtain more information from claimant about the documents but was unable to reach claimant. EAB Exhibit 1 at 2. On October 23, 2023, claimant's attorney filed a late application for review on claimant's behalf. EAB Exhibit 1 at 2.

CONCLUSIONS AND REASONS: Claimant's late application for review is allowed. Claimant voluntarily quit work without good cause.

Late Application for Review. An application for review is timely if it is filed within 20 days of the date that the Office of Administrative Hearings (OAH) mailed the order for which review is sought. ORS 657.270(6); OAR 471-041-0070(1) (May 13, 2019). The 20-day filing period may be extended a “reasonable time” upon a showing of “good cause.” ORS 657.875; OAR 471-041-0070(2). “Good cause” means that factors or circumstances beyond the applicant’s reasonable control prevented timely filing. OAR 471-041-0070(2)(a). A “reasonable time” is seven days after the circumstances that prevented the timely filing ceased to exist. OAR 471-041-0070(2)(b). A late application for review will be dismissed unless it includes a written statement describing the circumstances that prevented a timely filing. OAR 471-041-0070(3).

The application for review of Order No. 23-UI-236803 was due by October 16, 2023. Because claimant did not file her application for review until October 23, 2023, the application for review was late.

Claimant was represented by an attorney. The attorney provided her updated address to the ALJ at hearing but was not listed on the certificate of mailing of Order No. 23-UI-236803 and did not receive the hearing order. September 25, 2023 Audio Record at 1:50. On October 19, 2023, the attorney learned that claimant received documents pertaining to this case, and shortly thereafter, on October 23, 2023, filed an application for review on claimant’s behalf.

These circumstances are sufficient to establish that claimant failed to file a timely application for review because her attorney did not receive Order No. 23-UI-236803 due to it not being mailed to the attorney, a circumstance beyond claimant’s reasonable control. On October 19, 2023, the attorney learned that claimant had “received documents” and, four days later, on October 23, 2023, filed the late application for review. EAB Exhibit 1 at 1. The earliest point that the circumstances beyond claimant’s reasonable control could have ceased was October 19, 2023, because that was the date the attorney learned about claimant’s receipt of documents and, therefore, could have become aware of the possibility that Order No. 23-UI-236803 had been issued without being mailed to the attorney. Because the application for review was filed four days later, on October 23, 2023, it was filed within a seven-day reasonable time. Thus, claimant established good cause to extend the filing deadline to October 23, 2023, and the late application for review is allowed.

Nature of 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).

At hearing, claimant asserted that she never actually began an employment relationship with the employer. September 25, 2023 Transcript at 19, 22, 67. Claimant testified that hours and wages were not finalized on the day she trained at the front desk, and she was still waiting on final details of the job. September 25, 2023 Transcript at 22-23, 65-66. The owner testified that on the morning of February 27, 2020—after the parties exchanged emails, the owner suggested he would pay \$14 per hour and provide full-time work, and claimant agreed to come into the office—the parties had a “conversation” about “the increase in hours and pay” and it was the owner’s understanding that claimant was “onboard.”

September 25, 2023 Transcript at 35. Claimant conceded that the parties discussed “the monetary” and “extending hours” at that time, but claimant asserted the discussions were “nothing solid.” September 25, 2023 Transcript at 65. Nevertheless, claimant acknowledged accepting payment of \$42 for her time shadowing the front desk worker on February 27, 2020, which corresponds to the three hours the employer regarded claimant as having worked, paid at \$14 per hour. September 25, 2023 Transcript at 23-24. Claimant also conceded that she must have provided a copy of her Social Security card to the employer since the employer possessed that item. September 25, 2023 Transcript at 65.

To the extent the conflicting accounts of the parties need be resolved, the weight of the evidence favors the owner’s account given that claimant’s acceptance of payment runs counter to her characterization that the wage and hours remained uncertain when she shadowed the front desk worker, as well as the fact that claimant experienced some difficulty at hearing recalling details of the events at hand, which diminishes the reliability of her account to some degree. September 25, 2023 Transcript at 11, 15-16, 17.

The preponderance of evidence therefore shows that as of February 27, 2020, an employment relationship existed between claimant and the employer. The fact that claimant accepted payment for three hours of work performed on that date as well as the fact that claimant had completed a significant amount of new hire paperwork and made a special effort to find and then go to the employer’s office to drop off a copy of her Social Security card are consistent with a relationship between an employer and an employee having been formed. ORS 657.030(1) defines “employment” to mean “service for an employer . . . performed for remuneration.” The three hours claimant spent on February 27, 2020 shadowing the employer’s front desk worker, taking notes and becoming familiar with the office’s computer programs, were services claimant performed for the employer in exchange for remuneration in the amount of \$14 per hour. This employment relationship continued over the course of the weekend of February 29, 2020 and March 1, 2020, given that at the point claimant went home at the lunch hour on February 27, 2020 to look for her Social Security card, she and the owner had agreed to meet again at the office on Monday, March 2, 2020 at 9:00 a.m. However, on March 1, 2020, claimant severed the employment relationship when she sent her email advising that she was “thankful for the opportunity” the employer provided but she had been offered a job over the weekend that she could not turn down. Exhibit 2 at 9. At the time claimant severed the employment relationship by sending her email on March 1, 2020, she could have continued working for the employer for an additional period of time. The work separation therefore was a voluntary leaving. Accordingly, claimant voluntarily quit working for the employer and did so on March 1, 2020.

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 quits work must show that no reasonable and prudent person 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).

One reason claimant quit working for the employer was because at some point over the weekend of February 28 and 29, 2020, a different employer offered claimant work and claimant accepted the offer of work from that employer. Claimant failed to meet her burden to show that she quit work with good cause for this reason. At hearing, claimant testified that the offer of other work likely entailed social work, was permanent and full time, was not subject to contingencies, and that she accepted the offer. September 25, 2023 Transcript at 14-15, 16, 17. However, claimant otherwise could not recall the name of the employer, her rate of pay, or when the work began as necessary to determine whether the work began in the shortest time reasonable under the circumstances. September 25, 2023 Transcript at 15-18. Accordingly, claimant failed to show that the work began in the shortest length of time as can be deemed reasonable under the individual circumstances. Claimant also failed to show that the offered work paid either an amount equal to or in excess of her weekly benefit amount, or an amount greater than the work she left. Thus, claimant did not meet the criteria necessary to establish good cause under OAR 471-030-0038(5)(a) as applicable when an individual leaves work to accept an offer of other work, and as to this reason for leaving work, claimant quit work without good cause.

The record also shows that the cost of the insurance agent licensing exam was a factor in claimant deciding not to continue working for the employer because claimant understood from conversations with the owner that the employer would eventually expect her to become licensed and that she would be responsible for paying the upfront cost of the licensing exam. September 25, 2023 Transcript at 25, 66. To the extent claimant quit working for the employer for this reason, claimant did not meet her burden to prove that she quit work with good cause.

The record shows that obtaining licensing was not immediately required, the owner did not place a firm timeline on when he might expect claimant to obtain licensing, and the owner would reimburse the exam fee upon claimant passing the test. September 25, 2023 Transcript at 50-51, 56. The licensing exam was offered several times a week. September 25, 2023 Transcript at 57. Before taking the exam, applicants were required to take a 40-hour training course, the cost of which is unknown. September 25, 2023 Transcript at 57. The cost of the exam itself is also not evident from the record. September 25, 2023 Transcript at 66.

At hearing, claimant testified that she “didn’t have a lotta money at that time” and “There was no way I could afford paying for anything, whether it would be upfront or not.” September 25, 2023 Transcript at 66, 14. This evidence supports that claimant was experiencing financial difficulty during the time of her employment for the employer and being required to pay an exam fee, even one that would be reimbursed if claimant passed, had the potential to place claimant in a grave financial situation. However, claimant failed to pursue the reasonable alternative of discussing the matter further with the owner to assess how soon she might have to take the licensing exam. At hearing, the owner testified extensively that insurance agent licensing “was not a requirement up front,” is something “we hope they do later, but it’s not an immediate requirement for the position,” that licensing becomes an expectation only “[d]own the

road” and even then, the owner had “never put a timeline on anybody” regarding when licensing had to be obtained. September 25, 2023 Transcript at 50, 51, 56. The record therefore shows, more likely than not, that had she continued working for the employer, claimant would have had substantial flexibility as to when to take the licensing exam and that she may have delayed the exam until her financial circumstances improved. A reasonable and prudent person of normal sensitivity, exercising ordinary common sense would not leave work without first confirming with the employer that an expectation to become licensed, and to incur the upfront costs of licensure, was imminent.

For these reasons, claimant voluntarily quit work without good cause and was disqualified from receiving unemployment insurance benefits effective March 1, 2020.

DECISION: Order No. 23-UI-236803 is affirmed.

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

DATE of Service: December 7, 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.

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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.

Employment Appeals Board - 875 Union Street NE | Salem, OR 97311
 Phone: (503) 378-2077 | 1-800-734-6949 | Fax: (503) 378-2129 | TDD: 711
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