

EMPLOYMENT APPEALS BOARD DECISION
2024-EAB-0280

Reversed & Remanded

PROCEDURAL HISTORY: On February 8, 2024, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant quit working for the employer without good cause and was disqualified from receiving benefits effective November 26, 2023 (decision # 123040). Claimant filed a timely request for hearing. On March 12, 2024, ALJ Christon conducted a hearing at which the employer failed to appear, and issued Order No. 24-UI-249931, affirming decision # 123040. On March 18, 2024, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Nexa Mortgage, LLC employed claimant as a loan officer assistant from June 2023 until November 27, 2023.

(2) When claimant was offered her position, the offer was made by a loan officer who claimant understood to be an independent affiliate of the employer rather than an employee. The loan officer offered claimant a salary of \$7,000 per month. The loan officer nonetheless explained to claimant that the employer required the loan officer to prove to the employer that he had a cash reserve equivalent to six months of the promised salary in order to offer claimant the salaried position. The loan officer did not have that reserve and therefore conditioned the job offer on claimant signing an employment agreement stating that she would be paid on a commission-only basis to meet the employer's requirements, though he would honor his verbal agreement with claimant that she would be salaried. Claimant signed the agreement based on this understanding. Claimant was, at first, paid the agreed upon salary at bi-weekly intervals by the employer.

(3) By October 2023, the loan officer experienced financial difficulty and stopped approving the employer's full salary payments to claimant. Claimant understood the payments that were made thereafter to constitute portions of her salary, but that the timing and amount of the payments were conditioned on revenue received by the loan officer. Claimant did not explicitly agree to alter the terms of the initial verbal agreement regarding compensation. Claimant and the loan officer frequently argued about the timing and amount of these payments.

(4) On November 26, 2023, claimant quit working for the employer because she had not received any pay “for about a month,” and frequent conflict about her compensation “was taking a toll on [her] mental health[.]” Transcript at 16.

(5) At some point before or after quitting, claimant made a complaint to the Oregon Bureau of Labor and Industries (BOLI) regarding her unpaid wages, and was told that her complaint would take six months “to get back to [her].” Transcript at 22. Claimant received checks from the employer in December 2023 and January 2024 for wages or commissions owed. The BOLI complaint remained unresolved as of March 2024.

(6) Claimant did not consider contacting the employer’s human resources department regarding the wage dispute prior to quitting because she was unsure of their authority to intervene, given the degree of control the loan officer appeared to have over claimant’s wages even though the loan officer was apparently not an employee of the employer, and because the written employment agreement she had signed would likely undermine her claim that she was owed salary payments.

CONCLUSIONS AND REASONS: Order No. 24-UI-249931 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 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 due to a reduction in pay 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.” OAR 471-030-0038(5)(d). An employer does not reduce the rate of pay for an employee by changing or eliminating guaranteed minimum earnings, by reducing the percentage paid on commission, or by altering the calculation method of the commission. OAR 471-030-0038(5)(d)(B).

ORS 652.120 provides:

(1) Every employer shall establish and maintain a regular payday, at which date the employer shall pay all employees the wages due and owing to them.

(2) Payday may not extend beyond a period of 35 days from the time that the employees entered upon their work, or from the date of the last regular payday.

(3) This section does not prevent the employer from establishing and maintaining paydays at more frequent intervals.

(4) This section does not prevent any employer from entering into a written agreement, prior to the rendering of any services, and mutually satisfactory with the employer's employees, as to the payment of wages at a future date.

(5) When an employer has notice that an employee has not been paid the full amount the employee is owed on a regular payday and there is no dispute between the employer and the employee regarding the amount of the unpaid wages:

(a) If the unpaid amount is less than five percent of the employee's gross wages due on the regular payday, the employer shall pay the employee the unpaid amount no later than the next regular payday; or

(b) If the unpaid amount is five percent or more of the employee's gross wages due on the regular payday, the employer shall pay the employee the unpaid amount within three days after the employer has notice of the unpaid amount, excluding Saturdays, Sundays and holidays.

Claimant quit work because she believed the employer had not paid her as agreed and would likely fail to pay her as agreed in the future, which led to frequent conflict with her supervisor. The order under review concluded that if claimant faced a grave situation as a result of these circumstances, "it appears to be a grave situation of claimant's making" because claimant received wages in accordance with the written agreement she signed, and the verbal agreement which contradicted the written agreement "was not . . . binding on the employer." Order No. 24-UI-249931 at 3. The record as presently developed does not support these conclusions, and further development of the record is needed to determine whether claimant quit work with good cause.

As a preliminary matter, the record shows that claimant was paid a salary of \$7,000 per month in accordance with the terms of the verbal agreement, rather than only commissions as provided for in the written agreement. It was therefore reasonable for claimant to continue to work for the employer with the understanding that the verbal rather than written agreement was in effect, as the loan officer had originally represented. However, it is unclear from the record precisely what the agreed upon terms of claimant's compensation were, or what she reasonably believed them to be, for the entire duration of her employment. While claimant maintained she agreed to a salary of \$7,000 at hire, it is unclear whether the agreement called for claimant to receive commissions *in addition* to that salary and, if so, whether those commissions were paid.

The record also suggests that the employer may have changed claimant's compensation in October 2023 to reflect the terms of the written rather than verbal agreement. *See* Transcript at 23. As employers are generally permitted to change the terms of at-will employment if the employee agrees to the change by continuing to work, the change in wage structure itself from salary to commission is not necessarily indicative of an unfair labor practice. However, it is unclear whether this change affected pay already owed to claimant for work performed while the previous agreement was in effect, and if so, whether this violated the previous agreement. It is also unclear whether claimant effectively agreed to the October

2023 change in compensation by continuing to work after the employer announced the change. If only pay for the period that followed the announced change was affected by the change, and payment of wages for work performed thereafter was made in accordance with the terms announced, this was likely not an unfair labor practice and possibly subject to analysis under OAR 471-030-0038(5)(d) as quitting work due to a reduction in pay.

Additionally, the record suggests that claimant was not paid on a set schedule, as she was paid biweekly at the start of her employment but received no pay for a period of approximately one month during October and November 2023. Ongoing unfair labor practices, such as failure to timely or accurately pay wages, may constitute a situation of such gravity that no reasonable and prudent person would continue to work for their employer for an additional period of time. *See J. Clancy Bedspreads and Draperies v. Wheeler*, 152 Or App 646, 954 P2d 1265 (1998). Therefore, in order to determine whether claimant faced a grave situation, further development of the record is needed to assess whether unfair labor practices impacted claimant and were ongoing or likely to be repeated.

On remand, inquiry should be made into the precise terms of the verbal agreement made at hire, including whether it included commission in addition to the salary, when the employer notified claimant that that agreement was changing and what precisely the changes were, whether the employer applied the changes retroactively by paying claimant less than previously agreed for work performed prior to announcement of the change, whether the employer paid claimant in accordance with the changed agreement at all times after it became effective, whether the employer established a regular payday that met the requirements of ORS 653.120 and otherwise abided by the statute's provisions, whether the employer's pay and other practices amounted to unfair labor practices, and if the employer engaged in unfair labor practices, whether the practices were ongoing or likely to continue.

Further, if the record on remand supports a finding that claimant quit work due to a grave situation, additional inquiry should be made into whether claimant had reasonable alternatives to quitting work. The record suggests that the somewhat unorthodox arrangement whereby a non-employee of the employer hired and supervised claimant, while having seemingly complete control over when and how much claimant was paid by the employer, led claimant to believe that the employer would be of no assistance in settling ongoing wage disputes with that non-employee. Inquiry should therefore be made to determine whether claimant had reason to believe that seeking intervention from the employer's human resources department prior to quitting would have been futile.

Additionally, claimant testified that she made a complaint to BOLI about the pay issues she experienced in October and November 2023, but it is unclear from the record when this complaint was made. If the complaint was not made prior to quitting, inquiry should be made as to why it was not made at that time and whether this would have been a reasonable alternative to quitting. If BOLI would have taken six months to investigate or intervene in claimant's complaint, as the record suggests claimant was told, this may not have been a reasonable alternative. *See J. Clancy Bedspreads and Draperies v. Wheeler*, 152 Or App 646, 954 P2d 1265 (1998) (where unfair labor practices are ongoing or there is a substantial risk of recurrence, it is not reasonable to expect claimant to continue to work for an indefinite period of time while the unfair practices are handled by BOLI). Inquiry should also be made into the existence of any other reasonable alternatives to quitting that were available to claimant.

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 quit work with good cause, Order No. 24-UI-249931 is reversed, and this matter is remanded.

DECISION: Order No. 24-UI-249931 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: April 25, 2024

NOTE: The failure of any party to appear at the hearing on remand will not reinstate Order No. 24-UI-249931 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 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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