

EMPLOYMENT APPEALS BOARD DECISION
2024-EAB-0494

Reversed
No Disqualification

PROCEDURAL HISTORY: On July 21, 2021, 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 January 3, 2021 (decision # 134236). Claimant filed a timely request for hearing. On December 8, 2022, notice was mailed to the parties that a hearing was scheduled for December 21, 2022. On December 21, 2022, ALJ Sachet-Rung convened a hearing at which claimant failed to appear, and issued Order No. 22-UI-210654 dismissing claimant's request for hearing due to his failure to appear. On January 10, 2023, Order No. 22-UI-210654 became final without claimant having filed a request to reopen the hearing. On August 22, 2023, claimant filed a late request to reopen the hearing. ALJ Kangas considered the request, and on February 14, 2024, issued Order No. 24-UI-248062, denying the request and leaving Order No. 22-UI-210654 undisturbed.

On March 5, 2024, claimant filed an application for review of Order No. 24-UI-248062 with the Employment Appeals Board (EAB). On April 16, 2024, EAB issued EAB Decision 2024-EAB-0243, reversing Order No. 24-UI-248062 by allowing claimant's late request to reopen the hearing and remanding the matter for a hearing on the merits of decision # 134236. On May 17, 2024, ALJ Mellor conducted a hearing, and on May 24, 2024, issued Order No. 24-UI-254999, modifying decision # 134236 by concluding that claimant quit work without good cause and was disqualified from receiving benefits effective December 20, 2020.¹ On June 7, 2024, claimant filed an application for review of Order No. 24-UI-254999 with EAB.

EVIDENTIARY MATTER: Prior to the May 17, 2024, hearing, claimant submitted documents to the Office of Administrative Hearings (OAH) that he wished to be considered as evidence. The documents were stamped received by OAH on May 14, 2024, and contained a statement from claimant that he had

¹ Although Order No. 24-UI-254999 stated that it affirmed decision # 134236, it modified that decision by changing the effective date of the disqualification from January 3, 2021 to December 20, 2020. Order No. 24-UI-254999 at 3.

served a copy of the documents on the opposing party. The documents pertained to the dates he worked for the employer and therefore were probative of the issue to be decided. The ALJ did not address the admissibility of these documents at hearing.

OAR 471-040-0023(4) (August 1, 2004) states that “each party . . . shall provide to all other parties . . . copies of documentary evidence that it will seek to introduce into the record.” Claimant complied with this portion of the rule. Further, per OAR 471-040-0025(5) (August 1, 2004), the documents he submitted are relevant and are “evidence of a type commonly relied upon by reasonably prudent persons in conduct of serious affairs[.]” The documents therefore should have been admitted as evidence at hearing. Accordingly, pursuant to OAR 471-041-0090(1) (May 13, 2019), EAB has considered this evidence, which has been marked 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.

WRITTEN ARGUMENT: EAB considered claimant’s June 13, 2024, argument in reaching this decision.²

FINDINGS OF FACT: (1) 1800Flowers Team Services, Inc. employed claimant as an assembler in various years from the early 1980s through at least 2021, on a seasonal basis, including from approximately September or October 2020 through December 21, 2020.

(2) The employer typically laid off employees performing the work claimant did by December 25th of each year due to a lack of work. The employer typically asked for volunteers to be laid off a few days in advance of the date that no work would be available.

(3) On December 21, 2020, the employer asked for volunteers to be laid off immediately in anticipation of the seasonal layoffs occurring on December 24, 2020. Claimant volunteered for immediate layoff and did not work for the employer that season after December 21, 2020. Had he not volunteered, work would have available for him through December 24, 2020. Claimant next worked for the employer in the fall 2021 season.

CONCLUSIONS AND REASONS: Claimant quit work without good cause within 15 days of the date the employer planned to discharge him for reasons other than misconduct.

Nature of the 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).

² Claimant also submitted written arguments on June 7, 2024 and June 10, 2024 that did not contain the required statement that a copy of the argument had been served on the opposing party. *See* OAR 471-041-0080(2)(a) (May 13, 2019). However, these arguments were essentially duplicative of the June 13, 2024 arguments that were considered by EAB and EAB Exhibit 1.

ORS 657.176(7) provides that when a claimant who has been notified that the employer will discharge them, not for misconduct, on a particular date, quits work without good cause within 15 days of that date, the work separation will be adjudicated as though the voluntary leaving did not occur and the discharge had occurred. In such situations, the claimant will be ineligible for benefits from the week in which the voluntary leaving occurred until the week prior to the week in which the individual would have been discharged. ORS 657.176(7)(c).

The order under review concluded that claimant quit work without good cause and was therefore disqualified from receiving unemployment insurance benefits effective December 20, 2020. Order No. 24-UI-254999 at 3. The record supports that claimant quit work without good cause. However, because he quit within 15 days of the date the employer planned to discharge him for reasons other than misconduct, the record does not support a disqualification from benefits except as in accordance with ORS 657.176(7)(c).

Claimant testified that he had worked for the employer seasonally on many occasions over the preceding approximately 40 years, that the employer had always laid off employees in his position “around Christmas time,” and that the layoffs had “never been after Christmas.” Audio Record at 16:00. Claimant further testified that the employer began asking for volunteers to cease working on December 21, 2020, and claimant volunteered. Audio Record at 9:28. It is reasonable to infer from this testimony that the employer intended to discharge claimant on December 24, 2020, and that continuing work would have been available to claimant until that date had he not volunteered to be laid off. Because claimant could have continued working for the employer for an additional period of time, but did not, the work separation was a voluntary leaving. However, for reasons discussed in greater detail below, although claimant quit work without good cause, he did so within 15 days of when the employer planned to discharge him for reasons other than misconduct. Per ORS 657.176, the work separation is therefore analyzed as a discharge in determining whether claimant is subject to disqualification from benefits.

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). “[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.

Claimant quit working for the employer on December 21, 2020, because the employer asked for volunteers to be laid off that day rather than later in the week. The record does not show why claimant volunteered to stop working that day rather than continue working until the employer had no further work for him. Claimant therefore did not show that he quit because he faced a grave situation. Accordingly, claimant voluntarily quit work without good cause.

Discharge. ORS 657.176(2)(a) requires a disqualification from unemployment insurance benefits if the employer discharged claimant for misconduct connected with work. “As used in ORS 657.176(2)(a) . . . a willful or wantonly negligent violation of the standards of behavior which an employer has the right to

expect of an employee is misconduct. An act or series of actions that amount to a willful or wantonly negligent disregard of an employer's interest is misconduct.” OAR 471-030-0038(3)(a). “[W]antonly negligent’ means indifference to the consequences of an act or series of actions, or a failure to act or a series of failures to act, where the individual acting or failing to act is conscious of his or her conduct and knew or should have known that his or her conduct would probably result in a violation of the standards of behavior which an employer has the right to expect of an employee.” OAR 471-030-0038(1)(c). In a discharge case, the employer has the burden to establish misconduct by a preponderance of evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

The record shows that the employer planned to discharge claimant on December 24, 2020, due to a seasonal lack of work. As this did not involve a willful or wantonly negligent violation of the standards of behavior that an employer has the right to expect of an employee, the employer has not shown that they discharged claimant for misconduct. Accordingly, he is not disqualified from receiving unemployment insurance benefits as a result of the work separation.

For these reasons, claimant quit work without good cause, but did so within 15 days of when the employer planned to discharge him for reasons other than misconduct. He is therefore not disqualified from receiving unemployment insurance benefits based on the work separation. Because claimant did not voluntarily quit work until the week that the employer intended to discharge him, there is no period of ineligibility for benefits, as such a period would end the week *prior to* the week in which the discharge was to occur, in accordance with ORS 657.167(7).

DECISION: Order No. 24-UI-254999 is reversed, as outlined above.

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

DATE of Service: July 16, 2024

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.

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 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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