

EMPLOYMENT APPEALS BOARD DECISION
2024-EAB-0533

Affirmed
Disqualification

PROCEDURAL HISTORY: On April 19, 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 February 4, 2024 (decision # L0003680402). Claimant filed a timely request for hearing. On June 11, 2024, ALJ Mellor conducted a hearing, and on June 26, 2024, issued Order No. 24-UI-257524, affirming decision # L0003680402. On July 12, 2024, claimant filed an application for review with the Employment Appeals Board (EAB).

WRITTEN ARGUMENT: Claimant and the employer both submitted written arguments. Both parties' arguments contained information that was not part of the hearing record, and did not show that factors or circumstances beyond their reasonable control prevented them from offering the information during the hearing. Under ORS 657.275(2) and OAR 471-041-0090 (May 13, 2019), EAB considered only information received into evidence at the hearing when reaching this decision. EAB considered both parties' arguments to the extent they were based on the record.

FINDINGS OF FACT: (1) Integrity Staffing of Tualatin, Inc. employed claimant, most recently as their vice president of sales and marketing, from June 23, 2015, until February 7, 2024.

(2) As part of his employment agreement, the employer paid claimant a commission calculated as a percentage of the gross margin the employer earned for accounts that claimant signed to the business.

(3) Throughout much of the course of his employment, claimant and the managing co-owner discussed the possibility of claimant eventually taking equity in the business and assuming its operation.

(4) In approximately 2014, claimant was diagnosed with corneal neuropathy. This condition limited his ability to perform certain work-related tasks, such as working on a computer. Claimant sought an accommodation with the employer, in the form of a part-time assistant who could help with the tasks claimant had limited capacity to perform. The employer did not initially agree to claimant's proposal,

but agreed once claimant suggested that the assistant's salary could be paid from claimant's commissions.

(5) In or around March 2020, the Department approached multiple staffing agencies, including the employer's, requesting bids to fill the Department's temporary staffing needs caused by the COVID-19 pandemic. Claimant prepared the proposal that the employer submitted to the Department, which the Department accepted. The employer did not pay claimant commission on the resulting contract with the Department, as they did not consider claimant to have signed the Department to the business. Claimant did not pursue the matter of the commission at that time, but did complain to the employer in 2022 that they had not paid him a commission on that account.

(6) In early 2023, a person in a wheelchair visited the employer's office, looking for work. The managing co-owner advised staff not to work with the person because he was concerned about liability relating to hiring a person with a disability. Claimant was disturbed by this, but said nothing because he was concerned about losing his own employer-provided health insurance.

(7) In or around October 2023, the managing co-owner told claimant that he had received an offer for sale of the business, and asked claimant what he thought about it. Claimant was surprised at the news, due to the prior discussions of claimant taking over the business. The co-owner then suggested that claimant make an offer on the business instead. Thereafter, claimant began preparations to make an offer to buy the business.

(8) To help claimant prepare to make an offer on the business, the managing co-owner gave claimant access to financial information about the business to which claimant had not previously been privy. In or around December 2023, in the course of reviewing this information, claimant came to believe that the employer had been underpaying him by improperly calculating some of his commissions. Claimant raised this concern with the managing co-owner but did not request to be paid for the commissions he felt were owed to him.

(9) On February 5, 2024, claimant submitted his purchase offer to the managing co-owner. The managing co-owner rejected claimant's offer, as he felt the terms were not favorable to the employer, and made a counteroffer. Claimant was not willing to purchase the business on the terms of the employer's counteroffer.

(10) On the evening of February 6, 2024, claimant contacted the other co-owner and informed her that he was considering quitting. On the morning of February 7, 2024, claimant and the managing co-owner met, and claimant informed the managing co-owner that he was quitting. The managing co-owner attempted to dissuade claimant from quitting, but was unsuccessful, and claimant did not work for the employer thereafter.

(11) After claimant had quit on February 7, 2024, he drafted a letter to the employer requesting "immediate payment" of commissions on the employer's pandemic-era contract with the Department. Exhibit 2 at 95.

CONCLUSIONS AND REASONS: Claimant quit without 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.

At hearing, claimant testified that he voluntarily quit work because of the employer’s “deliberate underpayment... of [claimant’s] commissions as per [his] employment agreement, non-payment of [his] earned commission, and... intolerable working conditions for individuals with a disability.” Transcript at 5. Claimant’s testimony here apparently referred to what he alleged to be a miscalculation of commissions he was paid, the employer’s failure to pay him a commission on their 2020 contract with the Department, and matters relating to both his eye condition and the 2023 incident with the job applicant in a wheelchair. As the order under review correctly concluded, however, the record shows that none of these purported reasons were the proximate cause of claimant’s decision to quit, as “[a]ll three of claimant’s stated reasons were ongoing long-term issues that claimant had not addressed in years if at all.” Order No. 24-UI-257524 at 4. Instead, it can be reasonably inferred that claimant chose to quit when he did because of the employer’s rejection of his offer to buy the business.

Regarding the commissions that claimant believed he had been underpaid after he began examining the employer’s books in late 2023, claimant told the employer about his findings, but did not press the issue by seeking back-pay at that time, and continued working for the employer for some time afterwards. This shows that despite his belief that the employer had been underpaying him his commissions, claimant was willing to continue working for the employer at that point. Similarly, regarding the commissions that claimant believed he was due for the work he did on the employer’s contract with the Department, claimant raised the issue once, some two years after the contract was executed, and then made no mention of it for nearly another two years, until after he quit. Here too, claimant was willing to continue working for the employer despite feeling short-changed in his commissions, and did so. Finally, the record shows that claimant was willing to continue working for the employer despite his concerns about how the employer handled disabled individuals. Claimant’s concerns about his having to pay for an assistant from his own commission, and the employer’s treatment of a job applicant in a wheelchair, are understandable. However, in regard to both matters, claimant neither objected to the employer’s actions nor quit as a result.

By contrast, after several months of preparation, claimant made an offer to purchase the employer’s business on February 5, 2024, but saw his initial offer rejected. The following day, he spoke to the non-managing co-owner of the business and told her he was considering quitting, and then quit the day after that. This accelerated sequence of events strongly suggests that whatever his other frustrations with the employer, claimant’s decision to quit on February 7, 2024, was the proximate result of the employer’s rejection of his offer. This inference is further supported by the account of the managing co-owner, who testified at hearing that claimant explicitly told him that the rejected offer was his reason for quitting during their meeting on claimant’s last day of work. Transcript at 48–49. Thus, the preponderance of the

evidence shows that claimant likely quit because the employer rejected his offer to purchase the business.

This was not a reason of such gravity that claimant had no reasonable alternative but to quit. Although claimant's disappointment or frustration at the rejection of his initial offer was understandable, a reasonable and prudent person would not have concluded that they could no longer continue working for the employer as a result. Further, it is not clear from the record that claimant's decision to quit, rather than either continue to negotiate the sale of the business with the employer or continue working without an equity stake in the business, improved claimant's situation in any fashion. *See Oregon Public Utility Commission v. Employment Dep't.*, 267 Or App 68, 340 P3d 136 (2014) (for a claimant to have good cause to voluntarily leave work, the claimant must derive some benefit for leaving work). As such, to the extent that claimant quit for this reason, he quit without good cause.

As noted above, the record shows that the proximate cause of claimant's decision to quit was the rejection of his offer to buy the business. However, even if claimant had quit, in part, due to the allegedly improper calculation and resulting underpayment of his commissions, such reason would not constitute good cause for quitting. Claimant first learned of these alleged discrepancies in his compensation in or around December 2023 while he was reviewing business records relating to the proposed sale. Claimant notified the employer of these discrepancies when he learned of them, but did not request to be back paid at that time. In fact, while claimant requested, after he quit, payment of the commissions he believed he was owed on the employer's contract with the Department, it is not clear from the record that claimant *ever* requested the employer to recalculate his other commissions or back-pay claimant the commissions that were allegedly underpaid.

In his written argument, claimant asserted, "The important fact is that I demanded to be paid on February 7, 2024, the day I resigned," and further argued, "It was reasonable for me to quit at that point because a 'reasonable and prudent person of normal sensitivity, exercising ordinary common sense,' would not continue to work indefinitely when that would mean incurring the substantial risk of continued underpayment of commissions." Claimant's Written Argument at 2. As noted above, it is not clear that claimant demanded payment of the commissions he believed to have been underpaid (rather than just the commissions he believed he was owed from the contract with the Department). Regardless of whether claimant made such a demand, however, or whether he failed to do so because he felt it would be futile, claimant has not shown that the alleged underpayment of his prior commissions constituted good cause for quitting.

The Oregon Court of Appeals held in *J. Clancy Bedspreads and Draperies v. Wheeler*, 152 Or App 646, 954 P2d 1265 (1998), that 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. By contrast, the Court held in *Marian Estates v. Employment Department*, 158 Or App 630, 976 P2d 71 (1999) that, where unfair labor practices have ceased and the only remaining dispute between claimant and the employer is the resolution of the past issues, it was reasonable for claimant to continue working for the employer while litigating the claim.

Here, claimant essentially alleged unfair labor practices, by way of the alleged underpayment of his commissions. However, claimant has not shown, by a preponderance of the evidence, that the employer knowingly underpaid those commissions. Even if the commissions were underpaid, the evidence just as

likely shows that the alleged underpayments were the result of confusion, misunderstanding, or an honest disagreement about what commissions were due to claimant. This is relevant because it suggests that the employer would, more likely than not, have been willing to discuss the matter with claimant and potentially recalculate the rate at which claimant's *future* commissions were to be paid. That the employer would more than likely have been so willing is further supported by the fact that the employer made a significant attempt to dissuade claimant from quitting, which suggests that they may have been amenable to revisiting the terms of claimant's compensation.

Unlike in *J. Clancy Bedspreads and Draperies v. Wheeler*, then, claimant did not face a situation of such gravity that he had no reasonable alternative but to quit because the record fails to show that, more likely than not, the alleged underpayment of commissions would have been ongoing, and there would not have been a substantial risk of its recurrence, had claimant pressed the issue with the employer with respect to future commissions. Instead, claimant's circumstances were more akin to those in *Marian Estates*, and it would have been reasonable for claimant to continue working for the employer while attempting to seek backpay for the allegedly underpaid commissions. Doing so would have been a reasonable alternative to quitting.¹ Finally, as with the discussion of quitting due to the rejection of his initial purchase offer, above, quitting due to the dispute over the amount of commissions owed to claimant would not have constituted good cause because, under *Oregon Public Utility Commission v. Employment Dep't.*, claimant did not show that he derived any benefit from quitting for this reason.

For the above reasons, claimant quit work without good cause, and is disqualified from receiving unemployment insurance benefits effective February 4, 2024.

DECISION: Order No. 24-UI-257524 is affirmed.

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

DATE of Service: August 7, 2024

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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¹ Additionally, even if the employer refused to alter the calculation of claimant's commissions in the future, such would not have constituted good cause for quitting as a "reduction in pay" under OAR 471-030-0035(5)(d)(B) because that provision of the rule does not consider "reducing the percentage paid on commission" or "altering the calculation method of the commission" to be a "reduction in pay."



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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