

EMPLOYMENT APPEALS BOARD DECISION
2024-EAB-0817

Reversed & Remanded

PROCEDURAL HISTORY: On July 1, 2024, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant voluntarily quit work without good cause and therefore was disqualified from receiving unemployment insurance benefits from February 4, 2024 through February 1, 2025, and was overpaid \$4,280 in benefits that she was required to repay to the Department (decision # L0004850085). Claimant filed a timely request for hearing. On October 28, 2024, ALJ Goodrich conducted a hearing, and on November 5, 2024, issued Order No. 24-UI-272141, modifying decision # L0004850085 by concluding that claimant voluntarily quit work without good cause and was disqualified from receiving benefits effective December 24, 2023, and that claimant was overpaid \$4,280 in benefits that she was required to repay to the Department. On November 25, 2024, Order No. 24-UI-272141 became final without claimant having filed an application for review with the Employment Appeals Board (EAB). On November 26, 2024, 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 consists of the first page of claimant's statement enclosed with the late application for review, which has been marked as EAB Exhibit 1 and provided to the parties with this decision. Any party that objects to EAB taking notice of this information must send their objection to EAB in writing, saying why they object, within ten days of EAB mailing this decision. OAR 471-041-0090(2). Unless EAB receives and agrees with the objection, the exhibit will remain in the record.

WRITTEN ARGUMENT: With the written statement claimant submitted with her late application for review, claimant included a brief written argument on the merits of this case. Claimant did not declare that she provided a copy of this argument to the opposing party or parties as required by OAR 471-041-0080(2)(a). The argument also had 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). Except for EAB Exhibit 1 and the noticed facts, below, EAB considered only information received into evidence at the hearing when reaching this decision. *See* ORS 657.275(2). EAB considered claimant's argument to the extent it was based on the record.

The parties may offer new information, such as the new information contained in claimant's written argument, into evidence at the remand hearing. At that time, the administrative law judge (ALJ) will decide if the new information will be admitted into the record. The parties must follow the instructions on the notice of the remand hearing about documents they wish to have considered at the hearing. These instructions will direct the parties to provide copies of such documents to the ALJ and the other parties in advance of the hearing at their addresses as shown on the certificate of mailing for the notice of hearing.

FINDINGS OF FACT: (1) Clean Arrival, LLC employed claimant as a cleaning supervisor from November 1, 2023, through December 28, 2023. The employer ran a small residential cleaning company.

(2) Claimant worked approximately 20 to 25 hours per week for the employer, and was paid \$22 per hour. Claimant and the other cleaners would typically be assigned to jobs as a team of two or three cleaners, including at least one supervisor. On any given job, one of the supervisors would drive the team to the job site using one of the employer's work vehicles. Claimant was among the employees who were authorized to drive the employer's work vehicles. The employer operated Monday through Friday, and posted the following week's schedule on Wednesday.

(3) During the course of her employment, claimant was uncomfortable with one of her coworkers, "T," who was a supervisor and was responsible for training claimant. This was largely because claimant felt that T did not like her, did not communicate enough with claimant, and generally treated claimant poorly in comparison to how T treated the other employees. Claimant was also uncomfortable with how T drove the employer's work vehicle, as T's driving habits made claimant carsick. Claimant never talked to T about these issues directly because she did not feel comfortable doing so.

(4) During the course of her employment, claimant was also dissatisfied with the employer's scheduling policy because she felt that five days' notice, combined with occasional last-minute schedule changes, was not sufficient notice of when she was supposed to work. On or around December 4, 2023, claimant spoke to the owner of the business about her concerns about the scheduling practice. The owner explained that the scheduling practice was done the way it was because of operational needs.

(5) Because of the various difficulties claimant encountered while working for the employer, claimant felt "incredibly oppressed and therefore like very depressed," and "feeling like it was very hard for [her] to come to work because of not feeling heard in any way or seen." Transcript at 51.

(6) On December 18, 2023, claimant again spoke to the owner about her frustration with the schedule. The owner reiterated the reason why the schedule was issued as it was, but also told claimant that she was open to suggestions if claimant had a better idea for how the schedules could be issued. Claimant also told the owner that she was interested in taking on more administrative duties with the business, such as scheduling and marketing, but the owner did not need claimant to perform such work. During the conversation, claimant also raised her concerns about T's driving. The owner told claimant she would talk to T about how she drove, which she did.

(7) Prior to December 27, 2023, claimant received an offer to work for another cleaning company. The new job was to start on January 3, 2024, and would pay approximately the same as what the employer

had been paying claimant. The offer was contingent upon a background check, drug screen, or both. Claimant accepted the offer.

(8) On December 27, 2023, claimant notified the owner that she intended to quit, with a planned last day of work of January 2, 2024. Claimant would not have given her resignation at that time if she had not received an offer of other work. However, claimant's decision to find a new job was also motivated by the various difficulties she had encountered at work, and the feelings of depression that resulted.

(9) On December 28, 2023, claimant was scheduled to work at 7 a.m., the result of a late change in the schedule. However, claimant had not seen the email informing her of the schedule change, and instead believed she was supposed to work at 9 a.m. Claimant therefore did not appear for her shift as scheduled that day. When she and the owner spoke about it later, claimant decided that the prior day, December 27, 2023, would be her last day of work. Claimant had not completed the required background check or drug screen for the new employer as of that date.

(10) On February 8, 2024, claimant filed an initial claim for unemployment insurance benefits. The Department determined that claimant's weekly benefit amount was \$231. Claimant subsequently claimed benefits for the weeks of February 4, 2024, through June 22, 2024 (weeks 06-24 through 25-24). These are the weeks at issue. The Department paid claimant benefits totaling \$4,280 for the weeks at issue.

(11) After having paid claimant benefits for the weeks at issue, the Department decided that claimant was not eligible for those benefits because she had voluntarily quit working for the employer without good cause.

(12) Order No. 24-UI-272141, mailed to claimant on November 5, 2024, 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. 24-UI-272141 at 5. Order No. 24-UI-272141 also stated on its Certificate of Mailing, "Any appeal from this Order must be filed on or before November 5, 2024, to be timely."

(13) On November 7, 2024, the Department issued an administrative decision (decision # L0007014846) which amended decision # L0004850085 by modifying the dates of disqualification in the July 1, 2024, decision. Decision # L0007014846 stated, "You have the right to appeal our decision and request a hearing if you believe our decision is wrong. We must receive your request for a hearing no later than November 27, 2024."¹

(14) On November 21, 2024, claimant contacted the Department via live chat regarding the appeal in this matter. Regarding that chat, the Department representative with whom claimant chatted entered a

¹ EAB has taken notice of these facts, which are contained in Employment Department records. OAR 471-041-0090(1). Any party that objects to our taking notice of this information 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 noticed fact will remain in the record.

comment into claimant's claim which stated, in relevant part, "Request to appeal last appeal dec . . . Ptc, advsd can appeal amended Sep VQ-Clean Arrival now denied by 11/27/24[.]"²

(15) On November 25, 2024, Order No. 24-UI-272141 became final without claimant having filed an application for review with EAB. On November 26, 2024, claimant filed a late application for review of Order No. 24-UI-272141 with EAB.

CONCLUSIONS AND REASONS: Claimant's late application for review is allowed. Order No. 24-UI-272141 is set aside and this matter remanded for further development of the record.

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. 24-UI-272141 was due by November 25, 2024. Because claimant did not file her application for review until November 26, 2024, the application for review was late. However, the record shows that claimant was prevented from filing a timely application for review due to factors or circumstances beyond her reasonable control.

On November 7, 2024, shortly after the Office of Administrative Hearings issued Order No. 24-UI-272141, the Department issued an amended administrative decision (decision # L0007014846) in this matter. That administrative decision stated an appeal deadline of November 27, 2024. On her late application for review statement, claimant explained the reason that she filed the late application for review:

I noticed on my Appeals decision paperwork today that there was a discrepancy in the dates: in the appeals hearings paperwork it said to be in by 11/25/2024, my paperwork from unemployment and in my Frances account says my last day to file is tomorrow 11/27/2024.

EAB Exhibit 1 at 1. Claimant also stated that she did not notice until November 26, 2024, that there was a discrepancy between the appeal deadlines in Order No. 24-UI-272141 and decision # L0007014846. Furthermore, the Department specifically told claimant that she could appeal the decision by November 27, 2024, and did not appear to explain the difference between the amended administrative decision that they issued and the ALJ's order, issued two days prior. It is not clear from the record why the Department issued an amended decision modifying Order No. 24-UI-272141 on November 7, 2024.

² EAB has taken notice of these facts, which are contained in Employment Department records. OAR 471-041-0090(1). Any party that objects to our taking notice of this information 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 noticed fact will remain in the record.

Regardless, the confusion brought about by the two conflicting deadlines constituted factors or circumstances beyond claimant's reasonable control. As such, claimant had good cause for filing the late application for review. Further, claimant filed her late application for review within a reasonable time after those factors or circumstances ceased to exist. Claimant first learned of the discrepancy on November 26, 2024, at which point those factors or circumstances ceased to exist. Because claimant filed her application for review the same day, she filed it within the seven-day "reasonable time" period required under OAR 471-041-0070(2)(b). Claimant's late application for review is therefore allowed.

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) (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.

For an individual with a permanent or long-term "physical or mental impairment" (as defined at 29 CFR §1630.2(h)) good cause for voluntarily leaving work is such that a reasonable and prudent person with the characteristics and qualities of such individual, would leave work." OAR 471-030-0038(4). 29 C.F.R. §1630.2(h) defines "physical or mental impairment" as:

- (1) Any physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genito-urinary, hemic and lymphatic, skin, and endocrine; or
- (2) Any mental or psychological disorder, such as an intellectual disability (formerly termed "mental retardation"), organic brain syndrome, emotional or mental illness, and specific learning disabilities.

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).

The order under review concluded that claimant voluntarily quit work to accept an offer of other work; and further concluded that doing so did not constitute good cause because the offer was not definite, as the offer was contingent upon prerequisites that claimant had not completed as of when she quit.³ Order No. 24-UI-272141 at 4. The order under review correctly concluded that claimant's decision to quit, to the extent that she did so to accept the offer of other work, did not constitute good cause. However, the

³ 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).

record shows that other factors contributed to claimant's decision to seek other work and ultimately quit. Therefore, even if claimant's decision to quit based on her acceptance of other work was not good cause, it is necessary to determine if the other reasons that claimant quit *were* good cause. The record as developed is insufficient to make such a determination.

At hearing, claimant testified that she felt "incredibly oppressed and therefore like very depressed," and "like it was very hard for [her] to come to work because of not feeling heard in any way or seen." Transcript at 51. These feelings were the result, at least in part, of her frustrations with working with T. Claimant also explained, in relation to difficulties she had in recalling dates and other details, that she had "brain fog from [her] depression." Transcript at 52. This testimony suggests that claimant may have been suffering from a permanent or long-term mental impairment at the time that she quit work. If so, claimant's decision to quit due to her various work frustrations must be considered from the perspective of a reasonable and prudent person suffering from such condition.

On remand, the ALJ should develop the record to determine whether claimant was suffering from one or more long-term physical or mental impairments at the time she quit; if so, what those impairments were; and how, if at all, they impacted her decision to quit. The ALJ should also further develop the record to allow claimant to better specify what circumstances might have exacerbated any such conditions, as well as any efforts claimant made, or could have made, to mitigate them. If claimant has a long-term physical or mental impairment, the ALJ should develop the record so it possible to determine if a reasonable and prudent person with such condition would have left work when claimant did, or if there was a reasonable alternative for a person with such condition to doing so.

Overpayment. A claimant who has been overpaid benefits because of an error not caused by the claimant's false statement, misrepresentation of a material fact or failure to disclose a material fact, or because an initial decision to pay benefits is later reversed by a decision finding the individual is not eligible for the benefits, must have the amount deducted from any future benefits otherwise payable to the claimant for any week or weeks within five years following the week in which the decision establishing the erroneous payment became final. ORS 657.315(1)(a).

The order under review affirmed the Department's assessment of the \$4,280 overpayment for the weeks at issue on the basis that claimant was disqualified from benefits for those weeks because she had voluntarily quit work. Order No. 24-UI-272141 at 5. Because the record as developed, as explained above, is insufficient to determine whether claimant had good cause to quit, it cannot yet be determined whether claimant was eligible for benefits for the weeks at issue.

Even if the record on remand *does* show that claimant quit without good cause, however, two remaining issues regarding the overpayment must be addressed. First, Department records suggest that claimant started working for the new employer in January 2024. Because claimant did not file her initial claim for benefits until approximately a month later, it is possible that claimant earned sufficient wages after her separation from the employer in this matter to requalify her for benefits for some or all of the weeks at issue.⁴ On remand, the ALJ should inquire as to whether claimant earned wages totalling at least four

⁴ "An individual shall be disqualified from the receipt of benefits until the individual has performed service in employment subject to this chapter or the equivalent law of another state or Canada or as defined in ORS 657.030 (2) or as an employee of the federal government, for which remuneration is received that equals or exceeds four times the individual's weekly benefit amount subsequent to the week in which the act causing the disqualification occurred[.]" ORS 657.176(2).

times her weekly benefit amount in the relevant period. To that point, claimant should be prepared to testify to her gross earnings for the period after she quit working for this employer in December 2023, and may wish to produce proof of earnings to support that testimony. The Department should also produce a witness who can testify as to whether claimant had sufficient earnings to requalify.

Second, the order under review concluded that, under ORS 657.310, claimant “must either repay or have deducted from future benefits [the assessed overpayment amount] pursuant to ORS 657.310.” Order No. 24-UI-272141 at 5. However, the record does not show that the overpayment in this matter was the result of claimant having made an misrepresentation of fact. At hearing, the Department’s witness explained only that claimant was overpaid benefits because “it was determined that it was . . . her fault . . . due to . . . quitting without good cause.” Transcript at 15. This assertion of fault, without any evidence to support such an assertion, is insufficient to show that claimant was actually at fault for the overpayment. The Department therefore has not met its burden to show that the overpayment resulted from claimant having made a misrepresentation of fact. As such, to the extent that any overpayment remains after the hearing on remand, it must be assessed and collected, via deduction from future benefits only, under ORS 657.315.

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 without good cause and, if so, the amount of benefits that claimant was overpaid, Order No. 24-UI-272141 is reversed, and this matter is remanded.

DECISION: Order No. 24-UI-272141 is set aside, and this matter remanded for further proceedings consistent with this order.

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

DATE of Service: January 2, 2025

NOTE: The failure of any party to appear at the hearing on remand will not reinstate Order No. 24-UI-272141 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 دستورالعمل 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

Email: appealsboard@employ.oregon.gov

Website: www.Oregon.gov/employ/pages/employment-appeals-board.aspx

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El Departamento de Empleo de Oregon es un programa que respeta la igualdad de oportunidades. Disponemos de servicios o ayudas auxiliares, formatos alternos y asistencia de idiomas para personas con discapacidades o conocimiento limitado del inglés, a pedido y sin costo.