

EMPLOYMENT APPEALS BOARD DECISION
2025-EAB-0284

Reversed & Remanded

PROCEDURAL HISTORY: On November 22, 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 from September 15, 2024, to November 8, 2025 (decision # L0007345562). Claimant filed a timely request for hearing. On January 13, 2025, ALJ Griffith conducted a hearing at which the employer failed to appear, and on January 22, 2025, issued Order No. 25-UI-280546, modifying decision # L0007345562 by concluding that claimant quit work without good cause and was disqualified from receiving benefits effective September 15, 2024, and until requalified under Employment Department law.¹ On January 26, 2025, claimant filed an application for review with the Employment Appeals Board (EAB).

EVIDENTIARY MATTER: The ALJ posted Exhibit 1 in the evidentiary record in three files, all marked as “Exhibit 1.” The first file consisted of the entirety of claimant’s submitted documents, including a cover email, and two duplicates of claimant’s August 31, 2024, availability sheet appearing in the first five pages of the file. The second file consisted of the entirety of claimant’s submitted documents without the cover email or duplicated pages. The third file consisted of claimant’s cover email only.

For ease of reference, these three files have been merged into a single file and posted in the evidentiary record as “Exhibit 1.” EAB is providing Exhibit 1 to the parties with this decision.

WRITTEN ARGUMENT: Claimant submitted written arguments on January 26, May 8, and May 13, 2025. Claimant did not state that she provided a copy of her arguments to the employer as required by OAR 471-041-0080(2)(a) (May 13, 2019). The arguments also contained 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-

¹ Although Order No. 25-UI-280546 stated it affirmed decision # L0007345562, it modified that decision by changing the disqualification period from September 15, 2024, to November 8, 2025, to effective September 15, 2024, until requalified under Employment Department law. Order No. 25-UI-280546 at 4.

0090 (May 13, 2019). EAB considered only the information received into evidence at the hearing. *See* ORS 657.275(2).

The majority of the documents contained in claimant's written arguments are already in the hearing record as Exhibit 1. However, the parties may offer new information, such as the documents in claimant's written argument not already in the hearing record, into evidence at the remand hearing. At that time, it will be determined if the new information will be admitted into the record. The parties must follow the instructions on the notice of the remand hearing regarding 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) Nectar Markets, LLC employed claimant as a "budtender," a cannabis dispensary salesperson, from October 10, 2023, until September 18, 2024. Audio Record at 17:56.

(2) In December 2023, claimant's store manager had a meeting with claimant in which the store manager cautioned claimant on the proper use of pronouns and of the chosen names, rather than birth names, of transgender individuals. Afterward, claimant believed rumors were being spread about her being "against homosexual people." Audio Record at 39:31. In May 2024, claimant believed her store manager falsely accused her of saying something untoward about a transgender individual. Exhibit 1 at 11. On or about May 30, 2024, based on these incidents, claimant filed a complaint against the employer with the Bureau of Labor and Industry (BOLI), alleging discrimination based on her sexual orientation as a straight person.

(3) Thereafter, claimant believed the employer retaliated against her. For a time, claimant had worked a shift on Sundays from 11:00 a.m. to 7:00 p.m., which claimant regarded as a "good tipping shift." Audio Record at 38:50. In early June 2024, the employer stopped scheduling her for that shift. Exhibit 1 at 28. Claimant also believed that, as retaliation, the employer scheduled her at stores where the customer tips were poor. In late May 2024, claimant had a meeting with her store and zone managers in which the zone manager told claimant that claimant had been eavesdropping and that her assertions of retaliation and rumor spreading were not based in reality. Exhibit 1 at 29. In early June 2024, claimant sent emails to the employer's human resources (HR) department complaining, among other things, of losing the Sunday shift and declining sales, and sharing her impression that the employer's scheduling department had been contacted by claimant's managers to determine "who goes where." Exhibit 1 at 29. The HR department responded by suggesting that claimant reach out to the employer's scheduling department with concerns about her schedule and focus on providing good customer service rather than the status of sales. Exhibit 1 at 28. At some point after the foregoing, claimant filed a second complaint against the employer with BOLI, alleging retaliation.

(4) On or about July 16, 2024, claimant's physician diagnosed her with major depressive disorder and ordered her placed off work from July 16, 2024, until August 16, 2024, to support a Family and Medical Leave Act (FMLA) request. The physician then extended claimant's off-work status through September 15, 2024, and deemed her able to return to work at full capacity on September 16, 2024. Claimant was on FMLA leave from July 16, 2024, through September 15, 2024, and received Paid Leave Oregon benefits during that period.

- (5) A few days before going on leave, claimant interviewed for a job as a school bus driver for a prospective employer called First Student. On July 29, 2024, First Student gave claimant a conditional offer of employment, with an orientation scheduled for September 18, 2024, a training scheduled for September 23, 2024, and driver training to begin September 30, 2024. Exhibit 1 at 2. First Student's conditional job offer was contingent upon passing background checks and a medical screening, and obtaining a commercial driver's license.
- (6) Prior to going on leave, claimant typically worked Thursday, Friday, Saturday, and Sunday about 30 hours per week.
- (7) The employer required budtenders to submit an availability sheet giving at least two weeks' notice in advance when requesting a change to availability for shifts. On August 31, 2024, in anticipation of her leave expiring on September 15, 2024, claimant emailed an availability sheet to the employer's scheduling department. The sheet listed claimant's desired number of hours as eight and listed claimant as only being available to work on Saturdays. Exhibit 1 at 5.
- (8) Claimant reduced her work availability to accommodate classes she was taking and to enable her to transport her 12-year old son back and forth from school.
- (9) On August 31, 2024, a few minutes after claimant emailed her availability sheet, an employee replied that they would pass along claimant's sheet to claimant's scheduler. That day, claimant looked at the employer's schedule and saw that she was scheduled to work from 2:30 p.m. to 10:30 p.m. on Wednesday, September 18 and Thursday, September 19, 2024. Claimant recognized that the scheduled times would conflict with her classes and her transportation responsibilities. Specifically, claimant had classes on Thursdays, and her son got out of school at 3:00 p.m. on weekdays.
- (10) On September 1, 2024, claimant emailed the employer's scheduling department and stated that her availability was for Saturday only, but that she was scheduled to work on Wednesday, September 18 and Thursday, September 19. Exhibit 1 at 39. An employee replied that the scheduling department needed at least three days of availability from claimant. Exhibit 1 at 39.
- (11) Later on September 1, 2024, claimant emailed the employer a new availability sheet. Exhibit 1 at 43. The sheet listed claimant's desired number of hours as 15 and listed claimant as being available to work on Fridays, Saturdays, and Sundays, 8:30 to close, and *not* available to work on Mondays, Tuesdays, Wednesdays, and Thursdays. That day, an employee replied, thanking claimant for submitting a new form and stating that "scheduling will proceed with this form moving forward." Exhibit 1 at 38.
- (12) Each availability sheet claimant turned in contained the statement, "The more open your availability is, the more hours you will be scheduled. . . . **[The employer] does not guarantee hours, you are scheduled based on the stores' needs vs your availability.**" Exhibit 1 at 5 (emphasis in original). Each sheet also stated, above where claimant signed and dated each sheet, "I hereby acknowledge that the above schedule reflects my availability to work. Changes to availability can be requested by filling out a new form and providing it to the scheduling department. Please note that this does not guarantee the change in request and may result in a reduction of hours scheduled." Exhibit 1 at 5.

(13) On September 8, 2024, claimant noticed the employer had scheduled claimant to attend a work meeting on Thursday, September 26, 2024, from 1:30 p.m. to 2:00 p.m. and scheduled her to work Saturday, September 28, 2024, from 8:30 a.m. to 2:30 p.m. Exhibit 1 at 93. The employer's director of HR thought that claimant had been removed from the September 18 and September 19, 2024, shifts on September 1, 2024. Exhibit 1 at 19. However, claimant remained scheduled to work September 18 and 19, 2024 from 2:30 p.m. to 10:30 p.m. on both days.

(14) At 2:44 p.m. on September 18, 2024, a coworker texted claimant asking whether she was on her way to work. At 2:51 p.m., claimant responded, "I told you guys more than 2 weeks ahead of time that I cannot work Wed or Thursday. I turned in an availability form." Exhibit 1 at 46. At 2:55 p.m., the coworker responded, "we will remove you from today. Thank you!" Exhibit 1 at 46.

(15) On September 18, 2024, at 3:29 p.m., claimant emailed the employer. In the email, claimant stated that she had sent her availability "more than 2 weeks ahead of time" and asserted that she was "ignored." Exhibit 1 at 37. Claimant also stated that she "reminded scheduling of Wed and Thursday still being on my schedule and copied in HR," and asserted that she was "[s]till ignored." Exhibit 1 at 37. Claimant referred to the employer's scheduling activities as "unethical," suggested they were "retaliation," and exclaimed, "I quit!" Exhibit 1 at 37-38.

CONCLUSIONS AND REASONS: Order No. 25-UI-280546 is set aside, and this matter remanded for further proceedings consistent with this order.

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). "For an individual with a permanent or long-term "physical or mental impairment" (as defined at 29 CFR §1630.2(h))² 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). "[F]or all individuals, the reason must be of such gravity that the individual has no reasonable alternative but to leave work." OAR 471-030-0038(4).

The order under review concluded that claimant quit work without good cause. Order No. 25-UI-280546 at 3-4. The record as developed does not support this conclusion.

Based on the evidence claimant offered at hearing, it appears one of the reasons claimant left work was because she considered the employer's conduct in scheduling her work hours to be retaliation that would

² 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.

negatively affect her mental health. Remand is necessary to develop the record regarding whether the standard to apply to determine whether claimant quit with good cause is the ordinary standard, or a modified one for individuals with a permanent or long-term “physical or mental impairment” as defined at 29 CFR §1630.2(h). Remand is also required to develop the record as to the extent to which, under either good cause standard, claimant’s mental health issues contributed to the gravity of claimant’s situation and available reasonable alternatives when she quit.

At hearing, claimant testified that the employer’s conduct in scheduling claimant was retaliation for the BOLI complaints claimant had previously made. Audio Record at 38:33. In a statement included with her documentary evidence, claimant attributed her voluntary leaving to the employer’s “unprofessional conduct” in scheduling her return to work and, in a reference to her FMLA leave for major depressive disorder, a concern that returning to work would cause her “more stress and another mental breakdown.” Exhibit 1 at 2. In her resignation email, claimant referred to the employer’s scheduling activities as “unethical”, and suggested they were “retaliation[.]” Exhibit 1 at 37-38.

On remand, the ALJ should assess whether the appropriate standard to apply to determine whether claimant quit with good cause is the ordinary standard, or a modified one for individuals with a permanent or long-term “physical or mental impairment” as defined at 29 CFR §1630.2(h). The record as developed shows that claimant was diagnosed with major depressive disorder, placed on leave from July 16 through September 15, 2024, and then deemed able to return to work at full capacity on September 16, 2024. Exhibit 1 at 47-50. The ALJ should ask questions to develop the circumstances of claimant’s diagnosis for major depressive disorder, what led her to seek the diagnosis, whether she had ever been diagnosed with the condition before, and whether she experienced any lingering effects of the condition thereafter. The ALJ should also inquire on remand as to any other relevant physical or mental health conditions claimant may have been diagnosed with prior to her voluntary leaving, and when such diagnosis, if any, occurred. As it is mentioned in the documentary evidence, the ALJ should ask claimant whether she had a diagnosis of autism and, if so, inquire as to where on the autism spectrum claimant fell, and how the diagnosis impacted claimant’s decision to quit work, if at all. Exhibit 1 at 26.

The ALJ also should ask questions on remand to develop the record as to claimant’s assertions of retaliation or other misconduct on the part of the employer, claimant’s perceptions of the employer’s conduct, and the effects of the real or perceived retaliation, if any, on claimant’s mental health. To this end, the ALJ should ask claimant by what means rumors allegedly spread about her being “against homosexual people,” and what alleged misconduct caused claimant to file her BOLI complaints. Audio Record at 39:31. The ALJ should ask claimant to explain how the employer’s conduct of removing her from the Sunday shift or assigning her to certain stores was retaliatory, rather than the result of some other reason, such as business need. At hearing, claimant testified that the employer “will harass and they move you around and they work the scheduling. They’ll call scheduling and say don’t send this person to my store, or don’t schedule this person at this store.” Audio Record at 41:20. The ALJ should ask claimant if and, if so, how she was in a position to know that scheduling was done in such a manner. After the record is developed as to the alleged retaliation the employer subjected claimant to, the ALJ should ask questions to develop how any retaliation or misconduct on the part of the employer, real or perceived, affected claimant’s mental health.

Regardless of which good cause standard applies, the ALJ should make inquiries to develop the record regarding how claimant’s mental or emotional distress contributed to the gravity of claimant’s situation

and the availability of reasonable alternatives. The ALJ should ask questions to develop how claimant's mental or emotional distress affected how she perceived the employer's actions, and how the employers actions affected her mental health, both before and after claimant took medical leave. The ALJ should then ask questions to develop what aspects of her communications with the employer about returning to work caused her to believe that doing so would cause additional mental health difficulties.

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 quit work with good cause, Order No. 24-UI-280546 is reversed, and this matter is remanded.

DECISION: Order No. 25-UI-280546 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: May 23, 2025

NOTE: The failure of any party to appear at the hearing on remand will not reinstate Order No. 25-UI-280546 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

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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 دستورالعمل موجود در پایان آن، از دادگاه تجدید نظر اورگان درخواست تجدید نظر کنید.

Employment Appeals Board - 875 Union Street NE | Salem, OR 97311

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