

EMPLOYMENT APPEALS BOARD DECISION
2018-EAB-1030

Affirmed
No Disqualification

PROCEDURAL HISTORY: On September 27, 2018, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant voluntarily left work without good cause (decision # 112329). Claimant filed a timely request for hearing. On October 15, 2018, ALJ Snyder conducted a hearing, and on October 23, 2018 issued Order No. 18-UI-118602, reversing the Department's decision and concluding the employer discharged claimant but not for misconduct. On October 26, 2018, the employer filed an application for review with the Employment Appeals Board (EAB).

The employer submitted a written argument that contained information not offered into evidence during the hearing. The employer did not explain why it did not present this information at the hearing or otherwise show as required by OAR 471-0411-0090 (October 29, 2006) that it was prevented from doing so by factors or circumstances beyond its reasonable control. For this reason, EAB did not consider the new information that the employer sought to present by way of its written argument. EAB considered only information received into evidence during the hearing when reaching this decision.

FINDINGS OF FACT: (1) All You Need Maintenance & Construction employed claimant as a crew member from May 4, 2018 until August 10, 2018.

(2) The employer expected claimant to report for work as scheduled or to notify the employer if he was going to be absent. Claimant understood this expectation as matter of common sense.

(3) The employer preferred crew members to ride together in the foreman's truck to work sites. The foreman usually picked up claimant at his residence before he transported claimant, along with the crew, to the work site. On August 3, 2018, the owner told claimant that he did not want claimant to drive his personal vehicle to job sites because he thought claimant was doing so to leave work earlier than the other crew members who had ridden together to the job sites.

(4) On the morning of August 8, 2018, claimant drove his personal vehicle to the owner's home, where the foreman and crew members were preparing to depart for the work site. Because the weather forecast for that day was for temperatures in excess of 100 degrees and a heat advisory had been issued, claimant asked the foreman if he take his vehicle to the job site so he would have access to its air conditioning if he became too hot. The foreman was irritated that claimant wanted to drive himself to a job so soon after the August 3 conversation with the owner. However, the foreman told claimant he could drive his vehicle to the job site that day. Based on earlier conversations, claimant understood the work site that day was at Black Butte Ranch.

(5) After the foreman allowed claimant to drive his personal vehicle to the work site on August 8, claimant went to his vehicle as the foreman and the other crew members went to the foreman's truck. The foreman drove away from the owner's house as did claimant. A few blocks from the house, the foreman noticed that claimant was not following behind his truck. The foreman drove back to the owner's house, but claimant was not there, having already departed for Black Butte Ranch. The foreman then drove the crew to their first work site, which was not Black Butte Ranch. After he reached Black Butte Ranch, claimant waited for the foreman and the crew to arrive, and when they did not, he sent messages to the foreman via messenger, text message and voicemail message asking where he and the crew were and why they had not arrived at Black Butte Ranch. However, there was no phone service at the first job site that day and the foreman did not at that time receive any of claimant's messages to him. The foreman did not attempt to reach claimant to ask where he was. When the foreman took the crew to the second job site that day, which was Black Butte Ranch, he entered an area where he had phone service and saw that he had earlier been sent several messages from claimant. Although the foreman accessed the messages from claimant, he did not respond to them because he was "not going to turn around and come back in [to town] to talk to [claimant] about it" and he "did not want to deal with it." Audio at ~19:19, ~21:46. Because claimant did not have correct information about the location of the job site, he could not and did not report to that site.

(6) Because claimant was not able to report for work on August 8, claimant used what would otherwise have been work time that day and took an overdue time sheet to the owner's home and left it on the owner's doorstep, hoping to receive compensation for those hours. The time sheet claimant turned in was not for work performed during the current pay period of August 5 through August 17. At the conclusion of the work day on August 8, the foreman dropped the crew off at the owner's house and saw that claimant had left a time sheet for the owner. The foreman assumed the time sheet was for the current pay period and concluded that claimant had quit work that day. The foreman did not contact claimant in response to his messages from earlier that day or to ask whether claimant had left the time sheet intending to quit.

(7) Claimant was scheduled to work on August 9, 2018, and expected to be picked up at his residence by the foreman and transported to that day's job site. When the foreman did not appear, claimant called him and left a message. The foreman did not return claimant's message. Claimant was scheduled to work on August 10, 2018, and the foreman also did not appear that day to give him a ride to the job site.

(8) On August 10, 2018, after the foreman did not arrive, claimant contacted the owner who had just returned after being on vacation for the work week. Claimant asked the owner what his status was and why the foreman had not been picking him up. The owner told claimant he was discharged because he had failed to report for work on August 8, 9 and 10, 2018 and had not called the employer to state that he was going to be absent on those days.

CONCLUSIONS AND REASONS: The employer discharged claimant but not for misconduct.

While claimant contended that the employer discharged him, the employer appeared to contend that even if the owner told claimant he was discharged on August 10, 2018, claimant had earlier evidenced an intention to quit work on August 8 by not reporting for work and turning in a time sheet. Audio at ~29:05, ~34:18. As a result, the first issue this case presents is the nature of the work separation. If the 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) (January 11, 2018). 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).

Here, the employer's witnesses did not contend that claimant ever told the employer that he was quitting work. The reason that claimant would have decided to quit work on August 8 is obscure since the foreman had that day acceded to his request to allow him to drive his vehicle to the job site. Moreover, the foreman agreed that claimant had sent him messages on August 8 asking where he and the crew were when they did not appear at what claimant thought was the work site, suggesting that as of that day, claimant was willing to continue working for the employer. While claimant might have dropped off a time sheet at the owner's house later that day, after the foreman failed to respond to his messages, doing so was at best an ambiguous gesture about claimant's intentions. Claimant testified that the time sheet was not for the current pay period, and dropping it off would not indicate an intention to resign since he was still owed compensation for hours not shown on that time sheet. Finally, if claimant had intended to quit, it simply does not make sense that he would call the owner on August 10 seeking clarification of his employment status in light of the foreman's behavior on August 8, 9 and 10. Viewed as a whole, the preponderance of the evidence weighs in favor of the conclusion that claimant did not quit work before the owner told him he was discharged on August 10.

ORS 657.176(2)(a) requires a disqualification from unemployment insurance benefits if the employer discharged claimant for misconduct connected with work. OAR 471-030-0038(3)(a) defines misconduct, in relevant part, as a willful or wantonly negligent violation of the standards of behavior which an employer has the right to expect of an employee, or an act or series of actions that amount to a willful or wantonly negligent disregard of an employer's interest. OAR 471-030-0038(1)(c) defines wanton negligence, in relevant part, as 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. The employer carries the burden to show claimant's misconduct by preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

The owner testified that claimant was discharged because he did not show up at the designated job sites on August 8, 9 and 10, and did not call to notify the employer of an absence. Audio at ~43:56. However, while claimant may have had inaccurate information about the location of the job site on August 8, claimant did not act with indifference toward the employer's expectation that he would attend work that day since he promptly and diligently tried to reach the foreman to learn the job site location. By the calls that claimant made, it reasonably may be inferred that he was attempting to notify the employer and explain the reasons for his failure to report to that job site. Similarly, claimant waited for the foreman to appear to transport him to the work sites on August 9 and 10, and when the foreman did not appear on either of those days, made reasonable efforts to contact the foreman and the owner. Claimant's efforts to

report for work on those days and to reach either the foreman or the owner demonstrate, more likely than not, that he was not willfully or with wanton negligent violating the employer's standards.

Although the employer discharged claimant, it did not meet its burden to show that it did so for misconduct. Claimant is not disqualified from receiving unemployment insurance benefits.

DECISION: Order No. 18-UI-118602 is affirmed.

J. S. Cromwell and D. P. Hettle;
S. Alba, not participating.

DATE of Service: December 3, 2018

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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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 – 本判决会影响您的失业救济金。如果您不明白本判决，请立即联系就业上诉委员会。如果您不同意此判决，您可以按照该判决结尾所写的说明，向俄勒冈州上诉法院提出司法复审申请。

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 Asuntos Laborales. Si no está de acuerdo con esta decisión, puede presentar una Petición 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 ໄດ້ ໂດຍປະຕິບັດຕາມຄໍາແນະນຳທີ່ບອກໄວ້ຢູ່ຕອນທ້າຍຂອງຄໍາຕັດສິນນີ້.

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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