EO: 200
BYE: 201938

State of Oregon
Employment Appeals Board
875 Union St. N.E.
Salem, OR 97311

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DS 005.00

EMPLOYMENT APPEALS BOARD DECISION
2018-EAB-1141

Affirmed
Disqualification

PROCEDURAL HISTORY: On November 2, 2018, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant voluntarily left work without good cause (decision # 75827). Claimant filed a timely request for hearing. On November 28, 2018, ALJ M. Davis conducted a hearing, and on November 29, 2018 issued Order 18-UI-120439, affirming the Department's decision. On December 12, 2018, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant submitted a written argument that contained information that was not part of the hearing record. However, claimant failed to show that factors or circumstances beyond his reasonable control prevented him from offering that information during the hearing as required by OAR 471-041-0090(2) (October 29, 2006). For that reason, EAB considered only information received into evidence at the hearing when reaching this decision.

FINDINGS OF FACT: (1) NPC International Inc. employed claimant from approximately February 2017 until August 31, 2018, last as a delivery driver and shift lead.

(2) The employer expected that if claimant took time off from work he would, upon request, give the employer a date on which he anticipated that he would return to work. Claimant understood the employer's expectations.

(3) On July 27, 2018, with no prior notice, claimant told the general manager that he was required to travel immediately to Indonesia because his aunt who lived there was ill. Claimant told the general manager that he had booked a flight to Indonesia the next day. The general manager reminded claimant that he was currently scheduled to work through mid-August 2018, and claimant said he was not going to show up for those shifts. The general manager told claimant that he had the employer's permission to miss work due to this family emergency, but he needed to provide to him a specific date on which he anticipated that he would be returning to work. Claimant told the general manager he was not able to

give him a specific date at that time. Claimant then left the United States for Indonesia without giving the employer a date on which he expected to return to work.

(4) On July 31, 2018, the general manager sent a text message to claimant stating that claimant needed to give him the "exact date" on which he was going to return to work. Audio at ~15:03. Claimant received that text. In his response to the text, claimant did not supply an exact or estimated return to work date, told the general manager that he did not know how long he would be gone, and further stated that he would contact the general manager a week before he anticipated returning to work. Audio at ~9:06.

(5) Between August 1 and August 31, 2018, claimant did not contact the employer and did not supply an exact, approximate or estimated date on which he expected to return to work. On August 31, the employer's computer system automatically removed claimant from its list of employees since he had not worked in four weeks and no return to work date was shown in the employer's system. The employer discharged claimant on August 31, 2018.

(6) On September 20, 2018, claimant sent a text message to the general manager informing him that he would return to work the next week and inquiring about the shifts he would work. This text message was the first communication between claimant and the employer since July 31, 2018. In response to claimant's text, the general manager indicated that the employer had terminated claimant's employment for job abandonment since it did not have a return to work date for him and he had not remained in contact with the employer after July 31.

CONCLUSIONS AND REASONS: The employer discharged claimant for misconduct.

The first issue this case presents is the proper characterization 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).

Although the general manager referred to claimant having "abandoned work" in his response to claimant's September 20 text message, neither party contended that claimant quit work at any time or that the employer was willing to allow claimant to continue working for it after August 31. Regardless of how the employer referred to the work separation in the text, the preponderance of the evidence shows that the employer was unwilling to allow claimant to continue working and that it initiated an involuntary work separation as of August 31. Claimant's work separation was a discharge on August 31, 2018.

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) (January 11, 2018) 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 a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

The general manager told claimant orally on July 27 and by text on July 31 that he needed to provide a return to work date to the employer. The communications from the general manager to claimant about the necessity of giving the date on which he would return to work were very clear and not susceptible to misinterpretation. While claimant argued that there was an "agreement" between himself and the general manager presumably allowing him to be gone from work indefinitely and requiring him only to notify the employer a week before he planned to return to work, claimant based this supposed agreement on the general manager not having explicitly told him in the July 27 conversation or in response to the July 31 text message that the employer did not consider his protestations that he did not know when he would return to work sufficient to satisfy the employer's instructions to provide a return to work date. Audio at ~10:12. However, the record does not show that the general manager ever responded to claimant's communications by plainly and equivocally agreeing that claimant did not need to supply a return to work date, or did or said anything that reasonably undercut the clarity of his statements that claimant was required to supply a return to work date. Claimant knew or reasonably should have known that the employer expected him to provide an exact date on which he anticipated returning to work. That claimant disregarded this clear-cut expectation of the employer and did not provide an exact, approximate or estimated date on which he thought he would return to work during the month that followed his July 31 communication with the general manager was at least a wantonly negligent violation of the employer's standards.

Although claimant may have engaged in wantonly negligent behavior by not providing a return to work date to the employer for a month after July 31, claimant's behavior may be excused from constituting misconduct if it was an isolated instance of poor judgment under OAR 471-030-0038(3)(b). To be considered an isolated instance of poor judgment, the behavior of claimant that is at issue must, among other things, not have exceeded mere poor judgment by causing an irreparable breach of trust in the employment relationship or making a continued employment relationship impossible. OAR 471-030-0038(1)(d)(D).

Here, an objective employer would reasonably conclude that it could not continue an employment relationship with claimant under circumstances in which he did not give an expected or estimated duration for the time he would be away from work, failed to maintain contact with employer during this indefinite absence and expected to be returned to work whenever he decided to notify the employer that his return would be in one week. As a matter of common sense, an employer must be able to anticipate the work availability of its employees to allow it to meet its staffing requirements, which it reasonably could not do when claimant's absence was as open ended as that which claimant took. On these facts, the nature of claimant's wantonly negligent violation of the employer's standards exceeded mere poor judgment because it reasonable made a continued employment relationship impossible.

Nor was claimant's behavior in violation of the employer's standards excused from constituting misconduct as a good faith error under OAR 471-030-0038(3)(b). Here, it is implausible that claimant failed to understand the general manager's clear and unmistakable instruction that he was required to provide to the employer a date on which he expected to return to work. As such, claimant's failure to

provide an exact or estimated return to work date was not the result of a sincere, good faith misunderstanding of the employer's expectations, and may not be excused as a good faith error.

The employer discharged claimant for misconduct. Claimant is disqualified from receiving unemployment insurance benefits.

DECISION: Order No. 18-UI-120439 is affirmed.

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

DATE of Service: January 10, 2019

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

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