

EMPLOYMENT APPEALS BOARD DECISION
2019-EAB-0191

Reversed
No Disqualification

PROCEDURAL HISTORY: On December 24, 2018, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 145433). Claimant filed a timely request for hearing. On January 25, 2019, ALJ Wyatt conducted a hearing, and on February 1, 2019, issued Order No. 19-UI-123803, affirming the Department's decision. On February 19, 2019, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant submitted written argument to EAB. Claimant's argument contained information that was not part of the hearing record, and failed to show that factors or circumstances beyond claimant's reasonable control prevented claimant from offering the information during the hearing. Under ORS 657.275(2) and OAR 471-041-0090 we considered only information received into evidence at the hearing and claimant's argument, to the extent it was based thereon, when reaching this decision.

FINDINGS OF FACT: (1) Galt Foundation employed claimant as a staffing associate from May 14, 2018 to November 30, 2018. Claimant performed reception work and other office duties.

(2) Claimant worked five days per week and approximately 32-35 hours per week at an employer office in Portland. She typically worked from 10:00 a.m. to 5:00 p.m., Monday through Friday. The staffing manager at that office performed reception duties from 8:00 a.m., when the office opened, until claimant arrived.

(3) At the end of October 2018, claimant and the employer's regional manager (JC), who was based in Salem, together attended an interview with another organization. On that day, JC asked claimant if she would be willing to work 40 hours per week at some point in the future and she responded that she would.

(4) On November 21, 2018, the staffing manager at claimant's office left the employer and thereafter the account manager at that office opened it at 8:00 a.m. and performed reception duties until claimant

arrived. JC served as the interim staffing manager at the Portland office until a replacement could be hired. On November 21 and November 26, 2018, JC was in the Portland office and discussed with claimant “what it would [be] like for her to work 40 hours a week.” Transcript at 9. In their conversations, claimant neither offered to increase her hours to 40 nor refused to do so and JC did not specifically ask or direct her to increase her hours.

(5) On November 27, 2018, JC emailed claimant from his Salem office:

Hi Amber, I wanted to double check with you regarding working 40 hours per week. As I plan this month I really need someone in the office 40 hours per week. I know we spoke yesterday but just wanted to see if there was any way you could work the full 40 hours, M through F, 8:00 through 5:00? Please let me know. Thanks, [JC].

Transcript at 21.

(6) Claimant received the November 27 email. She did not respond to the email because it did not request an immediate response. She knew that JC would be in the Portland office two days later, on November 29, 2018, and planned to discuss with him whether the proposed change would be permanent or temporary until a new office staffing manager was hired before giving him her response.

(7) On November 29, 2018, after JC arrived at the office, claimant asked to speak with him about working a full 40 hours. JC responded that he was busy and could not meet at that time. Later that day when they met, before any discussion occurred, JC told claimant that she was being “let go.” Transcript at 13.

(8) On November 30, 2018, the employer discharged claimant because it concluded that she was unwilling to work 40 hours per week.

CONCLUSIONS AND REASONS: We disagree with the ALJ. The employer discharged claimant, but not for misconduct.

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. In a discharge case, the employer bears the burden to prove misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

In Order No. 19-UI-123803, the ALJ found as fact that on November 26, 2018 JC met with claimant, at which time she “declined” to work 40 hours per week, and after she failed to respond to the November 27 email, the employer discharged claimant because “she would not agree to work the 40 hour per week schedule required by the employer.” Order No. 19-UI-123803 at 2. The ALJ concluded that claimant’s discharge was for misconduct, reasoning that claimant should have known that her refusal to work the required schedule might lead to her discharge. *Id.* We disagree with the ALJ and conclude the employer failed to meet its burden of proof.

There was no dispute that when JC asked claimant, near the end of October 2018, whether she would be willing to work forty hours per week at some time in the future, claimant responded that she would. Transcript at 15-16, 18. However, the parties did dispute whether claimant “declined” to work 40 hours per week on November 26, 2018, with JC asserting that he confirmed on that date that claimant “wasn’t willing to work 40 hours” and claimant asserting that she did not have a conversation with him that day and “never refused to work 40 hours.” Cf. Transcript at 20-21 and 13, 25, 29. JC then asserted that to “document” claimant’s refusal on November 26, he sent the November 27 email. Transcript at 28. However, that email did not “document” a refusal by claimant to work 40 hours the previous day, but inquired “if there was any way you could work the full 40 hours, M through F, 8:00 through 5:00?” and is inconsistent with JC’s testimony regarding the purpose of his email. Moreover, that email did not give claimant a deadline for response but only stated, “Please let me know,” which claimant attempted to do by asking to speak with JC on November 29, 2018, before he informed her that she had been “let go”, which JC did not dispute.

Viewing the record as a whole, the employer’s evidence that claimant declined to work 40 hours per week both by her alleged statement on November 26 and by failing to send an email response to the employer’s November 27 email was internally inconsistent and unreliable. Similarly, claimant’s assertion that she never had a conversation with JC on November 26 is inconsistent with the plain language of the November 27 email, which claimant did not dispute, and also is of questionable reliability. As such, we have no particular reason to believe one witness over the other and conclude the parties’ relative credibility was roughly equal. Where neither party is more credible than the other and where the material evidence is in dispute, the party with the burden of proof, here the employer, has failed to meet its burden.

Accordingly, the employer discharged claimant, but not for misconduct under ORS 657.176(2)(a) and claimant is not disqualified from receiving unemployment insurance benefits on the basis of her work separation.

DECISION: Order No. 19-UI-123803 is set aside, as outlined above.¹

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

DATE of Service: March 27, 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.

¹ This decision reverses an order that denied benefits. Please note that payment of any benefits owed may take from several days to two weeks for the Department to complete.

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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 desisyong ito.

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 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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