

EMPLOYMENT APPEALS BOARD DECISION
2019-EAB-0359

Affirmed
No Disqualification
(No Descalificación)

PROCEDURAL HISTORY: On February 22, 2019, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant quit working for the employer without good cause (decision # 172311). Claimant filed a timely request for hearing. On March 20, 2019, ALJ Janzen conducted an interpreted hearing, and on March 25, 2019, issued Order No. 19-UI-126989, concluding the employer discharged claimant, not for misconduct. On April 5, 2019, the employer filed an application for review with the Employment Appeals Board (EAB).

With its application for review, the employer submitted written argument that included witness statements not provided at hearing, from individuals who did not appear at hearing. The new information was not part of the hearing record, and the employer's argument failed to show that factors or circumstances beyond its reasonable control prevented it from offering the information during the hearing. Under ORS 657.275(2) and OAR 471-041-0090 (October 29, 2006), we considered only information received into evidence at the hearing, and the employer's argument only to the extent it was based thereon, when reaching this decision.

FINDINGS OF FACT: (1) EBM Foods, Inc., dba Jack in the Box, employed claimant as a team member from December 3, 2018 to December 24, 2018. Claimant prepared and cooked potatoes for the employer.

(2) On December 24, 2018, claimant was working for the employer when an assistant manager told him at the end of his shift that he was "fired" because he was "too slow... [and]... needed to be faster." Transcript at 5-7. Claimant was surprised because he was still undergoing training and had not worked many hours for the employer.

(3) On December 26, 2018, claimant spoke with the restaurant manager and when he asked if he could return, was told, "no because you've been fired and there is nothing I can do about it." Transcript at 7.

(4) Prior to December 24, 2018, claimant had not been warned about or disciplined for violations of the employer's policies.

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

Work Separation. At hearing, claimant asserted that he was discharged and the employer asserted that claimant quit. *Cf.* Transcript at 5-7, 13. 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) (December 23, 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).

It was undisputed that December 24, 2018 was claimant's last day with the employer. Claimant testified that the assistant restaurant manager on duty that day told him at the end of his work shift that he was "fired." He also testified that he spoke with the "main boss," or restaurant manager, on December 26, 2018, and when he asked if he could return to work the manager told him "no because you've been fired and there is nothing I can do about it." The employer's human resources director testified that claimant failed to report for work as scheduled without calling in on December 25 and December 29, 2018, and the employer therefore concluded that claimant had abandoned his job. Transcript at 13. However, the human resources director did not dispute that claimant spoke with the restaurant manager on December 26, and that the restaurant manager confirmed that claimant had already been discharged. The preponderance of evidence shows that claimant was willing to continue to work for the employer after December 24, but was not allowed to do so by the employer. The work separation therefore was a discharge on December 24, and not a voluntary leaving.

Discharge. ORS 657.176(2)(a) requires a disqualification from unemployment insurance benefits if the employer discharged claimant for misconduct. OAR 471-030-0038(3)(a) defines misconduct, in relevant part, as a willful or wantonly negligent violation of standards of behavior the employer has the right to expect of the employee, or an act or series of actions that amount to a willful or wantonly negligent disregard of the employer's interest. Under OAR 471-030-0038(3)(b), mere inefficiency resulting from lack of job skills or experience is not misconduct. In a discharge case, the employer has the burden to establish misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

Claimant asserted he was told he was discharged because he was "too slow... [and]... needed to be faster." Claimant also testified he was surprised because he was still undergoing training and had not worked many hours performing that task for the employer. Transcript at 7-8. Under OAR 471-030-0038(3)(b), mere inefficiency resulting from lack of job skills or experience is not misconduct. Accordingly, on the record before us the employer discharged claimant, but not for misconduct under ORS 657.176(2)(a), and he is not disqualified from receiving benefits based on his work separation from the employer.

DECISION: Order No. 19-UI-126989 is affirmed. *La Orden de la Audiencia 19-UI-126989 queda confirmada.*

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

DATE of Service: May 8, 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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NOTA: Usted puede apelar esta decisión presentando una solicitud de revisión judicial ante la Corte de Apelaciones de Oregon (Oregon Court of Appeals) dentro de los 30 días siguientes a la fecha de notificación indicada arriba. Ver ORS 657.282. Para obtener formularios e información, puede escribir a la Corte de Apelaciones de Oregon, Sección de Registros (Oregon Court of Appeals/Records Section), 1163 State Street, Salem, Oregon 97310 o visite el sitio web en courts.oregon.gov. En este sitio web, hay información disponible en español.

Por favor, ayúdenos mejorar nuestros servicios por llenar el formulario de encuesta sobre nuestro servicio de atención al cliente. Para llenar este formulario, puede visitar <https://www.surveymonkey.com/s/5WQXNJH>. Si no puede llenar el formulario sobre el internet, puede comunicarse con nuestra oficina para una copia impresa de la encuesta.



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

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

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