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

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<p>EMPLOYMENT APPEALS BOARD DECISION 2019-EAB-0446</p>
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Order No. 19-UI-128852 Reversed
Discharged Not for Misconduct, No Disqualification

Order No. 19-UI-128872 Modified
No Overpayment, No Penalties

PROCEDURAL HISTORY: On March 20, 2019, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant voluntarily left work without good cause (decision # 120456). On March 21, 2019, the Department served notice of another administrative decision assessing a \$1,617 overpayment, \$242.55 monetary penalty, and 11 penalty weeks (decision # 193953). Claimant filed a timely request for hearing on both decisions. On April 22, 2019, ALJ S. Lee conducted two hearings, and on April 26, 2019 issued Order No. 19-UI-128852, affirming decision # 120456 and concluding that claimant voluntarily left work without good cause, and Order No. 19-UI-128872, modifying decision # 193953 and concluding that claimant was liable to repay a \$1,617 overpayment but was not liable for penalties. On May 6, 2019, claimant filed an application for review of both decisions with the Employment Appeals Board (EAB).

Pursuant to OAR 471-041-0095 (May 13, 2019), EAB consolidated its review of Orders No. 19-UI-128852 and 19-UI-128872. For case-tracking purposes, this decision is being issued in duplicate (EAB Decisions 2019-EAB-0445 and 2019-EAB-0446).

FINDINGS OF FACT: (1) In 2017, claimant worked for Grizzly Firefighters Inc. as a wildland firefighter. The employer kept track of claimant's qualifications and assignments on his "red card." The red card belonged to the employer, to be transferred to claimant's next employer should he stop working for the employer. The employer also maintained an employee file with claimant's employment history.

(2) Claimant worked for the employer throughout the 2017 firefighting season. Work dwindled at the end of the season then stopped. Claimant was not given any official notice that the season had ended or that he would not be given any additional assignments. He was not expected to contact the employer to ask for assignments, as he received all assignments by being dispatched by the employer.

(3) On January 26, 2018, claimant filed an initial claim for unemployment insurance benefits. His weekly benefit amount was \$342.

(4) Grizzly Firefighters Inc. re-employed claimant as a wildland firefighter from July 1, 2018 to September 3, 2018.

(5) In approximately August 2018, while on assignment, some employees approached claimant with a concern that they had been underpaid. Claimant referred the employees to speak with the owner.

(6) On September 3, 2018, claimant and the firefighting team returned from their assignment and met with the owner to debrief the assignment. During the debriefing, the owner called out claimant in front of his coworkers and said he should not be talking behind her back. Claimant was taken aback at having been called out in front of coworkers, and for something he had not done. He decided to seek work elsewhere.

(7) During the September 3, 2018 meeting, the owner also asked if anyone in the group would be unable to work if called for a fire after the next two days. Claimant said he could not, because he was caring for his sister's children while she gave birth.

(8) Later that day, claimant collected his paycheck from the owner. He asked the owner for his red card and employee file, because he thought he would need those items to seek work with a different employer. The owner considered claimant's request as an indication that he did not want to work for her any longer, and told claimant to let her know which employer to send his card and file to. Claimant left work with his paycheck.

(9) At the time claimant left work on September 3rd, he was not scheduled to work any longer that day. He was not scheduled to work the following two days.

(10) In the weeks after September 3rd, claimant waited for the employer to dispatch him to another fire. He heard that coworkers had been dispatched, but he was not. He assumed that the employer did not have work for him because it was getting toward the end of the firefighting season. However, the employer had decided to stop calling him to work and did not intend to dispatch him again in the future. Claimant never returned to work after September 3rd.

(11) On September 26, 2018, claimant restarted his unemployment insurance claim. He reported at that time that he was unemployed because he had been laid off due to a lack of work. Claimant filed weekly claims for benefits for the weeks of September 2, 2018 through October 20, 2018 (weeks 39-18 through 42-18). The Department paid him \$1,368 in benefits for those weeks based in part upon his assertion that he was unemployed due to a lack of work. Claimant's claim subsequently expired.

(12) On January 20, 2018, claimant filed another initial claim for benefits. His weekly benefit amount was \$249. He filed weekly claims for benefits for the weeks of January 20, 2019 through February 2, 2019 (weeks 4-19 to 5-19). The Department allowed benefits based in part upon his assertion that he was unemployed due to a lack of work. The Department did not pay claimant benefits during week 4-19 because that was his waiting week, but paid him \$249 in benefits for week 5-19.

CONCLUSIONS AND REASONS: Claimant did not quit work; he was discharged, but not for misconduct. Claimant is not liable to repay an overpayment, and is not liable for any penalties.

Work Separation. Order No. 19-UI-128852 concluded that claimant voluntarily left work. *See* Order No. 19-UI-128852 at 2-3. The order stated, “At hearing, claimant testified that he never said that he quit. However, he did not dispute that he requested his red card and file. When the employer told him that she needed to know what employer to send it to, claimant did not dispute that he was seeking work for a different employer. Based on the evidence at hearing, I was persuaded that claimant took the first step to sever the employment relationship.” *Id.* at 3. That conclusion is incorrect.

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).

There is no reasonable dispute that claimant was unhappy with the owner and intended to seek other work. Indeed that is why he requested that the owner give him his red card and file. However, there is no evidence in this record suggesting, much less establishing by a preponderance of the evidence, that claimant was not willing to continue working for the employer despite his desire to find a new job.

It was, rather, the owner who decided that claimant would not be allowed to return to work. The owner admitted she did not dispatch claimant to three separate fires, and testified, “When you ask for your file that means you’re moving.” Order No. 19-UI-128852 Transcript at 23. “[W]hen a person asks for their file that means they don’t want to be working here anymore. That they want to move. I had no incentive to call him at that point . . . This is a dangerous job. A person that doesn’t want to be there doesn’t want to be part of the team.” Order No. 19-UI-128852 Transcript at 24. “He did not want to work here anymore. So to me that means you quit.” *Id.* “You never know when [the season is] going to be over, but if you’re asking for your card, you’re terminating it right there.” Order No. 19-UI-128852 Transcript at 24-25.

The owner argued at the hearing that it was claimant’s responsibility to contact her to return to work, that he had indicated he was not available for a personal matter, and “I can’t chase after everybody.” Order No. 19-UI-128857 Transcript at 18. However, the employer customarily contacted people to dispatch them for assignments, not the other way around, and there is nothing suggesting that claimant knew or should have known to contact the employer after September 3rd. Nor, given the employer’s testimony in the voluntary leaving hearing, does the record suggest that continuing work was available for claimant if he had done so, given that the owner had concluded claimant quit and did not want to assign him to additional assignments after that point.

The preponderance of the evidence is that the owner either assumed or decided that claimant quit when he asked for his red card and file, even though claimant had not said he quit, and even though the owner did not ask claimant why he was requesting his red card and file. The fact that claimant planned to seek other work with a different employer does not mean he was no longer willing to work for the employer at that time. It is more likely than not that claimant was willing to continue to be dispatched and work for the employer, at least until he found a new job, but the employer did not allow him to do so. The work separation was therefore a discharge.

Discharge. ORS 657.176(2)(a) requires a disqualification from unemployment insurance benefits if the employer discharged claimant for misconduct connected with work. “As used in ORS 657.176(2)(a) . . . a willful or wantonly negligent violation of the standards of behavior which an employer has the right to expect of an employee is misconduct. An act or series of actions that amount to a willful or wantonly negligent disregard of an employer's interest is misconduct.” OAR 471-030-0038(3)(a). “[W]antonly negligent’ means 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.” OAR 471-030-0038(1)(c).

The employer discharged claimant because the owner was not willing to dispatch claimant to fires after he requested his red card and file, because his request symbolized to her that he did not want to work for the employer any longer. Neither claimant’s request nor his desire to find a different job was willful or wantonly negligent misconduct. Claimant is not disqualified from benefits because of his discharge.

Overpayment. Order No. 19-UI-128872 concluded that claimant was paid \$1,617 in benefits to which he was not entitled. However, that decision was based upon a finding that claimant voluntarily left work with Grizzly Firefighting, Inc. without good cause and was disqualified from receiving benefits as a result. Order No. 19-UI-128872 at 2, 5. As concluded herein, claimant’s work separation from Grizzly Firefighting was a non-disqualifying discharge not for misconduct. Claimant therefore was entitled to receive the \$1,617 in benefits. He was not overpaid, and is not liable to repay that amount to the Department.

Misrepresentation and penalties. Based on a *de novo* review of the entire record in this case, and pursuant to ORS 657.275(2), the portion of the order under review concluding that claimant did not make a misrepresentation and is not liable for a monetary penalty or penalty weeks is **adopted**.

DECISION: Order No. 19-UI-128852 is set aside, as outlined above. Order No. 19-UI-128872 is modified, as outlined above.

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

DATE of Service: June 7, 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 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

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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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