EO: 200
BYE: 202012

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

076
DS 005.00

EMPLOYMENT APPEALS BOARD DECISION
2019-EAB-0497

Reversed
No Disqualification

PROCEDURAL HISTORY: On April 17, 2019, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant voluntarily left work without good cause (decision # 104845). Claimant filed a timely request for hearing. On May 13, 2019, ALJ Snyder conducted a hearing, and on May 20, 2019, issued Order No. 19-UI-130206, affirming the Department's decision. On May 29, 2019, claimant filed an application for review with the Employment Appeals Board (EAB).

EAB considered claimant's written argument in reaching this decision.

FINDINGS OF FACT: (1) Marsee Foods Inc. employed claimant from March 19, 2018 until March 24, 2019 as a delivery driver. One of claimant's duties as a driver was to load a delivery truck.

(2) The employer expected claimant to report to work when he stated he would work, or notify the employer that he was unable to report to work. Claimant knew or should have known the employer's expectation as a matter of common sense.

(3) Before March 19, 2019, claimant experienced chronic back pain. On March 19, 2019, claimant sent the employer's distribution manager a text message stating, "My back needs more rest to heal that's what doctor ask me to do [I] don't like calling sick and [its] okay if I'm not getting paid. Hopefully you will find [someone] to cover me. [T]hank you." Exhibit 1. The text message included a photograph of a note from claimant's doctor asking the employer to excuse claimant from work for medical reasons until March 23, 2019. Exhibit 1. The manager responded by asking claimant if he would report to work for a training on March 22, 2019. On March 20, 2019, claimant responded, "Yes, no problem." Exhibit 1. The manager told claimant to report to work at 8:30 p.m., and claimant confirmed. Exhibit 1.

(4) On March 22, 2019, claimant was unable to work due to back pain. Claimant did not contact the employer or report to work for the training on March 22, 2019.

(5) Before Sunday, March 24, 2019, claimant's doctor scheduled claimant for an MRI. Claimant wanted to see the results of the MRI before he returned to work. On March 24, 2019, claimant sent the distribution manager a text message stating, "I have an MRI scan to my back on [March 28, 2019] and my back still bad and my wife took over [a coffee shop]. [W]hen I get better I can be a back up driver." Exhibit 1. The manager responded, "[Okay] that's what I assume since you didn't show up[.] We had a new driver started[.] I need your intel badge back please." Exhibit 1. Claimant responded, "[Okay] it was my pleasure working with you." Exhibit 1. The manager responded, "Likewise good luck with your coffee shop." Exhibit 1.

(6) Claimant's wife planned to purchase bakery items from the employer for the coffee shop.

CONCLUSION AND REASONS: The employer discharged claimant not for misconduct.

It is first necessary to determine the nature of the work separation in this case. 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). The order under review concluded that claimant quit work, reasoning that claimant could have continued to work for the employer, but did not, because he did not report to work for the training or ask for a medical leave of absence.[1] The record does not support this conclusion.

The employer's witness alleged that claimant quit by stating in a text message to him on March 24 that claimant's wife had purchased a coffee shop and that he had some "back issues" and was not going to be able to work for the employer "anymore." Audio Record at 15:25 to 15:59. Claimant testified that he did not quit, and the preponderance of the evidence supports that assertion. Audio Record at 24:32 to 24:46. Claimant did not report to work on March 22 due to back pain. The record does not show he was scheduled to work on March 23. Claimant's March 24 text message stated that he was willing to continue working for the employer "when I get better," and claimant did not state that he was not going to be able to work for the employer "anymore," as the employer's witness alleged. Audio Record at 15:25 to 15:59; Exhibit 1. Claimant had sent the manager a text showing that his doctor recommended he rest his back until March 23, and claimant's March 24 text provided an update to that information, stating that claimant's back was "still bad," and that he would have an MRI and return to work when he was "better." Exhibit 1. The distribution manager did not allow claimant to continue working, which was demonstrated when the manager asked for claimant's intel badge. The record does not show any reason why the employer would have requested that claimant turn in his intel badge other than the employer's unwillingness to allow claimant to continue working. Claimant reasonably understood that the employer would not allow him to continue working when the manager stated in a text to claimant that the employer had hired a new driver and asked for claimant's intel badge. Although the manager's act of severing the work relationship may have been based on a misunderstanding of claimant's text messages, it was the manager, and not claimant, who severed the work relationship. Therefore, the work separation was a discharge.

[1] Order No. 19-UI-130206 at 3-4.

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). Isolated instances of poor judgment are not misconduct. OAR 471-030-0038(3)(b).

Claimant knew as a matter of common sense that the employer expected him to report to work when scheduled or notify the employer that he was unable to work. It is undisputed that claimant stated in a text message to a manager that he would work on March 22, and that he did not report to work or contact the employer to state he would be absent. Although claimant was unable to work due to back pain, which is not misconduct, his failure to notify the employer was a wantonly negligent disregard of the employer's expectation that he communicate when he would be absent. Claimant acknowledged at hearing that it was a "mistake" not letting the employer know. Audio Record at 24:26 to 24:31.

The order under review found that claimant quit work, so did not assess whether the employer discharged claimant for misconduct. Because the employer discharged claimant after claimant missed work on March 22, that incident was more likely than not the reason the employer discharged claimant. While claimant's failure to notify the employer of his absence on March 22 was a wantonly negligent violation of the employer's standards, it is excused from constituting misconduct if it was an isolated instance of poor judgment within the meaning of OAR 471-030-0038(3)(b). To be excused as an isolated instance of poor judgment, the act must be isolated. It must be a single or infrequent occurrence rather than a repeated act or pattern of other willful or wantonly negligent behavior. OAR 471-030-0038(3)(b)(A). The record contains no evidence that claimant violated the employer's expectations before March 22. As a result, claimant's behavior meets the first part of the test to be excused as an isolated instance of poor judgment.

To be excused as an isolated instance of poor judgment, the behavior at issue must also not have been of a type that exceeded "mere poor judgment" by violating the law, being tantamount to unlawful conduct, creating an irreparable breach of trust in the employment relationship or otherwise making a continued employment relationship impossible. OAR 471-030-0038(1)(d)(D). Considering the circumstances surrounding claimant's conduct, the record does not show that claimant's failure to notify the employer that he would miss work on March 22 exceeded mere poor judgment. It was not illegal or tantamount to illegal conduct. Nor would such conduct, viewed objectively, create an irreparable breach of trust in the employment relationship or make a continued employment relationship impossible. Claimant notified the employer that his back condition was severe enough to require him to miss work until March 23 and provided a doctor's note excusing him from reporting to work on March 22. The record does not show that the employer responded to claimant's implicit request to miss work until March 23 other than to ask claimant to work on March 22. Under these circumstances, a reasonable employer would conclude that claimant's failure to report to work was a matter that could be resolved within a continued employment relationship. The record shows that claimant's behavior on March 22 was, at worst, an isolated instance of poor judgment and not misconduct.

The employer discharged claimant, but not for misconduct. He is not disqualified from the receipt of unemployment benefits on the basis of this work separation.

DECISION: Order No. 19-UI-130206 is set aside, as outlined above.

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

DATE of Service: July 2, 2019

NOTE: This decision reverses an order that denied benefits. Please note that payment of benefits, if any are owed, may take approximately a week for the Department to complete.

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.

Please help us improve our service by completing an online customer service survey. To complete the survey, please go to https://www.surveymonkey.com/s/5WQXNJH. If you are unable to complete the survey online and wish to have a paper copy of the survey, please contact our office.

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.

Employment Appeals Board - 875 Union Street NE | Salem, OR 97311
Phone: (503) 378-2077 | 1-800-734-6949 | Fax: (503) 378-2129 | TDD: 711
www.Oregon.gov/Employ/eab