

EMPLOYMENT APPEALS BOARD DECISION
2019-EAB-0566

Affirmed
No Disqualification

PROCEDURAL HISTORY: On April 18, 2019, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant voluntarily left work without good cause (decision # 81448). Claimant filed a timely request for hearing. On June 4, 2019, ALJ Meerdink conducted a hearing, and on June 5, 2019 issued Order No. 19-UI-131128, concluding the employer discharged claimant but not for misconduct. On June 21, 2019, the employer filed an application for review with the Employment Appeals Board (EAB).

EAB considered the employer's written argument when reaching this decision.

FINDINGS OF FACT: (1) Lane County Sheriff's Office employed claimant from September 29, 2014 until January 8, 2019, last as a management analyst.

(2) On September 13, 2018, claimant was involved in a car accident. Claimant sustained injuries to her spine, arms, neck, and shoulder. On September 13, claimant sent a text message to her supervisor notifying the supervisor of the accident, and that she was going to be absent from work until she saw a physician.

(3) On September 17, 2018, the employer received a note from claimant's physician stating that claimant was not able to return to work at that time and the physician would re-evaluate her condition in four weeks. The employer approved a leave for claimant beginning on September 14, 2018.

(4) From September 14 through December 12, 2018, claimant was not able to work and did not. During that period, the employer approved a series of short-term disability leaves for claimant, including under the Family and Medical Leave Act (FMLA) and the Oregon Family Leave Act (OFLA).

(5) On December 5, 2018, claimant participated by phone in a meeting with the employer to discuss the options that were available to her if she was not able to return to work when the leave she was currently

on expired. After that meeting, claimant did not understand that she might request additional unpaid leave under the Americans with Disabilities Act (ADA)

(6) On December 10, 2018, claimant requested an unpaid leave from the employer since she would exhaust her short-term disability leaves on December 12, but would not be able to return to work. On December 12, the employer approved an unpaid leave for claimant, starting on December 13, 2018 and continuing through January 8, 2019. That leave was not approved under the ADA. By letter dated that day, the employer notified claimant of the unpaid leave. In that letter, the employer stated, "You will be required to provide a full release upon your return on January 9, 2019. If you aren't able to return with a full release, your employment will terminate on January 8, 2019." Exhibit 2 at 3. On December 12, claimant sent an email to the employer requesting clarification if the employer's letter meant that she would be terminated if she had any physician-imposed work restrictions when she returned to work or if she was only able to work part-time. Exhibit 2 at 1. The employer replied that claimant had correctly understood the letter. Exhibit 2 at 1.

(7) On December 26, 2018, claimant submitted a physician's note to the employer stating that she was not released to return to work until January 31, 2019. Exhibit 7 at 1. Had claimant been released to return to work on January 8, she would have done so.

(8) Because claimant was not medically released to return to work, the employer sent claimant a letter on January 8, 2019. The letter stated, in part, "Due to business need, the Sheriff's Office has decided to proceed with a termination of your employment based on your inability to perform the essential duties of your position as a Management Analyst. A termination for the reason is not disciplinary." Exhibit 1 at 1. On January 8, 2019, the employer discharged claimant because she was not yet medically released to work.

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

Neither party contended at hearing that claimant quit work, or challenged that the work separation was a discharge. However, in the argument submitted to EAB, the employer argued that claimant voluntarily left work and the employer did not discharge her. OAR 471-030-0038(2) (December 23, 2018) sets out the standard to determine whether claimant left work or was discharged. 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 employer did not suggest that claimant was not willing to return to work if she were physically able and medically released to work. However, the hearing testimony of the employer's witnesses, and the employer's communications to claimant after she was on leave consistently stated that the employer was not willing to allow claimant to continue her employment after January 8, 2019 if she was not able to return to work without restrictions or did not have an ADA accommodation. The evidence does not support that under the circumstances as they existed on January 8, the employer was *willing* to allow claimant to continue her employment or that claimant was *not willing* to continue working. Applying OAR 471-030-0038(2), the work separation was a discharge on January 8, 2019.

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) (December 23, 2018). “[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). Absences due to illness or other physical or mental disabilities are not misconduct. OAR 471-030-0038(3)(b). In a discharge case, the employer has the burden to show misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976)

The employer did not contend that claimant was malingering or that she would be medically released to return to work as of January 9, 2019. The employer’s principal argument to disqualify claimant from benefits is that claimant should have sought an ADA accommodation, which had the employer approved it, possibly would have put off the employer’s discharge of her. However, whether claimant would have obtained an ADA accommodation is speculative. Indeed, the employer’s human resources manager testified that had claimant requested an ADA accommodation there was no guarantee that the employer would have approved it. Transcript at 16-17. The employer also did show that under the circumstances claimant’s failure to request an ADA accommodation was a willful or wantonly negligent violation of the employer’s standards. This is particularly so when the December 12 letter from the employer to claimant did not indicate that an ADA accommodation was a means to maintain employment if claimant was unable to return to work on January 9, and the employer did not mention an ADA accommodation in response to claimant’s request for clarification of the December 12 letter.

Claimant’s inability to return to work on January 9 was the result of injuries and was beyond claimant’s reasonable control. On this record, the employer did not meet its burden to show that claimant’s inability to return to work was misconduct.

The employer did not show that it discharged claimant for misconduct. Claimant is not therefore disqualified from receiving unemployment insurance benefits.

DECISION: Order No. 19-UI-131128 is affirmed.

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

DATE of Service: July 25, 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

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.

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