

EMPLOYMENT APPEALS BOARD DECISION
2019-EAB-0788

Reversed
No Disqualification

PROCEDURAL HISTORY: On June 24, 2019, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct, and disqualified claimant from the receipt of unemployment insurance benefits effective May 5, 2019 (decision # 83645). Claimant filed a timely request for hearing. On July 26, 2019, ALJ Janzen conducted a hearing, and on July 31, 2019 issued Order No. 19-UI-134304 concluding claimant voluntarily left work without good cause, and modifying the effective date of the disqualification to April 28, 2019. On August 20, 2019, claimant filed an application for review with the Employment Appeals Board (EAB).

EAB considered claimant's written argument to the extent it was based on the hearing record in reaching this decision.

FINDINGS OF FACT: (1) Engineered Machinery Inc. employed claimant from 2011 until May 9, 2019 as a clean room technician.

(2) The employer's attendance policy stated that the employer considered an employee to have voluntarily terminated their employment if an employee was absent from work "without justification acceptable [to the employer]," and "fail[ed] to communicate with a manager about the absence for two consecutive days." Transcript at 10.

(3) Claimant had received no warnings from the employer before May 2019.

(4) On Wednesday, May 1, 2019, human resources sent claimant an "urgent" email to "hurry up to handle" medical bills that had not been refunded yet to claimant by his insurance company. Transcript at 31, 15. Human resources requested medical records from claimant so that the insurance could reimburse claimant's medical bills.

(5) At about 5:00 p.m. on May 2, 2019, the employer's director of operations approached claimant and asked him, "Why [are you] still here and you should . . . go home already." Transcript at 13. Claimant

did not understand why the director asked him the question because claimant often worked past 5:00 p.m. Claimant thought the director asked him the question in a “laugh[ing] and rude” manner. Transcript at 13.

(6) At 7:30 a.m. on May 3, 2019, the director of operations told claimant that he was supposed to wait until 8:00 a.m. to begin working because he was scheduled to work at 8:00 a.m. The director called claimant’s lead. Claimant felt the director was being “unreasonable” and “picking on him” and requested to see human resources. Transcript at 16. Claimant saw the director make a telephone call, and understood that the director was calling human resources. Nobody answered, and the director left a message. Claimant asked the director if he could leave work to address his medical bills, but the director refused, stating that the accountant was not in the office that day. Claimant began working.

(7) Claimant felt he was in an “uncomfortable situation” and “terrible” environment with the director of operations, and wanted to go home to wait for human resources to respond to the voicemail the director left earlier that day and contact him about the situation with the director. Transcript at 19, 31. Claimant was concerned the director would “look for trouble” with him again that afternoon. Transcript at 19. Claimant also considered work to be “slow” that day, and wanted to begin collecting his medical records to address his unreimbursed medical bills. Transcript at 15.

(8) At 11:41 a.m. on Friday, May 3, 2019, claimant told his lead that he was going home to address his medical bills, that the work environment “was not comfortable for [him] to work,” and that he wanted human resources to “smooth out” the conflict so claimant could return to work. Transcript at 26, 25. The lead did not tell claimant he could not leave work. As he was leaving, claimant shook the hand of his lead and told him that he “may not be able to return to work.” Transcript at 17. Claimant went to his locker and removed his dirty laundry. Claimant left work with his laundry, and copies of timesheets from him and other employees that he intended to use to show human resources that he was not the only employee who began work before 8:00 a.m. or worked after 5:00 p.m. Claimant did not remove his food from the refrigerator. Claimant was not scheduled to work on May 4 or 5, 2019.

(9) The morning of Monday, May 6, 2019, claimant’s lead told the employer’s director of operations that claimant shook his hand and stated “nice working with you,” when he left work on May 3. Transcript at 7. The director looked in claimant’s locker and it appeared to him to be “basically empty, except for basically trash.” Transcript at 8.

(10) On May 6, 2019, claimant did not report to work because he was waiting for human resources to contact him regarding the message the director left for them on May 3, 2019, and hoped human resources would assist him to “smooth out the conflict between [claimant] and the [director].” Transcript at 25. Claimant also worked on preparing the records needed by human resources for his medical bills.

(11) On May 7, 2019, claimant did not report to work because he continued to prepare his medical records and wait to hear from human resources about the problem he had with the director. On the afternoon of May 7, claimant called and asked his lead for the accountant’s contact information to discuss his medical bills. Claimant did not state that he would not be returning to work. The lead did not ask claimant if he had quit or intended to quit.

(12) On May 8, 2019, claimant went to the workplace and spoke to the employer's accountant about his medical bills. The director of operations went into the accountant's office and asked claimant if he had quit. Claimant told the director, "[N]o, I did not quit." Transcript at 24. Later on May 8, claimant sent an email to human resources asking them to help with his conflict with the director.

(13) On May 9, 2019, human resources responded to claimant's email and stated that the employer considered claimant to have voluntarily left work.

CONCLUSIONS AND REASONS: On May 9, 2019, the employer discharged claimant, but not for misconduct.

Work Separation. 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). "Work" means "the continuing relationship between an employer and an employee." OAR 471-030-0038(1)(a).

Order No. 19-UI-134304 concluded that claimant voluntarily left work because he left work on May 3 "without the approval of his manager," took items from his locker, and did not notify the employer again after May 3 that he would be absent or return to work.¹ The order reasons that, although claimant was waiting to hear from human resources, he did not contact human resources when it failed to contact him.² However, because claimant was willing to continue working for the employer, but was not allowed to do so by the employer, the record shows that the employer discharged claimant.

Claimant did not voluntarily leave work. Although the director first told claimant that he should not leave work on May 3 because the accountant was not there, claimant did not leave work without advising the employer he was doing so. He later told his lead that he was leaving work, and the lead did not tell him he was not permitted to leave work that day. Although claimant shook the lead's hand and expressed doubt about whether he would be able to return to work, claimant's decision about whether to return to work was contingent on the response he expected to receive from human resources, and whether it would assist him with the conflict he was having with the director. Claimant told the lead he was leaving due to the conflict with the director, and to collect his medical records.

As of May 8, claimant was still waiting to hear from human resources, and was using the time to collect his medical records for the "urgent" situation regarding his medical bills. Although he did not report to work on May 6, 7 and 8, the record does not show that claimant was unwilling to continue working. To the contrary, claimant contacted his lead on May 7 to ask about the accountant, and went to the accountant's office on May 8. When the director asked claimant on May 8 if he had quit, claimant responded that he had not quit, and sent human resources an email to that effect that evening. It was the employer, and not claimant, that ended the employment relationship, because it considered claimant to have failed to report to work without justification for three days. The employer discharged claimant on

¹ Order No. 19-UI-134304 at 2.

² Order No. 19-UI-134304 at 3.

May 9, 2019 when its human resources department notified him by email that the employer considered claimant to have voluntarily left work.

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

In the present case, the record shows that the employer discharged claimant for mere negligence, and not for misconduct, on May 9.

Claimant’s absences from work on May 6, 7 and 8 occurred because claimant was expecting and awaiting a response from human resources that he hoped would “smooth out” the conflict he had with the director of operations. Although his conduct was an apparent violation of the employer’s attendance policy, the record does not show that claimant’s violation was due to his conscious disregard of the policy. Instead, claimant had told his lead that he was leaving work to await a response from human resources and to address his medical bills. It is apparent that the director of operations expected claimant to report to work or explain his absences on May 6, 7 and 8. However, it is more likely than not that claimant mistakenly believed his communication with the lead on May 3 was adequate to explain his absences, especially in light of claimant’s continued interaction with the employer’s accounting office during that time.

Claimant’s conduct was negligence or the failure to exercise due care. Although mere negligence may be a valid basis for discharge, it is not sufficient to establish misconduct. The record in this case does not show that claimant intentionally violated the policy or was indifferent to the employer’s expectations or the consequences of having unexcused absences. Claimant’s failure to report to work or contact the employer about his absences on May 6, 7 and 8 was, therefore, not willful or wantonly negligent. The employer discharged claimant, not for misconduct. Claimant is not disqualified from receiving unemployment insurance benefits based on this work separation.

DECISION: Order No. 19-UI-134304 is set aside, as outlined above.

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

DATE of Service: September 27, 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.

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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 Empleo. Si no está de acuerdo con esta decisión, puede presentar una Aplicación 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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