EO: 700
BYE: 202023

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

465
DS 005.00
VQ 005.00

EMPLOYMENT APPEALS BOARD DECISION
2019-EAB-0806

Reversed
No Disqualification

PROCEDURAL HISTORY: On July 16, 2019, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant voluntarily left work without good cause (decision # 84921). Claimant filed a timely request for hearing. On August 5, 2019, ALJ Scott conducted a hearing, and on August 7, 2019 issued Order No. 19-UI-134657, affirming the Department's decision. On August 21, 2019, claimant filed an application for review with the Employment Appeals Board (EAB).

EAB did not consider claimant's written argument when reaching this decision because they did not include a statement declaring that they provided a copy of their argument to the opposing party or parties as required by OAR 471-041-0080(2)(a) (May 13, 2019). However, due process requires addressing claimant's representative's allegation that the ALJ engaged in a procedurally unfair practice by admitting text messages sent by the employer into the record after the hearing record was closed "without permitting claimant's representative the ability to cross-examine the claimant or the employer."

Claimant's representative's allegation does not reflect what actually happened in this case. First, the ALJ asked the employer to submit documentary evidence of the text messages they testified about into evidence, and the employer agreed. The ALJ asked claimant's representative, "Any objection []?" Claimant's representative replied,

> Well, I – I would see them. So if they're going to submit them, they could submit – send them to me as well, I suppose. But, you know, I don't have any opportunity to take a look at them and cross-examine what they say. I think – I don't know whether that makes as [*sic*] difference to be honest with you. Because the text that Mr. Arnold has testified came after his conversation with Mr. Wright. *So I don't think I would – [] – have an objection.*

Transcript at 37-38 (emphasis added). Second, the ALJ explained during the hearing that the text messages *would* also have to be sent to claimant's representative and that the representative *would* have the opportunity to object at that time. The ALJ stated, "whenever I receive documents after the hearing I do attach those to the Order. And in the evidentiary rulings there's an opportunity for you to object. And so you have the – and there's a process in there where you can file your objection with the Office of Administrative Hearings." Transcript at 38. At the end of the hearing, the ALJ left the record open through "close of business today" to receive the text messages; claimant's representative did not object to her doing so or to the process described. Transcript at 42. Finally, the ALJ's decision included an "evidentiary ruling" which stated, "The evidentiary record was held open to allow for the submission of documents, specifically, the text messages . . . *The documents were not received and the record was closed*." Order No. 19-UI-134657 at 1 (emphasis added).

The record therefore shows that not only did claimant's representative have the opportunity to object to the text messages during the hearing – and chose not to object, he was also allowed the opportunity to review any text messages submitted into evidence, and was allowed the opportunity to object to admission of the text messages into evidence. However, the entire issue is also moot because the ALJ closed the record without having received or admitted the text messages into evidence. The proceedings were not unfair to claimant, and claimant's representative's allegations of procedural unfairness have no basis in fact.

FINDINGS OF FACT: (1) Gary R. Wright Contracting, Inc. employed claimant as a loader operator from July 1, 2018 to June 7, 2019.

(2) In June 2019, claimant wanted year-round employment and to earn a higher wage. On June 7, 2019, he sent a text message to his supervisor that stated, "I'm going to have to talk to [the owner] on Monday to see how bad he wants to keep me for the season.[1] The only way I could work for him is if he wrote me a check for 20 grand and that would only work until next February. I need $20,000 year round with matching 401, and insurance."[2]

(3) Also on June 7, 2019, claimant sent a text to the owner that stated, "If you want me to commit to this season. Now through the [] end of February, I would have to have $20,000 up front so I can pay my back bill. That sounds like a lot, but I will be making $35 to $40 an hour shortly. And there's no reason for me to give up that opportunity for less."[3]

(4) The owner and his business partner received claimant's text second message. They viewed it as "a minor blackmail."[4] They could neither afford nor wanted to pay claimant $20,000 to keep working. The contacted another individual interested in working for the employer and hired him to replace claimant.

(5) The business partner then sent a text message to claimant asking, "Do you want to turn your hours in?"[5] Claimant replied, "I haven't heard from [the owner] if I'm fired or if he will keep me on until he

[1] Transcript at 17.
[2] *Id*. at 18.
[3] *Id*. at 24.
[4] *Id*. at 18.
[5] *Id*. at 20.

finds someone else."[6] The business partner replied, "We have found someone else. Go ahead and send me your hours."[7] Claimant did not work again for the employer after June 7, 2019.

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

Decision # 84921 and Order No. 19-UI-134657 both concluded that claimant voluntarily left his job. 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 stated,

> Although claimant testified at hearing that he was willing to continue working for employer at $19 per hour, even without his demand for $20,000 being met, this is completely inconsistent with what he text-messaged at the time and this testimony is rejected as not credible. Claimant clearly evinced, through text messages * * * directly to the owner, that he was not willing to continue working for employer for an additional period of time unless his demands were met. Employer refused to meet those demands. If claimant had not made those demands, employer would have allowed claimant to continue working for $19 per hour, their original arrangement. Claimant initiated the work separation by sending the demand for drastically different working conditions, including $20,000 up front, and expressing them as "the only way I would commit." Therefore, this work separation was a voluntary leaving of work.[8]

The record does not support those conclusions. As a preliminary matter, nothing in this record suggests that either party was more or less credible than the other. We find it plausible that an individual might ineptly try to demand or negotiate new financial terms of employment, yet still be willing to continue working for the employer for an additional period of time if those demands are unmet, or if the attempt at negotiation fails. Claimant's testimony did not lack credibility for that reason.

It does not matter that claimant's text message to the owner began the series of events that led to the work separation; the issue to be resolved is whether claimant could have continued to work, or whether the employer was not willing to allow him to do so. Claimant's text message did not specifically state that he would quit his job with the employer if the employer did not agree to his demands, or agree to renegotiate the financial terms of his employment, the message threatened only not to "commit." The meaning claimant intended by stating that he would not commit is ambiguous and does not establish whether or not claimant was not willing to continue working for the employer for some additional period of time. Several factors suggest that he was willing to do so. For instance, he referred to another opportunity he expected "shortly," but not immediately, which did not foreclose the possibility that he would be willing to continue with the employer until that opportunity arose. The text message claimant sent to his supervisor was not phrased in terms of whether claimant would quit or not, but rather in terms

[6] *Id*.
[7] *Id*.
[8] Order No. 19-UI-134657 at 3.

of whether the owner wanted to "keep me." When asked about turning his hours in, claimant replied that he was waiting to hear from the owner about his employment status.

Those factors suggest that claimant did not intend his text message as a resignation, or to otherwise communicate his unwillingness to continue any further amount of work for the employer. Rather, claimant's initial text message to the employer and his text message about waiting to hear if the owner wanted to "keep me on" both unambiguously suggested that claimant was, in fact, willing to continue working for the employer for an additional period of time, albeit with different financial terms. The first event between the employer and claimant that unambiguously ended the employment relationship was the employer's reaction to receiving claimant's text message, specifically, that the employer hired someone to replace claimant and then, when claimant indicated he was waiting to hear if the employer wanted to "keep me on," informed him that he had been replaced. The preponderance of the evidence suggests that, at a time when claimant was willing to continue working for the employer, the employer became unwilling to allow claimant to continue working. The work separation was, therefore, a 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). OAR 471-030-0038(1)(c). A conscious decision not to comply with an unreasonable employer policy is not misconduct. OAR 471-030-0038(1)(d)(C).

To the extent the employer discharged claimant for attempting to renegotiate the financial terms of his employment, which the employer's owner and business partner construed as "a minor blackmail," claimant's discharge was not for misconduct. Employers may not reasonably prohibit employees from asking for raises, or from trying to renegotiate the terms of their employment. To any extent claimant's attempt to do so violated an employer expectation, the expectation was not reasonable, and claimant's violation therefore was not misconduct. OAR 471-030-0038(1)(d)(C).

To the extent the employer discharged claimant because of the tone or content of his text, the discharge was not for misconduct. The record does not show that the employer had any policies regulating the tone or content of such requests. Nor was the tone or phrasing of claimant's text message so patently offensive or inappropriate that he should have known as a matter of common sense that the text would violate the standards of behavior the employer had the right to expect of him.

To any extent the employer discharged claimant because the owner and business partner understood based upon claimant's text message that he intended to quit work immediately unless they paid claimant $20,000, the discharge also was not for misconduct. First, neither quitting a job nor intending to quit a job are misconduct. Second, the assumption that claimant wanted to quit was speculative under the circumstances described in this hearing. the employer had the right to discharge claimant for any lawful reason or no reason at all, objectively considered, any reasonable employer in receipt of such a text could easily have communicated with the employee about the request and rejected any requests the employer considered unreasonable, at which time claimant could either choose to actually leave work or rescind the request and continue working. Either way, claimant's text was not misconduct.

The employer discharged claimant, but not for misconduct. Claimant is not disqualified from receiving unemployment insurance benefits because of this work separation.

DECISION: Order No. 19-UI-134657 is set aside, as outlined above.

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

DATE of Service: September 26, 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 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 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.

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