EO: 200
BYE: 202014

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

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DS 005.00

EMPLOYMENT APPEALS BOARD DECISION
2019-EAB-0842

Modified
Late Request to Reopen Allowed
No Disqualification

PROCEDURAL HISTORY: On May 1, 2019, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant quit work with good cause (decision # 160128). The employer filed a timely request for hearing. On May 23, 2019, the Office of Administrative Hearings (OAH) served notice of a hearing scheduled for June 6, 2019. On June 6, 2019, ALJ S. Lee conducted a hearing at which claimant did not appear, and on June 14, 2019 issued Order No. 19-UI-131747, concluding claimant quit work without good cause and was disqualified from benefits effective April 21, 2019, but that he was discharged not for misconduct within fifteen days of his planned quit date, and therefore was eligible for benefits from April 7 through 20, 2019. On July 15, 2019, claimant filed a motion to reopen the hearing. On August 1, 2019, ALJ S. Lee conducted a hearing, and on August 12, 2019 issued Order No. 19-UI-134872, allowing claimant's request for a reopening, and again concluding claimant quit work without good cause and was disqualified from benefits effective April 21, 2019, but that he was discharged not for misconduct within fifteen days of his planned quit date, and therefore was eligible for benefits from April 7 through 20, 2019. On September 3, 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).

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 allowing claimant's request to reopen the June 6, 2019 hearing is **adopted.** The remainder of this decision addresses whether claimant is qualified for benefits based on his work separation from Airgas USA LLC.[1]

[1] The record shows claimant filed his request to reopen the June 6, 2019 hearing late. The ALJ did not inquire about that issue during the hearing and Order No. 19-UI-134872 does not address it. However, no adversely affected party requested review

FINDINGS OF FACT: (1) Airgas USA LLC employed claimant from June 26, 2017 until April 11, 2019 as a delivery driver.

(2) The employer expected claimant to complete his deliveries in a safe manner. Claimant understood that expectation as a matter of common sense, and had a perfect safety record with the employer because he never had an accident or injury at work.

(3) From March 11 through 21, 2019, claimant was on family medical leave due to his own health condition. Claimant took additional intermittent medical leave after March 21, 2019. The last day he worked before April 11, 2019 was April 5, 2019.

(4) Before April 10, 2019, claimant applied for a position with another employer. The other employer contacted claimant's supervisor, the branch manager, about claimant's application for work. The other employer made a contingent offer of employment to claimant. As of April 10, 2019, claimant had not yet decided if he wanted to work for the other employer.

(5) On April 10, 2019, claimant was scheduled to work. Claimant was not able to work that day due to illness. Before his shift began, claimant sent the branch manager a text message stating that he would be taking family medical leave that day, and expected to report back to work on April 11, 2019. Exhibit 1. The manager responded with the following text message: "I was contacted by [another employer] for your bus driving position. If you're not coming back, can you honestly just let me know so I can get the position posted?" Exhibit 1. Claimant responded that he wanted to discuss the matter when he returned to work, and stated, "I would like to give a 2 week notice. I've been dealing with medical crap trying to get healthier otherwise I would have been back already." Exhibit 1. The manager responded, "We will talk about it tomorrow." Exhibit 1. Claimant responded, stating, "I'll be in tomorrow for sure so please have a route for me if you could. We can talk about it when I see you." Exhibit 1.

(6) On April 10, 2019, after his conversation with claimant, the branch manager decided to discharge claimant. The manager sent an email to the employer's human resources stating, "I would like to move forward with letting [claimant] go tomorrow. If he comes in like he says he will, I would like to let him go at the end of the day. I do not feel comfortable with him being in a customer facing role with one foot out the door so I will have him in the warehouse. Please let me know if this is okay and I will move forward tomorrow. On the other hand, if he doesn't show up tomorrow I would like to call him and terminate his employment with us tomorrow in the morning." Exhibit 1. The branch manager also asked human resources to advertise for claimant's position immediately. Exhibit 1.

(7) As of April 11, 2019, claimant had not accepted an offer of other work from another employer, and did not tell the employer that he had accepted an offer of other work. Claimant never gave the employer notice that he planned to leave work on a specific date.

(8) On April 11, 2019, claimant was scheduled to begin work at 5:30 a.m. Claimant was unable to work due to illness. Claimant did not report to work or contact the employer before his shift began. At 7:00

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of the portion of Order No. 19-UI-134872 which allowed claimant's late request to reopen the hearing. Because that determination is not in dispute, this decision addresses only claimant's eligibility for benefits based on his work separation.

a.m., the branch manager sent claimant a text message asking claimant if he had "a change of plans." Audio Record (June 6, 2019) at 20:03. Claimant responded that he was not able to work that day due to illness.

(9) Later on April 11, 2019, the branch manager called and left claimant a voicemail message stating that his resignation was effective immediately. The employer ended claimant's employment on April 11 because of claimant's interest in quitting, the alleged implications his interest in leaving work had on safety, and because the employer wanted to rehire claimant's position immediately. Transcript at 23-24. Claimant's failure to report to work or call the employer before his shift began was not the reason the employer ended claimant's employment. Claimant did not respond to the branch manager's voicemail.

CONCLUSIONS AND REASONS: The employer discharged claimant on April 11, 2019, not for misconduct.

Work Separation. The first issue to address in this case is the nature of the 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) (December 23, 2018).

Order No. 19-UI-134872 determined that claimant voluntarily left work because he sent the branch manager a text message that "appear[ed] to be his giving a two week notice to quit his position," and because claimant could have continued to work for the employer if he had not sent that text message and failed to report to work on April 11, 2019.[2] The order reasoned that claimant "took the first step" to sever the employment relationship, and could have contacted the employer after the manager discharged him if claimant had not intended to give notice to quit.[3] The order also concluded that the employer accelerated claimant's planned quit by discharging claimant on April 11, 2019.[4] However, the record shows that claimant did not voluntarily leave work, and that the employer, not claimant, severed the employment relationship when it discharged claimant on April 11, 2019.

Although the record shows that the employer would not have discharged claimant on April 11, 2019 had it not known that claimant sought work elsewhere, the record does not show that claimant could have continued to work for the employer for an additional period of time after April 11th and chose not to do so. *See* OAR 471-030-0038(2)(a). Claimant did not initiate the work separation. Although he had been offered other work, the other work was still "under contingency" on April 10, and claimant did not know at that time if he would work for the other employer. Transcript at 12. He did not initiate the discussion about the possibility of leaving work, but rather, responded to the manager's question about whether he would be returning to work. Claimant told his manager that he wanted to give the employer two weeks' notice, but did not notify the employer that his employment would end on a specific date. Moreover, the record does not show, and the employer did not contend, that the employer understood from claimant's April 10 text message that the two-week notice period began on April 10 or any other date certain. To

[2] Order No. 19-UI-134872 at 5.
[3] Order No. 19-UI-134872 at 5.
[4] Order No. 19-UI-134872 at 6.

the contrary, claimant expressed his intent to continue working for an additional period of time when he told the manager that he intended to report to work on April 11 and discuss his two-week notice with the manager. On April 11, when claimant did not report to work, the manager asked claimant if he had had a "change of plans." Claimant told his manager that he was unable to work that day due to illness, and did not state that he was unwilling to continue the employment relationship at that time.

The employer's witnesses asserted that the employer chose to end the employment relationship on April 11 because claimant had "showed interest in leaving," for safety reasons, and so the employer could "post" claimant's position and hire a new driver immediately. Transcript at 23, 24. In sum, claimant did not voluntarily leave work; the work separation was a discharge.

Discharge. Order No. 19-UI-134872 concluded that claimant quit work without good cause, and that the employer discharged claimant not for misconduct within fifteen days of claimant's planned quit.[5] The order therefore applied ORS 657.176(8).[6] However, because claimant did not quit work or notify the employer that he would leave work on a specific date, ORS 657.176(8) does not apply to the facts of this case. The proper standard to determine whether claimant is disqualified from receiving unemployment insurance benefits because of this work separation is the standard used in a discharge case.

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). 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). Absences due to illness or other physical or mental disabilities are not misconduct. OAR 471-030-0038(3)(b).

To the extent the employer discharged claimant because he had sought other work, the employer did not discharge claimant for misconduct. The employer's witnesses asserted that the employer discharged claimant on April 11, 2019 because they did not feel like claimant was "committed" to work and because claimant "had chosen to disconnect." Audio Record (June 6, 2019) at 25:52; Transcript at 21. Accordingly, the record does not establish that claimant's discharge was due to any willful or wantonly negligent violation of a reasonable employer expectation. Claimant's search for other work and absences

[5] Order No. 19-UI-134872 at 4-6.

[6] ORS 657.176(8) states, "For purposes of applying subsection (2) of this section, when an individual has notified an employer that the individual will leave work on a specific date and it is determined that: (a) The voluntary leaving would be for reasons that do not constitute good cause; (b) The employer discharged the individual, but not for misconduct connected with work, prior to the date of the planned voluntary leaving; and (c) The actual discharge occurred no more than 15 days prior to the planned voluntary leaving, then the separation from work shall be adjudicated as if the discharge had not occurred and the planned voluntary leaving had occurred. However, the individual shall be eligible for benefits for the period including the week in which the actual discharge occurred through the week prior to the week of the planned voluntary leaving date."

due to illness were not misconduct. Nor does the record show that the employer's safety concerns were reasonable or attributable to claimant as misconduct, as he had a perfect safety record. Finally, to the extent the employer discharged claimant so that it could rehire his position immediately, the record shows claimant was taking protected leave from work and the employer's decision to replace claimant is not attributable to misconduct on claimant's part.

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-134872 is modified, as outlined above.

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

DATE of Service: October 10, 2019

NOTE: This decision modifies 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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