

EMPLOYMENT APPEALS BOARD DECISION
2019-EAB-0877

Reversed
No Disqualification

PROCEDURAL HISTORY: On July 5, 2019, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant, but not for misconduct, and claimant was not disqualified from receiving unemployment insurance benefits (decision # 101436). The employer filed a timely request for hearing. On August 12, 2019, ALJ Snyder conducted a hearing, and on August 23, 2019 issued Order No. 19-UI-135498, concluding claimant's discharge was for misconduct, and claimant was disqualified from receiving unemployment insurance benefits effective June 2, 2019. On September 10, 2019, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Prestige Senior Management, LLC employed claimant as executive director from December 2017 to June 3, 2019.

(2) In March 2019 claimant was hospitalized after losing consciousness from exhaustion and sleep deprivation after working an 18-hour day. Claimant considered her hospitalization work-related and filed a worker's compensation claim.

(3) Claimant was medically restricted from working the week after her hospitalization. On March 13, 2019, the employer mailed claimant a form to request leave under the Family and Medical Leave Act (FMLA).

(4) Effective March 18, 2019, claimant's physician agreed to release her to work four hours per day. Claimant's physician wanted her to take more time off, but claimant was concerned that an extended absence would affect her job and asked to return to work.

(5) On March 25, 2019, claimant's supervisor approached claimant at work to discuss her situation, with another supervisor listening in on speakerphone. The supervisor told claimant she had two options, to resign immediately or to accept a demotion that involved a significant salary cut and transfer to a location that would involve a significant commute.

(6) Claimant asked the supervisors for time to think about the options before deciding what to do, and was told that she could have until 5:00 p.m. to decide. Claimant left work after her four-hour restricted shift ended. After claimant left, the supervisor told claimant's coworkers that claimant was not coming back.

(7) On March 25, 2019 and for weeks thereafter, claimant contacted her supervisor and human resources about her situation, including what she thought had been a retaliatory demotion while she was on protected leave, whether she had been discharged, to resolve issues regarding her pay, and instructions for what to do while off work waiting for the worker's compensation claim to be resolved.

(8) On approximately March 25th, claimant was told that she should "[j]ust rest." Transcript at 25. She was told the employer was "not going to make any decisions at this time until the Worker's Comp. claim has either been accepted or denied. We're going to hold flat." Transcript at 19. The employer told claimant, "don't do anything until we have the denial." Transcript at 21.

(9) On April 24, 2019, the employer's worker's compensation insurance carrier denied claimant's claim. Claimant never heard from the employer again. Thereafter, the employer mailed or emailed four letters to claimant instructing her variously to complete FMLA paperwork in order to be on approved leave, and stating that if she did not respond to the letters she would either be required to return to work or considered to have quit her job.

(10) Claimant did not receive any of the FMLA letters the employer sent to her, and did not know that she had to do anything to retain her employment. On June 3, 2019, when claimant had not responded to the fourth letter, the employer discharged her.

CONCLUSIONS AND REASONS: Claimant's discharge was not for misconduct.

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).

The order under review concluded that claimant's discharge was for misconduct. The order reasoned that even though claimant did not receive any of the employer's letters about extending her leave or returning to work after her worker's compensation claim was denied, she was still wantonly negligent in failing to contact the employer for two reasons: first, because she "knew that the Employer expected to discuss Claimant's time away from work when the worker's compensation claim was denied"; and second, because "as a matter of common sense Claimant knew that she would have to contact the Employer in order to continue her employment and express that she was able to return to work, or that

she needed to request additional leave.” Order No. 19-UI-135498 at 3. The record does not support those conclusions.

Nothing in the employer’s witnesses’ testimony suggests that the employer notified claimant between March 25th and mid-April 2019 that she was expected to do anything when the worker’s compensation claim was decided. Neither of the employer’s witness knew what was said to claimant during conversations about her worker’s compensation claim or return to work, and did not establish that anything claimant was told informed her she was expected to contact the employer. Transcript at 9, 33.

Claimant’s testimony suggested that she was not informed that she was supposed to reach out to the employer at any relevant point in time. She was instructed to “just rest,” that the employer was waiting, and that the employer was “going to hold flat” until the employer made a decision. She was also told, “don’t do anything until we [the employer] have the denial.” The record fails to show that claimant had a responsibility, or had reason to know as a matter of common sense, that she need to reach out to the employer rather than “resting” and refraining from “doing anything” until the employer had the denial.

On this record, the only way the employer informed claimant that she was expected to be in touch with them was by sending letters to claimant, none of which she received. The fact that claimant likely knew that the employer would want to have a discussion with her after her worker’s compensation claim was denied does not suggest that claimant also knew that she was the one who was supposed to reach out to the employer and ask for that discussion. Even if she had thought that might be the case, claimant had made repeated attempts over a period of weeks to speak with individuals at the employer’s business without receiving a response. As claimant testified, “I don’t know how to talk to them when no one calls me back.” Transcript at 22.

The preponderance of the evidence in this case shows that claimant did not willfully or with wanton negligence violate the employer’s expectations that she contact the employer after her worker’s compensation claim was denied, because she did not know or have reason to know the employer wanted her to do so. Claimant’s discharge therefore was not for misconduct, and claimant is not disqualified from receiving unemployment insurance benefits because of this work separation.

DECISION: Order No. 19-UI-135498 is set aside, as outlined above.

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

DATE of Service: October 16, 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 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 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.

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