EO: 200
BYE: 202023

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

487
VQ 005.00

EMPLOYMENT APPEALS BOARD DECISION
2019-EAB-0899

Modified
Disqualification Effective July 14, 2019

PROCEDURAL HISTORY: On August 12, 2019, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant quit working for the employer without good cause on June 4, 2019, and that claimant was denied benefits, effective June 2, 2019 (decision # 91138). Claimant filed a timely request for hearing. On September 3, 2019, ALJ Seideman conducted a hearing, and on September 5, 2019 issued Order No. 19-UI-136149, modifying the Department's decision by concluding that claimant quit working for the employer without good cause on July 2, 2019, and that claimant was disqualified from receiving benefits, effective, June 30, 2019. On September 18, 2019, claimant filed an application for review of Order No. 19-UI-136149 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).

FINDINGS OF FACT: (1) Cognitive Enhancement Center Inc. employed claimant as its program manager from November 6, 2015 until mid-July 2019.

(2) On June 5, 2019, claimant began a leave of absence to have and recover from surgery, which was expected to take up to two weeks. Prior to leaving, clamant and the employer's chief executive officer (CEO) tentatively agreed to have claimant return to work as a facilitator or participant assistant, and not as the program manager. However, claimant did not make a definite commitment to returning to work after her surgery. The CEO told claimant to let him know after her surgery whether she intended to return.

(3) On June 12, 2019, the CEO texted claimant and asked her how things went. Claimant replied that she was getting around better and had a doctor appointment the following Monday.

(4) Claimant did not contact the CEO between June 12 and 28, 2019 to confirm whether she intended to return to work. On June 28th, the CEO texted claimant, asking if he could call her the following Monday.

Claimant replied, asking what time, and the CEO replied 2:00 p.m. Claimant did not reply to confirm that it was okay for the CEO to call her at that time, and he therefore did not call claimant.

(5) On Tuesday, July 2, 2019, claimant texted the CEO, stating that she was wondering why he had not called her, and the CEO replied that it was because claimant had failed confirm that it was okay to do so. The CEO then texted, "Well, last time we spoke you were going to take a week or two recovery, as recommended from your physician, and then we were going to talk about what you wanted to do." Transcript at 16. Claimant replied that she was not ready to return to work. The CEO replied, "I'm not asking you to come back to work. I'm asking you to come in to meet with me." Transcript at 19. After claimant did not respond, the CEO texted, "So not coming in tomorrow to meet with me?" Transcript at 19. Claimant replied, "I'm sorry, I just noticed your text," which she attributed to the side effects of her pain medication. Transcript at 19. Claimant did not agree to meet with the CEO to discuss whether she intended to return to work for the employer.

(6) Claimant did not contact the CEO after July 2nd to discuss whether she intended to return to work for the employer. The CEO determined that the employer could no longer hold claimant's position open for her, and filled claimant's position. At that time, claimant was willing to return to work for the employer at some point in the future.

CONCLUSIONS AND REASONS: The employer discharged claimant for misconduct during the week of July 14 through 20, 2019. Claimant therefore is disqualified from receiving benefits, effective July 14th.

The first issue 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). The date an individual is separated from work is the date the employer-employee relationship is severed. OAR 471-030-0038(1)(a).

Order No. 19-UI-136149 concluded that the work separation was a voluntary leaving because the employer's CEO did not say claimant was discharged, wanted to talk with her and see how she was doing, and kept sending her texts, but for the most part claimant did not respond.[1] However, the record shows that as of mid-July 2019, claimant was willing to return to work for the employer at some point in the future, but was not allowed to do so by the employer, which filled claimant's position. The work separation therefore is a discharge, most likely occurring during the week of July 14 through 20, 2019. The remaining issue is whether claimant is disqualified from receiving benefits based on her discharge by the employer.

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

[1] Order No. 19-UI-136149 at 2.

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). Isolated instances of poor judgment and good faith errors are not misconduct. OAR 471-030-0038(3)(b).

The employer discharged claimant for failing to let its CEO know after July 2, 2019 whether she intended to return to work for the employer after recovering from her surgery. The employer had a right to expect claimant to do so. Claimant understood the employer's expectations based on what the CEO told her before her leave of absence, and what he told her via text message on July 2nd. Claimant therefore knew or should have known that failing to let the CEO know whether she intended to return to work probably violated the employer's expectations. Claimant's failure to do so demonstrated a conscious indifference to the consequences of her failure to act, and therefore was, at best, wantonly negligent.

Claimant's conduct cannot be excused as an isolated instance of poor judgment. For an isolated instance of poor judgment to have occurred, the act must be isolated, meaning that the exercise of poor judgment must be a single or infrequent occurrence rather than a repeated act or pattern of other willful or wantonly negligent behavior. OAR 471-030-0038(3)(b)(A). In addition, acts that violate the law, acts that are tantamount to unlawful conduct, acts that create irreparable breaches of trust in the employment relationship or otherwise make a continued employment relationship impossible exceed mere poor judgment and do not fall within the exculpatory provisions of OAR 471-030-0038(3).

Here, claimant's failure to let the CEO know after July 2nd whether she intended to return to work for the employer was not an isolated act. Claimant also failed to do so from June 5, 2019 to July 2, 2019 despite the fact that she was expected to recover from her surgery in only about 2 weeks, and that the CEO had told her to let him know whether she intended to return. Claimant's failure to let the CEO know prior to July 2nd was, at best wantonly negligent, and her failure to let the him know after July 2nd therefore was a repeated act, and not a single or infrequent occurrence. Claimant's conduct also exceeded mere poor judgment, and therefore does not fall within the exculpatory provisions of OAR 471-030-0038(3). It is unreasonable to expect an employer to hold an employee's position open indefinitely where, as here, the employee was expected to return to work in about two weeks, and fails for over a month to let the employer know whether the employee intends to return. As a practical matter for the employer, claimant's conduct made a continued employment relationship impossible.

Finally, claimant's conduct cannot be excused as a good faith error. The record fails to show that claimant sincerely believed, or had a rational basis for believing, that she was not expected to let the CEO know whether she intended to return to work for the employer after recovering from her surgery.

The record therefore establishes that the employer discharged claimant for misconduct during the week of July 14 through 20, 2019. Claimant is disqualified from receiving benefits, effective July 14th.

DECISION: Order No. 19-UI-136149 is modified, as outlined above.

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

DATE of Service: October 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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