

EMPLOYMENT APPEALS BOARD DECISION
2019-EAB-1036

Reversed
No Disqualification

PROCEDURAL HISTORY: On July 1, 2019, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant voluntarily quit work without good cause (decision # 74041). Claimant filed a timely request for hearing. On July 23, 2019, ALJ Murdock conducted a hearing, and on July 29, 2019 issued Order No. 19-UI-134123, affirming the Department's decision. On August 2, 2019, claimant filed an application for review with the Employment Appeals Board (EAB).

On September 6, 2019, EAB issued Appeals Board Decision 2019-EAB-0760, remanding this case for further development of the record to determine whether the employer discharged claimant, and if so, for misconduct, or claimant quit work, and if so, without good cause. On September 26, 2019, ALJ Murdock conducted a hearing on remand, and on October 4, 2019, issued Order No. 19-UI-137602, again concluding claimant voluntarily left work without good cause.

On October 23, 2019, claimant filed an application for review of Order No. 19-UI-137602 with EAB, and filed a written argument in support of his application for review. Claimant's argument contained information that was not part of the hearing record, and did not show that factors or circumstances beyond claimant's reasonable control prevented them from offering the information during the hearing. Under ORS 657.275(2) and OAR 471-041-0090 (May 13, 2019), EAB considered only information received into evidence at the hearing when reaching this decision.

FINDINGS OF FACT: (1) Seus Family Farms employed claimant as a laborer from December 20, 2018 to June 6, 2019. The employer was owned by Scott S (SCS) and Sara S (SAS).

(2) WM was the owner of the contracting company that supervised all of the work for the employer and was considered the "head foreman" and "supervisor onsite." Transcript (September 26, 2019 hearing) at 41 and 43. When WM was not present, MG acted as the on-site foreman.

(3) WM was the person who hired claimant to work for the employer. From the time of his hire, claimant reported his attendance issues to WM. Between December 20, 2018 and May 28, 2019,

claimant missed numerous days of work due to health issues, including diabetes and a respiratory incident that occurred on the job, and required a short hospitalization several weeks prior to the end of claimant's employment.

(4) On May 28, 2019, claimant accidentally struck a pallet of concrete tiles as he backed up WM's pickup truck at the employer's worksite. WM observed the collision and raised his voice at claimant as he admonished him for not paying closer attention to what he was doing. Claimant became upset at WM, and a short time later approached MG and told him that he was not going to work for someone who treated him like WM had, that he had clocked out, and that he was going to walk home to Klamath Falls, Oregon, about 30 miles away. Claimant had carpooled with a coworker (MK) to work and had no other transportation home. MG told claimant that he did not want him to walk home and that he should just clock back in, finish the day, and then return home with MK, which claimant did. Transcript (July 23, 2019) hearing at 18-19. After claimant worked remainder of the day, claimant believed the incident was over. Neither he nor the employer considered the employment relationship severed.

(5) Claimant did not work on May 29, 2019. Instead, he went to a health clinic about a leg infection he had and was told that if the swelling and infection did not dissipate he would have to be hospitalized. Claimant notified WM about his leg infection and that he would not be able to work. Transcript (July 23, 2019) hearing at 56-57. Claimant also did not work on May 30 or 31, 2019.

(6) On Saturday, June 1, claimant worked at WM's home assisting him with milling some cedar for the employer's owners. Transcript at 55-56. That same day he returned to the medical clinic, and his physician told him that his leg condition had worsened and that he needed to be hospitalized. On Sunday, June 2, 2019, claimant was hospitalized for treatment of his leg infection. While at the hospital, he notified WM of his condition and that he had been directed to stay off of his leg for approximately one week. WM responded, "Okay. That's fine." Transcript (July 23, 2019 hearing) at 10-11.

(7) Claimant was released from the hospital on Wednesday, June 5, 2019. On June 6, 2019, claimant attempted to contact WM by phone, without success, to let him know he could return to work on the following Monday. Transcript (July 23, 2019 hearing) at 7-8. When he could not reach WM, he contacted two coworkers, WW and KM, and asked them to let WM know that he could return to work the following Monday. However, both of those coworkers told him that they had heard he had been terminated from work due to his health problems. Transcript (July 23, 2019 hearing) at 30-31 and 41-48.

(8) Claimant then attempted to contact WM several times to clarify his work status. After WM failed to answer his calls, he placed two cell phone calls to SAS to attempt to clarify his status with her. Claimant called SAS on Friday, June 7 at 1:32 p.m. and on Saturday, June 8 at 3:27 p.m. SAS did not answer either of his calls.

(9) On Sunday, June 9, 2019, claimant reached WM by phone. In that call, WM told him, "I hate to tell you this...But Seuses said that they're going to let you go because of, you know, you're missing too much time over medical conditions." Transcript (September 26, 2019 hearing) at 30-31.

(10) On or about June 6, 2019, the employer discharged claimant because he had been absent from work since May 29, 2019 work due to his medical conditions.

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

Work Separation. The employer asserted claimant quit and claimant asserted that he was discharged. *Cf.* Transcript (July 23, 2019 hearing) at 4-5 and 18-19. 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-137602 concluded that claimant quit work reasoning:

...claimant’s testimony was vague, illogical, and inconsistent and was not reliable. Therefore, where the testimony differed, I found facts consistent with the employer’s testimony. The credible evidence establishes that claimant quit work on May 28, 2019. [After that day], he did not return to work or communicate with the supervisor or the owner that he intended to return to work the next day or the next day he was able to (based on his medical condition at the time). The employer was willing to permit claimant to continue to work up until the time that he expressed his decision to leave work and claimant did, in fact, fail to return to work or communicate further with his supervisor or the owners of the company that employed him.

Order No. 19-UI-137602 at 3. However, the employer’s witnesses clarified that WM was “head foreman” and “supervisor onsite.” The employer did not dispute that throughout his employment, claimant typically communicated any tardiness or absences to WM. Transcript (July 23, 2019 hearing) at 27. Nor did the employer dispute claimant’s testimony that claimant notified WM on May 29 that he had a leg infection and could not work, and shortly thereafter had been hospitalized for the condition and would be off for about one week, to which WM responded, “Okay. That’s fine.” Thereafter, on or about June 6, 2019, both WW and MK told claimant that they had heard from MG that claimant no longer worked for the employer due to his health problems. When claimant finally reached WM on June 9, he told claimant, “I hate to tell you this...But Seuses said that they’re going to let you go because of, you know, you’re missing too much time over medical conditions.” That testimony was not disputed by the employer. Viewing the record as a whole, claimant was willing to continue to work for the employer both before and after June 6, 2019, but was not allowed to do so by the employer after that date. Accordingly, the work separation was a discharge that occurred on or about June 6, 2019.

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) (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 the 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).

The preponderance of the evidence shows the employer discharged claimant because he was “missing too much time over medical conditions.” In addition to that undisputed statement from WM, discharging claimant for that reason was not only plausible but likely given that the employer had considered terminating claimant’s employment due to attendance issues prior to the May 28 incident, and that during the 30 work days MG had been a supervisor for the employer, claimant had only worked on 16 of them. Transcript (July 23, 2019 hearing) at 8. Claimant also had been hospitalized twice during the last two months of his employment due to his various medical conditions, and his poor attendance for health reasons was likely to continue.

Claimant was absent from work from May 29, 2019 to June 6, 2019. An employer has a right to expect an employee to report for work as scheduled. Claimant’s absences from work during that time violated that reasonable employer expectation. However, claimant did not miss work because he was indifferent to the consequences of his actions for the employer. Claimant’s absences were due to his leg infection that eventually resulted in his hospitalization from June 2 through June 5, 2019, and absences due to illness or other physical or mental disabilities are not misconduct. OAR 471-030-0038(3)(b).

The employer discharged claimant, but not for misconduct under ORS 657.176(2)(a). Claimant is not disqualified from receiving unemployment insurance benefits on the basis of his work separation.

DECISION: Order No. 19-UI-137602 is set aside, as outlined above.¹

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

DATE of Service: November 27, 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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¹ 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.



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

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 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 دستور العمل موجود در پایان آن، از دادگاه تجدید نظر اورگان درخواست تجدید نظر کنید.

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