

EMPLOYMENT APPEALS BOARD DECISION
2020-EAB-0122

Affirmed
No Disqualification

PROCEDURAL HISTORY: On November 19, 2019, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant voluntarily left work without good cause (decision # 105524). Claimant filed a timely request for hearing. On January 16, 2020, ALJ Shoemake conducted a hearing, and on January 22, 2020, issued Order No. 20-UI-143109, concluding that the employer discharged claimant, but not for misconduct. On February 10, 2020, the employer filed an application for review with the Employment Appeals Board (EAB).

EAB considered the employer's written argument in reaching this decision.

FINDINGS OF FACT: (1) Avamere Health Services LLC employed claimant from July 13, 2015 until October 7, 2019 as a chief information officer (CIO).

(2) In 2017, the employer issued claimant a company credit card to use for business-related expenses associated with his position, including travel for work. The employer expected claimant to refrain from using the employer's credit card for personal expenses. Claimant understood the employer's expectation. The employer expected to receive a monthly expense report for claimant's expenses. The employer assigned another employee to process claimant's expenses, including charges to the employer's credit card, and to produce a monthly expense report for claimant's supervisor to review.

(3) Claimant frequently used Apple Pay, a mobile payment service, to pay for personal and business-related expenses. Because he used it for both types of expenses, he had his personal payment card and the employer's company credit card as payment sources on Apple Pay. Claimant traveled "extensively . . . sometimes two times a month," and used Apple Pay for those business expenses because he considered it a secure way to pay for expenses while traveling. Transcript at 21.

(4) In May 2019, claimant used Apple Pay via his telephone to pay a \$4,200 repair on his personal vehicle that was not for business purposes. Claimant inadvertently paid the expense using the

employer's credit card stored in Apple Pay. Claimant did not notice that the payment was not charged to his personal account.

(5) In June and July 2019, the employee who processed claimant's expense reports did not complete claimant's expense reports on time because the employee was absent due to illness. Claimant had given the employee the information necessary to complete the reports.

(6) By August 27, 2019, claimant's supervisor had not received claimant's June or July 2019 expense reports and asked claimant to submit them. The supervisor asked claimant for the reports again on September 3 and 10, 2019. On September 10, the supervisor told claimant the employer expected to receive the reports monthly. Claimant explained that the employee who usually completed the reports had been out sick, but that he "would follow up with [the employee] when [the employee] got back to work." Transcript at 17-18.

(7) After September 10, claimant's supervisor reviewed claimant's charges and found the \$4,200 vehicle repair charge. The employer reviewed claimant's charges for 2019, and found an additional \$5,800 worth of charges it concluded were "personal charges." Transcript at 17.

(8) On September 24, 2019, claimant's supervisor asked claimant about the \$4,200 charge. Claimant responded that it was a mistake and stated that he would pay for it. The supervisor did not ask claimant about any other charges. Before October 7, 2019, claimant had not received a warning related to his expenses or charges.

(9) On October 7, 2019, claimant's supervisor spoke with claimant and gave claimant the option to be discharged that day, or resign. Claimant asked his supervisor why he was "being dismissed." Transcript at 7. The supervisor told claimant that it was due to personal charges claimant made on the company credit card, and that the employer "[was] not going to discuss it further." Transcript at 7. Claimant "chose the resignation." Transcript at 4. The employer would have discharged claimant on October 7 even if claimant had not done so.

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

Nature of the Work Separation. The first matter in this case is to assess whether the work separation was a voluntary leaving (quit) or a discharge. 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).

It is undisputed that the employer would not have allowed claimant to continue working after October 7, 2019 if claimant had not "chose the resignation." The employer initiated the work separation, and the record does not show that claimant could have done anything on October 7 to prevent the work separation from occurring that day. To the contrary, claimant's supervisor told him the employer "[was] not going to discuss it further." Thus, regardless of what the parties called the separation, it was a discharge under OAR 471-030-0038(2).

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). “[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 employer discharged claimant for mere negligence, and not misconduct, when he charged his personal automobile repair on the employer’s credit card. Although the charge was a violation of the employer’s expectations, the record does not show that claimant’s conduct in charging the vehicle repair on the employer’s credit card was due to a conscious disregard of the employer’s expectations. Claimant saved the employer’s payment information in Apple Pay to have a secure method of payment when he traveled. Claimant did not notice that the charge went to the incorrect card. The record does not show that the error was more than negligence or claimant’s failure to use exercise due care when he paid for the car repair. Mere negligence is not sufficient to establish misconduct.

Nor does the record show by a preponderance of the evidence that claimant made multiple other personal charges totaling \$5,800 to the employer’s credit card. The employer did not ask claimant about the other alleged personal charges, or present sufficient detail at hearing to show that claimant knowingly made personal charges on the employer’s credit card. The employer’s witness testified that the charges were for restaurants and iTunes. Transcript at 26-27. However, the employer did not provide sufficient detail to show that the restaurant charges were not business-related, and claimant testified plausibly that there were business-related applications charged through iTunes. Transcript at 26-27.

Finally, to the extent the employer discharged claimant because his expense reports were late, the employer failed to show that the tardiness of the reports was attributable to claimant as misconduct. The record shows the expense reports were late because the employee assigned to complete them had been absent due to illness. Claimant had provided the other employee his expense information, and had assured his supervisor he would address the matter when the employee returned to work.

The employer did not meet its burden to show that it discharged claimant for misconduct. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976) (in a discharge case, the employer has the burden to establish misconduct by a preponderance of evidence). Claimant is therefore not disqualified from receiving unemployment insurance benefits based on this work separation.

DECISION: Order No. 20-UI-143109 is affirmed.

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

DATE of Service: March 17, 2020

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 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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