

EMPLOYMENT APPEALS BOARD DECISION
2020-EAB-0161

Order No. 20-UI-143793 Modified – Late Request Allowed, No Disqualification
Order No. 20-UI-143793 Modified – Late Request Allowed, No Overpayment, No Penalties

PROCEDURAL HISTORY: On October 29, 2019, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant quit work with the employer without good cause (decision # 90809). On November 18, 2019, decision # 90809 became final without claimant having filed a timely request for hearing.

On October 30, 2019, the Department served notice of another administrative decision concluding willfully made misrepresentations and failed to report material facts to obtain benefits, and assessing a \$5,394 overpayment, a \$809.10 monetary penalty and 35 penalty weeks (decision # 195047). On November 19, 2019, decision # 195047 became final without claimant having filed a timely request for hearing.

On December 5, 2019, claimant filed late requests for hearing regarding decisions # 90809 and 195047. ALJ Kangas reviewed claimant's late hearing request regarding decision #90809 and on December 12, 2019, issued Order No. 19-UI-141123 dismissing claimant's late request for hearing, subject to claimant's right to renew the request by responding to an appellant questionnaire by December 26, 2019. ALJ Kangas also reviewed claimant's late hearing request regarding decision #195047 and on December 12, 2019, issued Order No. 19-UI-141124 dismissing claimant's late request for hearing, subject to claimant's right to renew the request by responding to an appellant questionnaire by December 26, 2019. Claimant timely responded to the questionnaires. On January 7, 2020, the Office of Administrative Hearings (OAH) mailed letters to the parties stating that Order Nos. 19-UI-141123 and 19-UI-141124 were vacated and a hearing would be scheduled. On January 21, 2020, OAH mailed notice of a consolidated hearing scheduled for January 28, 2020 to the parties.

On January 28, 2020, ALJ Murdock conducted the consolidated hearing. On February 3, 2020, ALJ Murdock issued Order No. 20-UI-143793, allowing claimant's late request for hearing regarding decision # 90809, but affirming that Department decision. On February 3, 2020, ALJ Murdock also issued Order No. 20-UI-143802, allowing claimant's late request for hearing regarding decision # 195047, but affirming that Department decision. On February 21, 2020, claimant filed timely

applications for review of Order Nos. 20-UI-143793 and 20-UI-143802 with the Employment Appeals Board (EAB).

Pursuant to OAR 471-041-0095 (October 29, 2006), EAB consolidated its review of Order Nos. 20-UI-143793 and 20-UI-143802. For case-tracking purposes, this decision is being issued in duplicate (EAB Decisions 2020-EAB-0160 and 2020-EAB-0161, respectively).

Based on a *de novo* review of the entire record regarding Order Nos. 20-UI-143793 and 20-UI-143802, and pursuant to ORS 657.275(2), the portion of the orders under review allowing claimant's late requests for hearing on decisions # 90809 and 195047 are **adopted**. The remainder of this decision addresses the work separation, overpayment and penalties issues.

FINDINGS OF FACT: (1) Point Blank Distributing, a beverage distributor, employed claimant from September 25, 2017 to December 21, 2018.

(2) Claimant worked as a full-time merchandiser for the employer until August 16, 2018, when she went on a medical leave of absence. The leave ended on October 10, 2018. After claimant returned to work, she learned that the employer had hired a new employee to take over her merchandiser route and that her job had been changed. Claimant's new job involved only two days of merchandising along with some hours as warehouse worker which, together, did not provide her with full-time work.

(3) Claimant had difficulty meeting her expenses working less than full-time. On October 18, 2018, she asked the branch manager about "the possibility of being laid off" because she was working less than 40 hours and wanted time to seek more gainful employment. Transcript at 62. The branch manager consulted with the employer's human resources manager and denied claimant's request. On or about October 19, 2018, the employer removed one of claimant's merchandising days from her schedule after she called in sick and did not report to work to perform one of her two remaining merchandising shifts.

(4) Claimant continued to work her scheduled hours for the employer, and obtained part-time work as an autism therapist to supplement her income. On or about November 21, 2018, claimant notified the branch manager about her new part-time job and asked him to work around her schedule at that job if possible to maximize her work hours with both. Transcript at 30, 64. Although the employer's branch manager agreed to do so, claimant's work hours with the employer decreased, in part because both of claimant's jobs required morning hours. Additionally, after working almost 27 hours as an autism therapist during her first week with her new employer, claimant's hours decreased thereafter. During the week ending December 8, 2018 she worked 11.45 hours, during the week ending December 15, 2018, she worked 4 hours and during the week ending December 22, 2018, she worked 7.93 hours. Exhibit 8 at 103 (Order No. 20-UI-143802).

(5) On December 21, 2018, the employer presented claimant with an envelope that contained her final paycheck, a check for her accrued personal time off (PTO), and healthcare information. The employer told her it was her "final paycheck." Transcript at 47. The envelope did not contain any explanation regarding the reason for the work separation and the work separation came as a surprise to claimant. Claimant concluded that the employer had laid her off work because the employer had found it difficult to provide her with hours after she began her supplemental part-time job. The employer considered the

work separation a voluntary quit based on a mutual agreement because claimant had previously expressed her interest in being laid off from work.

(6) On October 19, 2018, claimant filed an initial claim for unemployment insurance benefits. The Department determined that claimant's claim was monetarily valid with a weekly benefit amount of \$390. Claimant claimed benefits for each of the weeks including December 16, 2018 through April 6, 2019 (weeks 51-18 through 14-19). When claimant claimed benefits for the week ending December 22, 2018, when asked whether she had quit a job that week, claimant responded, "No." Claimant also reported to the Department that she had been laid off from work during the week. As a result of claimant's reports to the Department and claimant's weekly benefit claims, the Department paid claimant and claimant received a total of \$5,394 in regular benefits.

CONCLUSIONS AND REASONS: The employer discharged claimant on December 21, 2018, but not for misconduct, and claimant is not disqualified from receiving benefits on the basis of her work separation. Accordingly, claimant was not overpaid benefits and is not liable for an overpayment, monetary penalty, or penalty weeks.

Work Separation. 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). An individual is separated from work when the employer-employee relationship is severed. *Id.*

At hearing, the employer asserted that claimant quit work based on a "mutual agreement" with claimant, whereas claimant asserted that the envelope she received from the employer on her last day of work was unexpected, did not specify a reason for the work separation, and she assumed she had been laid off. Transcript at 34, 47-48. 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.

Order No. 20-UI-143793 found that after claimant worked both of her part-time jobs for a time, she told the employer's branch manager "that she could work full-time at her new job and she wanted to leave work with the employer to do that" following which the employer presented her with her final paycheck. Order No. 20-UI-143793 at 2. Based on that finding, the order concluded that claimant voluntarily left work without good cause, reasoning that continuing work was available to claimant if she had chosen to continue but did not based on the parties "mutual agreement." Order No. 20-UI-143793 at 2. However, although claimant admitted that she had asked the branch manager if she could be laid off on October 18, 2019, claimant consistently denied at hearing that she had later quit, and the employer did not dispute claimant's assertion that claimant's final paperwork did not state a reason for the work separation. Transcript at 52-54.

The preponderance of the other evidence in the record does not support the order's finding that claimant told the employer that she wanted to leave the employer "to work full-time at her new job." The record of claimant's hours with her new employer shows that for the week ending December 1, 2018, claimant worked 26.62 hours, for the week ending December 8, 2018, she worked 11.45 hours, for the week ending December 15, 2018, she worked just 4.0 hours and for the week ending December 22, 2018, she worked only 7.93 hours. Nor did the employer document claimant's reported statement to the branch

manager that she was leaving work with the employer for that reason even though they had documented claimant's request to be laid off on October 18, 2018. Exhibit 7 at 61-62 (Order No. 20-UI-143802). More likely than not, claimant was willing to continue work with the employer on and after December 21, 2018 but was not allowed to do so. Accordingly, the work separation was a discharge that occurred on that day.

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). 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).

Because the employer asserted that claimant quit and did not specify a reason for the work separation in claimant's final paperwork, the record fails to show that it discharged claimant for a willful or wantonly negligent violation of a reasonable employer expectation. The record does not otherwise show that claimant's discharge was due to willful or wantonly negligent misconduct on her part. Accordingly, the employer failed to meet its burden of proof. The employer discharged claimant, but not for misconduct under ORS 657.176(2)(a).

Overpayment and Penalties. ORS 657.310(1) provides that an individual who received benefits to which the individual was not entitled is liable to either repay the benefits or have the amount of the benefits deducted from any future benefits otherwise payable to the individual under ORS chapter 657. Read together, ORS 657.215 and ORS 657.310(2) provide that if an individual has received any benefits to which the individual is not entitled because the individual has willfully made a false statement or misrepresentation or willfully failed to report a material fact to obtain benefits, the individual is liable to pay a monetary penalty and to have a penalty period of benefit disqualification imposed.

The Department concluded, and Order No. 20-UI-143802 agreed, that claimant was disqualified from receiving the \$5,394 in regular benefits paid to her for weeks 51-18 through 14-19 and that because she received those benefits based upon a willfully false certification to the Department that she had not quit a job during week 51-18, she was liable to repay those benefits to the Department, and subject to a monetary penalty of \$809.10 and a penalty disqualification period of 35 weeks. Order No. 20-UI-143802 at 6. However, having concluded in this consolidated decision that the employer discharged claimant, but not for misconduct, claimant was not disqualified from receiving benefits for weeks 51-18 through 14-19, and, as such, was not overpaid \$5,394 in benefits or subject to a monetary penalty or a penalty disqualification period.

DECISION: Order Nos. 20-UI-143793 and 20-UI-143802 are modified, as outlined above.

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

DATE of Service: March 30, 2020

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

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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.

Employment Appeals Board - 875 Union Street NE | Salem, OR 97311
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