

EMPLOYMENT APPEALS BOARD DECISION
2020-EAB-0203

Reversed
No Disqualification

PROCEDURAL HISTORY: On January 9, 2020, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant voluntarily quit working for the employer without good cause and was disqualified from receiving benefits beginning December 8, 2019 (decision # 121920). Claimant filed a timely request for hearing. On February 13, 2020, ALJ Janzen conducted a hearing, and on February 18, 2020 issued Order No. 20-UI-144652, affirming the Department's decision. On March 9, 2020, claimant filed an application for review with the Employment Appeals Board (EAB).

EAB considered claimant's argument when reaching this decision, to the extent the argument was relevant and based upon the record.

FINDINGS OF FACT: (1) Modern Plumbing, Co. employed claimant as an administrative assistant from September 13, 2018 until December 13, 2019.

(2) At all relevant times, the employer had no written policy for its employees addressing attendance and no written policy for its employees addressing changing computer passwords. The employer also had no employee handbook for its employees.

(3) Prior to October 14, 2019, if claimant needed time off for a doctor's appointment, claimant would raise the issue a couple of days in advance and ask the then-owner what would be the best time of the day to make an appointment. Based on the response claimant received, she would schedule the appointment and place it on her calendar. The then-employer never had any issues with the way claimant arranged time off. In addition, prior to October 14, 2019, claimant never changed the password for the computer that sat on her desk.

(4) On October 14, 2019, the employer's ownership changed. Because the new owners did not state any expectation with respect to the procedures for requesting leave, claimant continued to arrange leave the same way she had with the prior owner. Claimant was not aware of any expectation from the new owners that she could not change the password for the computer on her desk.

(5) On or about December 12, 2019, claimant changed the computer password for the computer on her desk as part of an attempt to make the office copier work and “make the passwords line up together”. Transcript at 24-25. The employer did not have outside IT support, the system was “messaging up” and claimant “was trying to figure out how to make it right.” Transcript at 24-25.

(6) On the morning of Friday, December 13, 2019, the employer needed to access the computer on claimant’s desk for a work-related task, but could not do so because they did not know the new password. The employer believed that this was the second time claimant had locked them out of the computer. The employer texted claimant prior to work seeking the password, but claimant did not respond.

(7) When claimant arrived to work, the new owner, E.L. and an administrative assistant, J.L., had a meeting with claimant in the middle of the office. Claimant had no prior knowledge of the meeting and felt “blindsided” by it. Transcript at 6. The employer wanted an explanation for why claimant had changed the password and felt that she could “leav[e] and go[] as she pleased” from work. Transcript at 11. The employer was not satisfied with claimant’s explanations. E.L. handed claimant her final paycheck and told her that the employer was letting her go.

(8) Claimant became emotional because “[she] needed [her] job... [and] loved [her] job.” Transcript at 32. The employer told claimant to go home and that E.L. and J.L. “were going to discuss it over the weekend and they would ... let [her] know.” Transcript at 23. Claimant wanted to work that day and would not leave, so J.L. threatened to call the police to get claimant to leave. Claimant “sat there for a while and then she started packing up... and then she left.” Audio Record at 49:45.¹ Claimant believed that the employer had terminated her but also that the employer would let her know over the weekend “if [she] had [her] job back.” Transcript at 23.

(9) The employer did not make contact with claimant over the weekend and claimant did not return to the job on Monday, December 16, 2019.

CONCLUSIONS AND REASONS: Claimant was discharged, but not for misconduct.

Nature of the work separation. The first issue this case presents is the nature of the work separation. The standard for determining how to characterize the nature of the work separation is set out in OAR 4710030-0038(2) (December 23, 2018). 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).

Order No. 20-UI-144652 concluded that claimant quit work on December 13, 2019. The order reasoned that the employer’s testimony that claimant was asked to return to work on Monday, December 16, 2019, but she failed to do so, was more “reliable” than claimant’s testimony that claimant was

¹ The hearing transcript erroneously stated that the employer testified claimant “started *acting* up...”, when review of the audio recording of the hearing established that the employer actually said “started *packing* up.” Compare Transcript at 31 (emphasis added), with Audio Record at 49:45. Where the transcript fails to accurately reflect a party’s testimony, EAB will find facts in accordance with the audio recording.

discharged by the employer on Friday, December 13, 2016, when the employer told her they were letting her go. Order No. 20-UI-144652 at 2. Because of the reliability of the employer's testimony on the nature of the work separation, the order concluded that claimant quit work without good cause because she could have continued to work for the employer for an additional period of time, but chose not to. Order No. 20-UI-144652 at 2. The record does not support the order's conclusion.

The record evidence reflects a conflict as to whether the employer told claimant, prior to her leaving work on December 13, 2019, that she should return on Monday to further address the issues, or whether the employer told claimant that E.L. and J.L. would discuss the issue over the weekend and let claimant know if she should return to work on Monday. Because claimant did not receive any weekend communication from the employer, the answer to this question weighs heavily on the question of whether claimant's work separation was a voluntary act of claimant, or a discharge by the employer. Order No. 20-UI-144652 resolved this conflict in favor of the employer, concluding that claimant's testimony on the issue was less credible than the employer's testimony because claimant was "evasive" in answering certain questions during the hearing. Order No. 20-UI-144652 at 4. The order pointed to claimant's failure to "initially disclose the employer's reasons for wanting to meet with her and [that she] could not provide a logical reason for changing the employer's passwords" as evidence of claimant's evasion. Order No. 20-UI-144652 at 4. The record does not support that credibility finding.

Claimant was "blindsided" by the December 19, 2013 meeting, and had no prior knowledge that it would occur. Claimant's initial hearing testimony was therefore consistent with the surprise nature of the meeting and her later testimony elaborated on the reasons provided by the employer for the meeting. The preponderance of the evidence demonstrates that claimant's testimony was not inconsistent, and that she was not evasive in answering questions about the employer's reasons for the meeting. Furthermore, claimant provided objectively reasonable testimony regarding the reason for her decision to change the computer password; to wit: claimant was trying to fix an issue with the communication between the computer and the office copier. Meanwhile, the testimony of the employer's witness, J.L. was less reliable. Although J.L. was present at the meeting, knew that the purpose of the meeting was to address deficiencies in claimant's work performance, and was aware of the employer's intent to hand claimant her final paycheck, she was unable to answer whether E.L. told claimant during the meeting that the employer was letting claimant go. Likewise, although J.L. testified that the employer told claimant to return on Monday, December 16, 2019, so that all parties could further discuss the issues, J.L. also testified that she threatened to call the police in order to get claimant to leave the office on December 13, 2019. These latter two concepts are inconsistent with one another and, coupled with J.L.'s inability to recall whether the employer told claimant she was being let go, establishes that claimant's testimony was more credible than the employer's.

The preponderance of the evidence demonstrates that claimant arrived to work on Friday, December 13, 2019 and the employer had a conversation with claimant in the middle of the office seeking explanations for why claimant changed the computer password on two occasions, and for why claimant felt like she could come and go from work as she pleased. Unsatisfied with claimant's explanations, the owner, E.L., handed claimant her final paycheck and he told her that the employer was "letting her go". At that point, claimant became emotional and sought to continue her work that day, but the employer prevented her from doing so, telling her to leave or the employer would call the police. At that point, claimant packed her things and left, believing the employer had terminated her employment. Under these circumstances no reasonable person in claimant's position would have believed that the employer would have allowed

them to continue working for the employer after December 13, 2019. Because continuing work was not available to claimant, the work separation was a discharge.

Discharge. The final issue this case presents is whether the employer's discharge of claimant was 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). "[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 carries the burden to show claimant's misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

The employer discharged claimant for failing to properly notify the employer when she needed time off from work, and for changing the computer password for the computer on her desk. The preponderance of the evidence demonstrates, however, that at all relevant times the employer had no written policies, nor any set expectations, for how its employees were supposed to request leave from work, nor any policies addressing computer passwords. Claimant continued to apply the same approach that she had used when seeking to take leave under the prior owner, and for which she never had any previous issues. The record fails to demonstrate that the employer ever placed claimant on notice prior to the meeting on December 13, 2019, that she was not meeting the employer's expectations with respect to taking time off work or with respect to changing the computer password. As a result, the employer has failed to meet its burden in demonstrating by a preponderance of the evidence that claimant's discharge was the result of misconduct because, under the totality of the circumstances, no reasonable person would conclude that claimant knew or should have known that her conduct in changing the computer password and in taking leave from work violated an employer policy.

The employer discharged claimant but not for misconduct. Claimant is not disqualified from receiving unemployment insurance benefits.

DECISION: Order No. 20-UI-144652 is set aside, as outlined above.

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

DATE of Service: April 10, 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 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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