

EMPLOYMENT APPEALS BOARD DECISION
2020-EAB-0344

Reversed
No Disqualification

PROCEDURAL HISTORY: On March 6, 2020, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant quit work without good cause and was disqualified from receiving unemployment insurance benefits effective December 22, 2019 (decision # 102626). Claimant filed a timely request for hearing. On April 15, 2020, ALJ Scott conducted a hearing, and on April 17, 2020, issued Order No. 20-UI-148294, concluding claimant was discharged for misconduct and was disqualified from receiving benefits effective December 22, 2020. On May 4, 2020, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant did not declare 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). The argument also 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 as required by OAR 471-041-0090 (May 13, 2019). EAB considered only information received into evidence at the hearing when reaching this decision. *See* ORS 657.275(2).

FINDINGS OF FACT: (1) Pridestaff Inc. (Pridestaff), a temporary staffing agency, employed claimant at an assignment as a laborer at Virtual Supply from November 18, 2019 to December 27, 2019.

(2) Pridestaff expected its employees to call or text it at any time to report if they were going to miss work at an assignment, and to leave a message if they did not reach someone on Pridestaff's telephone. Pridestaff's policy was to report to its clients if an employee was going to miss work at an assignment. Claimant had followed this policy in the past and on November 29, 2019, when he called the staffing consultant that handled the Virtual Supply account to report that he would miss work that day due to illness.

(3) Claimant found his onsite Pridestaff supervisor at Virtual Supply to be "terrible" at replying to claimant when claimant contacted him about work. Audio Record at 30:29. After working at Virtual Supply for a few weeks, claimant began to communicate more through his lead, who was also a

Pridestaff employee, rather than the onsite Pridestaff supervisor or the Pridestaff staffing consultant. The lead was claimant's primary source of information about work and claimant felt he "communicated everything for [claimant]." Audio Record 30:42 to 30:47. For claimant, "it became a normal thing" for him to communicate with his supervisor through claimant's lead. Audio Record at 6:07.

(4) On December 16 and 17, 2019, claimant was not able to work due to illness. Claimant told his lead he was not able to work those days. He did not contact the Pridestaff staffing consultant directly to report his absences. Pridestaff did not warn claimant for failing to contact the staffing consultant or otherwise notify claimant that it expected him to contact someone other than his lead if he was going to miss work at Virtual Supply.

(5) On December 23, 2019, claimant became ill while he was at work at Virtual Supply. Claimant "messed" his onsite Pridestaff supervisor, who did not respond to claimant. Audio Record at 5:10. Claimant went to the supervisor's office, and he was not there. At approximately 10:00 a.m. on December 23, claimant told his lead that he needed to leave work due to illness. Someone picked claimant up from work because he was too ill to drive himself home. Claimant sent the supervisor a text message stating that he had to leave work and had left his car at work. Exhibit 1.

(6) On December 25, 2019,¹ claimant "messed" his lead to ask if there was work on December 26 and to let him know he planned to return to work on December 26. Audio Record at 6:30 to 6:43.

(7) On December 26, 2019, claimant called his lead and explained that he was ill and unable to work for the "rest of that week." Audio Record at 8:01. During the conversation, claimant's lead told claimant that Virtual Supply "had a slow season" and would be laying off temporary and permanent staff. Audio Record at 9:06. Claimant called the staffing consultant at Pridestaff who managed the Virtual Supply account and told him he "wouldn't be a good fit" at Virtual Supply because he wanted a permanent position. The staffing consultant offered to take claimant out of his position at Virtual Supply, but claimant responded that he wanted to complete his assignment. Claimant planned to return to work on December 30, 2019.

(8) On December 27, 2019, at 2:06 p.m., the Pridestaff staffing consultant who managed the Virtual Supply account sent claimant a text message stating, "Virtual Supply has slowed down and they've asked to end your assignment. I will contact you if we have anything else for you." Exhibit 1. On December 27, the Pridestaff staffing consultant wrote in claimant's termination note that claimant had stated he did not want to work for Virtual Supply long-term, but would complete the assignment, and that Virtual Supply was not willing to allow claimant to continue working because of his attendance. The only communication claimant received from Pridestaff on December 27 was the text message ending his assignment at Virtual Supply. Exhibit 1. Pridestaff did not tell claimant that Virtual Supply did not want to continue claimant's employment due to claimant's attendance.

CONCLUSIONS AND REASONS: The employer discharged claimant, not for misconduct. Claimant is not disqualified from receiving unemployment insurance benefits based on this work separation.

¹ The record does not show if Pridestaff expected claimant to report to work at Virtual Supply on December 24 or 25, 2019. If they did, it would not change the outcome of this decision.

Work separation. The Department concluded that claimant quit work without good cause.² Order No. 20-UI-148294 concluded, however, that the employer discharged claimant.³ The first issue is therefore 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). For purposes of unemployment insurance benefits cases, when an individual works for a temporary agency, the employment relationship “shall be deemed severed at the time that a work assignment ends.” OAR 471-030-0038(1)(a).

Order No. 20-UI-148294 concluded that Pridestaff discharged claimant.⁴ The order reasoned that both Pridestaff and claimant asserted that Virtual Supply was not willing to allow claimant to continue working at the assignment, and that because claimant was willing to continue working at Virtual Supply, but was not permitted to do so, the work separation was a discharge.⁵ The record supports the conclusion that the work separation was a discharge.

The employer’s witness asserted at hearing that claimant did not “call out” on December 26 and 27, 2019, and told the staffing consultant for Virtual Supply on December 26 that he did not want to do the assignment. Audio Record at 22:24 to 22:56. The employer therefore considered claimant to have abandoned his job because its records showed that claimant was a “no call, no show” for two consecutive days. Audio Record at 22:24 to 22:56. However, claimant’s firsthand testimony shows he was willing to continue working after December 26 because he told the staffing consultant for Virtual Supply that although he was dissatisfied that Virtual Supply was laying off employees, he wanted to complete his assignment. Also, had claimant already stated he did not want to continue his position on December 26, it is not logical that Pridestaff would have sent claimant a text message on December 27 stating, “Virtual Supply has slowed down and they’ve asked to end your assignment.”

The employer’s witness also asserted that Virtual Supply “did not want claimant to come back,” and testified that the staffing consultant wrote a note in claimant’s file on December 27 stating that claimant had told him he did not want to work for Virtual Supply long-term, but “would finish the temporary assignment.” *See Exhibit 1*; Audio Record at 22:58, 27:00 to 27:16. In sum, the preponderance of the firsthand evidence regarding the nature of the work separation shows that it was a discharge because claimant was willing to continue working and planned to return to work on December 30, but was not permitted to do so by the employer because Virtual Supply ended claimant’s assignment on December 27.

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

² Decision # 102626.

³ Order No. 20-UI-148294 at 3.

⁴ Order No. 20-UI-148294 at 3.

⁵ Order No. 20-UI-148294 at 3.

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). Isolated instances of poor judgment, good faith errors, and absences due to illness or other physical or mental disabilities are not misconduct. OAR 471-030-0038(3)(b).

The order under review concluded that the employer discharged claimant for misconduct, reasoning that claimant failed to report to work six times in December 2019 without notifying Pridestaff directly of his absences, and that claimant “had no reasonable explanation” for his conduct.⁶ The order further concluded that claimant’s conduct was repeated and therefore not an isolated instance of poor judgment, and that claimant had no “valid basis” on which to assume or believe that Pridestaff would condone his failure to report his absences directly to Pridestaff.⁷ The record does not support these conclusions.

To the extent the employer discharged claimant for failing to notify his onsite Pridestaff supervisor or the Pridestaff staffing consultant that he would miss work on December 26 and 27, 2019, 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’s firsthand testimony was that he told his lead at Virtual Supply on December 26 that he would miss work due to illness until December 30. To the extent the employer expected claimant to communicate his absences directly with the his onsite Pridestaff supervisor or someone else at Pridestaff, the record fails to show that claimant knew or should have known this expectation through prior training, experience, or warnings. To the contrary, it had become a “normal thing” for claimant to receive work information and report his absences through his Virtual Supply lead. Claimant had told only his lead about his absences when he missed work on December 16 and 17, and there is no evidence to show that Pridestaff reprimanded claimant then for failing to contact the Pridestaff staffing consultant about his absences. The preponderance of the evidence in the record shows that claimant sincerely believed in good faith, based upon his past experiences, that notifying his lead of his absences was sufficient notice to the employer. The employer therefore failed to establish that claimant’s conduct was a willful or wantonly negligent violation of the employer’s expectations, and failed to establish that claimant’s conduct was not the result of a good faith error in his understanding of those expectations.

To the extent claimant’s discharge occurred because Virtual Supply decided to end claimant’s job assignment because it had “slowed down,” claimant was not discharged for misconduct. The end of a temporary job assignment because the assignment’s business had decreased is not attributable to claimant as willful or wantonly negligent misconduct.

Because claimant’s discharge was not due to misconduct, claimant is not disqualified from receiving benefits based on the December 27, 2019 work separation.

⁶ Order No. 20-UI-148294 at 5.

⁷ Order No. 20-UI-148294 at 5.

DECISION: Order No. 20-UI-148294 is set aside, as outlined above.

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

DATE of Service: May 18, 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.

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