EO: 200
BYE: 202110

State of Oregon
Employment Appeals Board
875 Union St. N.E.
Salem, OR 97311

639
DS 005.00

EMPLOYMENT APPEALS BOARD DECISION
2020-EAB-0665

Affirmed
No Disqualification

PROCEDURAL HISTORY: On August 6, 2020, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that the employer discharged claimant for misconduct and was disqualified from receiving unemployment insurance benefits effective April 26, 2020 (decision # 153115). Claimant filed a timely request for hearing. On October 1, 2020, ALJ Monroe conducted a hearing, and on October 2, 2020 issued Order No. 20-UI-154774, concluding that the employer discharged claimant, but not for misconduct, and that claimant was not disqualified from receiving benefits. On October 12, 2020, the employer filed an application for review with the Employment Appeals Board (EAB).

WRITTEN ARGUMENT: The employer and claimant submitted written argument. The employer submitted its written argument in three iterations: (1) a one-paragraph argument typed across the top of its application for review; (2) a multiple-page submission transmitted by overnight mail; and (3) a three-page submission transmitted by fax. With respect to the employer's one-paragraph argument typed across the top of its application for review, EAB did not consider it because the employer did not declare that it provided a copy of the argument to the opposing party or parties as required by OAR 471-041-0080(2)(a) (May 13, 2019). With respect to the employer's multiple-page submission transmitted by overnight mail, the argument contained information that was not part of the hearing record, and did not show that factors or circumstances beyond the employer's reasonable control prevented it from offering the information during the hearing as required by OAR 471-041-0090 (May 13, 2019). EAB did not consider any information contained in the employer's argument that was not received into evidence at the hearing when reaching this decision. Apart from the exceptions noted above, EAB considered the written argument of the employer and of claimant when reaching this decision.

FINDINGS OF FACT: (1) Ashland Recycled Furniture employed claimant as a sales clerk from September 1, 2018 until April 27, 2020.

(2) The employer expected claimant to report an accurate separation reason when making a claim for unemployment insurance benefits.

(3) At claimant's most recent performance review in late 2019, the owner gave claimant a raise of fifty cents but did not want claimant's raise to appear on payroll because the owner did not want a different employee who managed payroll to be aware of claimant's raise. Initially, the owner paid claimant's raise in monthly $40 gift certificates, but for three months after this initial period, the owner instructed claimant to take $40 cash from the store's cash box each month. On approximately March 11, 2020, the owner informed claimant that going forward, the owner would pay claimant the $40 on regular payroll rather than cash. Claimant "was fine" with that change. Transcript at 46.

(4) Beginning March 16, 2020 at close of business, the owner closed the store temporarily in order to comply with a government directive issued to address the COVID-19 pandemic.

(5) Claimant worked at the store on March 16, but the owner was not there that day because the owner was sick. After claimant's shift ended, the owner called claimant. The owner informed claimant during the March 16 telephone call that the store would close for approximately two weeks and she could not afford to pay claimant during the closure. The owner also requested during the call that claimant do a few odd jobs at the store during the business closure, and claimant agreed to do them. The owner instructed claimant to keep track of the hours she worked doing the odd jobs, but the two did not discuss whether claimant would be compensated for the work via payroll or in some other manner. On March 17, 20, 21, and 23, claimant performed some of the odd jobs the owner had requested her to do at the store during the closure.

(6) On March 19, 2020, claimant filed an initial claim for unemployment insurance benefits. On her initial claim, claimant reported that she was unemployed due to a lack of work. Claimant reported lack of work because she believed she had been laid off. Claimant did not inform the owner that she had filed a claim for unemployment insurance benefits because she was not aware that the owner expected her to do so.

(7) On March 23, 2020, claimant left a note at the store for the owner that requested that claimant be paid for her work on March 16 via the regular payroll. The note also requested that the owner pay claimant by "separate check" for 5 ½ hours of work claimant performed doing odd jobs on March 17, 20, 21, and 23. Exhibit B, "A Special Note" dated March 23, 2020 at 2.

(8) On March 30, 2020, claimant had another telephone conversation with the owner. During the March 30 telephone call, the owner told claimant that the employer had gotten a loan and as a result would be paying claimant's salary during the pendency of the store closure. Upon learning this, claimant informed the owner that she had filed for unemployment insurance benefits but would void and return any payments received, and would stop making the weekly reports necessary to receive unemployment insurance payments.

(9) On April 15, 2020, the employer's store reopened.

(10) On April 27, 2020, the employer discharged claimant. The main reason for the discharge was the fact that claimant had requested to be paid off of the regular payroll for the odd jobs claimant did for the employer after the store closed. Another reason for the discharge was that the owner believed claimant provided inaccurate information to the Department by reporting a lack of work.

CONCLUSIONS AND REASONS: The employer discharged claimant, but not 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) (September 22, 2020). "'[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 evidence. *Babcock v. Employment Division*, 25 Or. App. 661, 550 P.2d 1233 (1976).

As a preliminary matter, the testimony of the owner and claimant differed on several key issues. For example, the owner testified that she paid claimant an extra $40 a month (initially via gift certificates) for extra cleanings claimant did, but that claimant became insistent that she be paid the $40 in cash, which caused the owner to consult the internet and her CPA to confirm that such cash payments would be illegal, and ultimately drove the owner to give claimant a letter in which she warned claimant that if claimant continued to ask to be paid "under the table," the owner would discharge her. Transcript at 17-19. Claimant maintained, in contrast, that the owner had granted claimant a raise of fifty cents and wanted to conceal the raise from her payroll manager, so the owner paid claimant the $40 each month (first via gift certificates, then in cash) to give claimant the raise without the payroll manager learning about it. Transcript at 44-45. Claimant testified that the owner eventually decided to pay the $40 on regular payroll and that claimant was "fine with that." Transcript at 45-46. Claimant stated she never received any warning letter. Transcript at 46.

The parties also provided irreconcilable testimony regarding the store closure. In the owner's telling, despite being "very, very sick" on March 16, 2020, the owner spent the whole day at the store with claimant, at which time she and claimant agreed that the owner would continue to pay claimant her regular rate of pay, and that when the store reopened, claimant would stay on as an employee. Transcript at 72, 11-12. However, claimant testified that the owner was not at the store on March 16 because the owner was sick. Transcript at 49. Claimant stated that the owner called claimant after work on the evening of March 16 and informed claimant that the store would close and the owner could not afford to pay claimant during the closure. Transcript at 49. Claimant submitted a telephone record substantiating that she received a call from the owner's telephone number on March 16 at 6:13 p.m. Exhibit D, Sprint Call Record. The owner acknowledged the March 16 telephone call but testified she was "really, really sick" that day and did not recall the telephone conversation. Transcript at 71-72. Claimant stated that she only learned that the employer would pay her regular salary during a telephone call on March 30, 2020, which was after claimant had filed for unemployment insurance benefits. Transcript at 50, 53-54.

Claimant stated that she told the owner about her initial claim on the March 30 call. Transcript at 53-54. The owner testified that she did not learn about claimant's claim until mid-to-late April. Transcript at 39.

Viewed objectively, the evidence on the issues discussed above was no more than equally balanced between the parties. Where the evidence is no more than equally balanced, the party with the burden of persuasion – here, the employer – has failed to satisfy its evidentiary burden. Consequently, on these disputed matters, we based our findings on claimant's evidence.

The employer's decision to discharge claimant was based on a combination of two principal factors: (1) that claimant requested to be paid off of regular payroll for the odd jobs claimant did for the employer while the store was closed, and (2) that claimant reported a lack of work when she filed her claim for unemployment insurance benefits, which the employer viewed as a misrepresentation.[1] Transcript at 30. The employer failed to meet its burden to establish that claimant was discharged for misconduct with respect to either of these reasons.

It is undisputed that, during the store closure, claimant performed some "extra" or "odd" jobs for the employer and left the March 23 note requesting that the employer pay her for the work by separate check. Transcript at 15, 49, 8-9, 51. But the record does not show by a preponderance of the evidence that claimant's request to be paid off of payroll amounted to a willful or wantonly negligent violation of the employer's expectations or disregard of its interests. The employer condoned paying claimant off of payroll; claimant received $40 payments off of payroll for months. The owner herself testified that she had a practice of paying claimant for her "extra work" cleaning in the mornings with $40 gift certificates – a form of payment it is reasonable to infer was not captured in the employer's official payroll ledger. Transcript at 9-10. The primary evidence that may be credited to have established a rule barring claimant from asking to be paid off of payroll was the March 12 warning letter. Exhibit B, March 12, 2020 Letter of Warning. However, given the conflicted state of the record (claimant denied ever receiving the letter), and the letter's relatively weak evidentiary value (it is unsigned, and nothing from the face of the letter can verify claimant actually received it), the letter is not sufficient to establish that claimant knew or should have known that she was prohibited from asking to be paid off of payroll.

Nor does the preponderance of evidence show that claimant committed misconduct by reporting a lack of work when she filed her initial claim for unemployment insurance benefits. On this record, it is more probable than not that claimant did not consciously misrepresent the truth by reporting a lack of work. Given the employer's burden of persuasion in a discharge case, and coupled with the owner's inability to recall the details of her March 16 telephone conversation with claimant, claimant's version of what

[1] The owner also testified that she believed claimant left the store five or ten minutes early on three occasions between February 18 and March 12, 2020, and that those instances of leaving early factored into the employer's decision to discharge claimant. Transcript at 25-27. However, the owner also stated that the occasions when claimant left early only became a "bigger deal" to her later, and she never confronted claimant about them because "the amount of time was so insignificant." Transcript at 27-28. The owner further testified that she did not think she would have discharged claimant on the sole basis of claimant leaving the store early. Transcript at 28. For her part, claimant denied ever leaving the store early, and nothing in the record contradicts that apart from the testimony of the owner. Transcript at 48. The preponderance of the evidence shows that claimant's discharge would have happened whether or not claimant left the store early. Therefore, leaving early was not a proximate cause of claimant's discharge and need not be analyzed for misconduct. *See, e.g., Appeals Board Decision* 12-AB-0434, March 16, 2012 (discharge analysis focuses on proximate cause of the discharge, which is generally the last incident of misconduct before the discharge); *Appeals Board Decision* 09-AB-1767, June 29, 2009 (discharge analysis focuses on proximate cause of discharge, which is the incident without which the discharge would not have occurred when it did).

was discussed on March 16 was more reliable. Under claimant's version of events, in which the owner told claimant that the store would be closed for approximately two weeks and claimant would not receive her regular salary, it was plausible for claimant to believe she had been laid off. While it is true that claimant agreed to do some "extra" or "odd" jobs for the employer in the days following March 16, which suggests the existence of a continuing employment relationship rather than a lack of work, that point does no more than present a case of equally balanced evidence as to whether claimant reasonably believed she was laid off on March 16. Given the employer's burden of persuasion, the fact claimant did some odd jobs for the employer after March 16 is not sufficient to conclude that claimant was consciously misrepresenting the truth when she reported a layoff due to lack of work when claiming benefits.

The employer discharged claimant, but not for misconduct. Claimant is not disqualified from receiving unemployment insurance benefits based upon this work separation.

DECISION: Order No. 20-UI-154774 is affirmed.

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

DATE of Service: November 19, 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.

Please help us improve our service by completing an online customer service survey. To complete the survey, please go to https://www.surveygizmo.com/s3/5552642/EAB-Customer-Service-Survey. You can access the survey using a computer, tablet, or smartphone. If you are unable to complete the survey online and need a paper copy of the survey, please contact our office.

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 – 本判决会影响您的失业救济金。 如果您不明白本判决， 请立即联系就业上诉委员会。 如果您不同意此判 决，您可以按照该判决结尾所写的说明，向俄勒冈州上诉法院提出司法复审申请。

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 فورا، 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 دستورالعمل موجود در پایان آن، از دادگاه تجدید نظر اورگان درخواست تجدید نظر کنید.

Employment Appeals Board - 875 Union Street NE | Salem, OR 97311
Phone: (503) 378-2077 | 1-800-734-6949 | Fax: (503) 378-2129 | TDD: 711
www.Oregon.gov/Employ/eab