

EMPLOYMENT APPEALS BOARD DECISION
2020-EAB-0728

Affirmed
No Disqualification

PROCEDURAL HISTORY: On October 2, 2020, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant quit work without good cause and was disqualified from receiving unemployment insurance benefits effective April 28, 2019 (decision # 102250). Claimant filed a timely request for hearing. On October 22, 2020, ALJ Griffin conducted a hearing, and on October 26, 2020 issued Order No. 20-UI-155701, concluding that claimant quit work for good cause. On November 13, 2020, the employer filed an application for review with the Employment Appeals Board (EAB).

WRITTEN ARGUMENT: EAB considered the employer's written argument when reaching this decision.

FINDINGS OF FACT: (1) Jacksons Food Stores employed claimant as a fuel attendant from July 31, 2017 until April 30, 2019.

(2) Around January of 2019, claimant began experiencing an unusually depressed mood, apathy, loss of energy, fatigue, thought disturbances, and suicidal thinking and impulses. These symptoms were unfamiliar to him and he had trouble coping with them. Claimant was diagnosed with bipolar disorder, and requested medical leave from the employer for his medical condition. The employer approved medical leave for claimant beginning on January 31, 2019 and tentatively scheduled to end April 28, 2019. During his medical leave, claimant sought and received treatment for his condition.

(3) Shortly before his medical leave expired, claimant contacted the manager of the store at which he worked and requested an extension of his leave, as he felt that he was not yet ready to return to work. The manager informed claimant that the employer would not extend his medical leave, and that he would have to return to work.

(4) On April 30, 2019, claimant returned to work, although he did not feel that he was well enough to return to work. After claimant had worked about half of his shift, the store manager raised concerns

about claimant's performance. Because of these concerns about his performance, the employer discharged claimant mid-way through his shift on April 30.

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

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) (September 22, 2020). 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).

The order under review stated that claimant testified that he had “. . . returned to work for a brief period after his medical leave and was told by the store manager that his performance was not satisfactory and he was being let go.” Order No. 20-UI-155701 at 3. However, the order concluded that because claimant acknowledged that “. . . his memory, particularly for assigning dates and times to events is poor,” the employer's testimony regarding the events leading to claimant's separation from work was more persuasive. Order No. 20-UI-155701 at 3. The employer testified that they had attempted to contact claimant about extending his leave, but that claimant never responded. Transcript at 35 to 38. Based on this testimony, the order concluded that, because the employer “. . . did nothing that barred claimant from employment,” claimant quit the job. Order No. 20-UI-155701 at 3.

The employer's witness, an “employment specialist” from the employer's human resources department, testified that shortly before claimant's leave expired, claimant contacted both his store manager and the employer's “benefits manager” to request an extension of leave; that the benefits manager told the store manager that it might be possible to extend claimant's leave but that she would have to speak to claimant first; and that claimant ultimately neither reported to work nor contacted the employer again after April 26, 2019. Transcript at 35 to 38. The employment specialist also testified that the store manager did not have authority to discharge claimant without approval from the human resources department, and that the employer had no such request from the store manager on file. Transcript at 39, 40.

Claimant, by contrast, testified that he attempted to request an extension of his leave from the employer and that the employer told him that an extension was not possible. Transcript at 7. Claimant testified further that he briefly returned to work after his leave expired, and that upon his return, the store manager was dissatisfied with his work performance and told him “. . . not to come back.” Transcript at 7, 8.

These two accounts of the events leading to claimant's separation from work cannot be reconciled, and therefore it is necessary to determine which testimony is more persuasive. In weighing this conflicting evidence, the order under review concluded that due to claimant's self-acknowledged memory deficits, the employer's account was more likely to be correct. Order No. 20-UI-155701 at 3. However, the record does not support this conclusion.

The record does not show that claimant's ability to recall the events leading to his separation from work was impaired or unreliable. Although claimant had difficulty in correctly recalling some dates, such as when he began working for the employer, claimant did not otherwise testify that his memory—either in

general or in regards to his separation from work—was impaired by his mental health condition. A conclusion that claimant’s memory was so unreliable that he erroneously recalled returning to work and being told not to return to work due to his work performance is not supported by the record.

Additionally, on this record, only claimant’s testimony was based on firsthand knowledge of the events that led to his separation from work. The employer’s witness provided testimony based not on her own personal involvement in the incidents leading to claimant’s work separation, but based entirely on hearsay reports from managers claimant interacted with prior to his separation from work. Although hearsay is admissible in unemployment insurance benefits hearings, written statements or statements that do not come from a firsthand witness are generally less persuasive evidence because the statements are not made under oath and the other party (here, the claimant) cannot cross-examine the witnesses who made the statements.

For these reasons, claimant’s firsthand account of the events that led to his work separation is more persuasive. The more persuasive evidence shows that the employer was dissatisfied with claimant’s work performance when he returned to work after his medical leave ended and, because they were dissatisfied with his work performance, the employer told claimant not to come back to work. Because the employer told claimant not to return to work, claimant could not have worked for the employer for an additional period of time, and was therefore discharged.

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). 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 P2d 1233 (1976).

The record shows that claimant briefly returned to work after a 12-week medical leave and that the employer, for unspecified reasons relating to claimant’s performance, told him not to return to work. Because the employer’s witness testified that claimant voluntarily quit, she did not offer testimony to explain in detail why claimant was discharged and the record does not otherwise show that claimant engaged in a willful or wantonly negligent disregard of the employer’s interest. The employer has therefore not met their burden to prove that claimant engaged in a willful or wantonly negligent disregard of the employer’s interest. For that reason, claimant was discharged but not for misconduct, and is not disqualified from receiving unemployment insurance benefits.

DECISION: Order No. 20-UI-155701 is affirmed.

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

DATE of Service: December 16, 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 desisyong ito.

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.

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

The Oregon Employment Department is an equal opportunity employer/program. Auxiliary aids and services are available upon request to individuals with disabilities. Language assistance is available to persons with limited English proficiency at no cost.

El Departamento de Empleo de Oregon es un programa que respeta la igualdad de oportunidades. Disponemos de servicios o ayudas auxiliares, formatos alternos y asistencia de idiomas para personas con discapacidades o conocimiento limitado del inglés, a pedido y sin costo.