EO: 200
BYE: 202104

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

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DS 005.00
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EMPLOYMENT APPEALS BOARD DECISION
2021-EAB-0065

Reversed & Remanded

PROCEDURAL HISTORY: On November 10, 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 June 28, 2020 (decision # 85054). Claimant filed a timely request for hearing. On January 7, 2021, ALJ Snyder conducted a hearing, and on January 12, 2021 issued Order No. 21-UI-159028, affirming the Department's decision. On January 29, 2021, claimant filed an application for review with the Employment Appeals Board (EAB).

WRITTEN ARGUMENT: EAB did not consider claimant's written argument when reaching this decision because he did not include a statement declaring that he provided a copy of his argument to the opposing party or parties as required by OAR 471-041-0080(2)(a) (May 13, 2019).

However, the parties may offer new information into evidence at the remand hearing. At that time, it will be determined if the new information will be admitted into the record. The parties must follow the instructions on the notice of the remand hearing regarding documents they wish to have considered at the hearing. These instructions will direct the parties to provide copies of such documents to the ALJ and the other parties in advance of the hearing at their addresses as shown on the certificate of mailing for the notice of hearing.

FINDINGS OF FACT: (1) Diamond Medical Maintenance employed claimant as a room cleaner in medical facilities, last from June 15, 2020 to approximately June 29, 2020.

(2) Claimant previously worked for the employer from early 2019 to January 2020, when the employer paid him a wage of $15.00 per hour. In late March 2020, the employer's owner sent claimant a text message requesting that he come in and fill out a work application. In early June 2020, claimant met with the owner in person, discussed returning to work for the employer at a Providence hospital for six months at an hourly wage of $15.50, and completed a work application. Based on their discussion, claimant believed he and the owner had agreed that claimant would be paid an hourly wage of $15.50 while working at the Providence hospital for six months.

(3) Between June 15, 2020 and June 26, 2020, claimant worked at the Providence hospital cleaning rooms. During that time, a Providence employee complained to the employer's owner about aspects of claimant's work, which the owner intended to discuss with the Providence employee on Monday, June 29, 2020. On June 26, 2020, as claimant "clocked in" his hours with an employer desk supervisor, the supervisor told claimant the owner had told the supervisor that claimant's hourly wage was $14.00. Transcript at 10.

(4) On Sunday, June 28, 2020, claimant had the following text message exchange with the owner:

> [H]i Richard, you and I had a verbal wage agreement, $15.50 an hour and now on Friday you . . . tell me my wage is $14.00 an hour . . . I will not accept $14.00 an hour, and that is not the wage we agreed upon when you called me for work. I will not be in for work . . . until I come in and sign a wage agreement . . . [The owner responded that day,] . . . you are terminated. We brought you back to be nice and to help Providence. I hear they are struggling with you wanting to do work there as well. We will not tolerate you calling the shots and showing up to work when you want. You are to report, at Providence, at 7 a.m. tomorrow and now you are leveraging – leveraging me. I accept your quoting. Good night.

Transcript at 10-11.

(5) On June 29, 2020, claimant did not report for work at Providence and the owner sent claimant a text messaging asking when claimant would like to pick up his "final check." Transcript at 11. Claimant picked up his check shortly thereafter. The check paid claimant a wage of $15.50 per hour for all of the hours he had worked since June 15, 2020.

CONCLUSIONS AND REASONS: Order No. 21-UI-159028 is reversed and this matter is remanded for further development of the record.

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). "Work" means "the continuing relationship between an employer and an employee." OAR 471-030-0038(1)(a).

At hearing, claimant denied that he quit work with the employer, and the employer's witness explained, "I believe when he sent that text, I was going to . . . terminate him regardless . . . it seemed like he was quitting on his own, but yes, at that point I would have terminated him." Transcript at 6, 19. Order No. 21-UI-159028 found and concluded that claimant quit work on June 29, 2020, reasoning:

> At hearing, Claimant asserted that he had not voluntarily left work. The Employer testified that Claimant's supervisor intended to discuss performance issues with Claimant on June 29, 2020, but Claimant did not report to work, and the Employer prepared Claimant's final pay check. Because Claimant could have continued working for an additional period of time by reporting to his scheduled shift on June 29, 2020, the work separation is a voluntary leaving, and not a discharge.

Order No. 21-UI-159028 at 2. However, the record, as developed, does not support the order's finding or conclusion.

At hearing, the legal distinction between a voluntary leaving and a discharge was never explained to the parties and there was insufficient inquiry into that issue to determine if claimant quit or the employer discharged him. The record fails to show what claimant meant by a "wage agreement" in his initial text to the owner, and whether he was willing to continue to work for the employer while they discussed or reached such an agreement. The record also fails to show what was written on the employment application about claimant's wage rate when claimant completed the application. The record fails to show whether the owner would have allowed claimant to continue to work for the employer under any circumstances after claimant sent his initial text message to him on June 28, 2020, and why he told claimant he was "terminated" if the owner considered claimant to have quit when he sent the June 28, 2020 text message. The record fails to show that if the owner intended to discuss performance issues with claimant on June 29, 2020 or sometime thereafter as the order concluded, whether that was ever communicated to claimant. The record also fails to show why the owner eventually paid claimant a wage of $15.50 per hour for the hours he worked, if it was the result of other discussion between the parties, the substance of any discussion between claimant and the owner when claimant picked up his final check, and whether the employer ever prepared any correspondence to claimant about the work separation. Without additional inquiry into all of these matters, the record fails to support any conclusion about the nature and date of claimant's work separation from the employer.

Regardless of the nature of the work separation, additional inquiry must be conducted to determine whether the work separation is disqualifying.

If the work separation was a voluntary leaving, a claimant who leaves work is disqualified from the receipt of benefits unless they prove, by a preponderance of the evidence, that they had good cause for leaving work when they did. ORS 657.176(2)(c); *Young v. Employment Department*, 170 Or App 752, 13 P3d 1027 (2000). "Good cause . . . is such that a reasonable and prudent person of normal sensitivity, exercising ordinary common sense, would leave work." OAR 471-030-0038(4). "[T]he reason must be of such gravity that the individual has no reasonable alternative but to leave work." OAR 471-030-0038(4). The standard is objective. *McDowell v. Employment Department*, 348 Or 605, 612, 236 P3d 722 (2010). A claimant who quits work must show that no reasonable and prudent person would have continued to work for their employer for an additional period of time.

Order No. 21-UI-159028 concluded that claimant quit work without good cause. Order No. 21-UI-159028 at 3. The order reasoned that claimant failed to establish that working at a wage of $14.00 per hour rather than the $15.50 he expected constituted a grave circumstance for claimant sufficient to justify quitting, and that even if it did, he failed to pursue the reasonable alternative of asking for a wage clarification rather than abruptly quitting. Order No. 21-UI-159028 at 3. However, the record fails to show why claimant may have believed that working at $14.00 per hour constituted a grave situation for claimant. Transcript at 12-13. On remand, if the work separation is determined to be a voluntary leaving, additional inquiry is necessary regarding the reasons claimant considered working at $14.00 a situation of such gravity that he had to quit when he did, and whether he considered any alternatives, other than a wage clarification, prior to quitting. For example, the record fails to show whether claimant considered asking the owner why he paid claimant a wage rate lower than the wage rate he had worked at previously for the employer when it was the owner that had asked claimant to apply for work.

If the work separation was a 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). Isolated instances of poor conduct and good faith errors are not misconduct. OAR 471-030-0038(3)(b). 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).

Because the order under review concluded the work separation was voluntary leaving, the record does not contain the information necessary to determine if the employer discharged claimant for misconduct. The record fails to show that if the employer discharged claimant, when it occurred, what the employer's expectation was that claimant allegedly violated, whether it was reasonable under the facts as determined on remand, and whether claimant violated the employer's expectation willfully or with wanton negligence. If claimant violated a reasonable employer expectation with at least wanton negligence, the record fails to show whether it would have been excusable as an isolated instance of poor judgment or a good faith error.

ORS 657.270 requires the ALJ to give all parties a reasonable opportunity for a fair hearing. That obligation necessarily requires the ALJ to ensure that the record developed at the hearing shows a full and fair inquiry into the facts necessary for consideration of all issues properly before the ALJ in a case. ORS 657.270(3); *see accord Dennis v. Employment Division*, 302 Or 160, 728 P2d 12 (1986). Because further development of the record is necessary for a determination of the nature of claimant's work separation and whether it was disqualifying, Order No. 21-UI-159028 is reversed, and this matter is remanded.[1]

DECISION: Order No. 21-UI-159028 is set aside, and this matter remanded for further proceedings consistent with this order.

S. Alba and D. P. Hettle.

DATE of Service: <u>March 8, 2021</u>

NOTE: The failure of any party to appear at the hearing on remand will not reinstate Order No. 21-UI-159028 or return this matter to EAB. Only a timely application for review of the subsequent order will cause this matter to return to EAB.

[1] Although it appears that claimant worked directly for the employer, on remand, the record must be clarified to show if the employer was a temporary staffing agency or employee leasing company. *See* OAR 471-030-0038(1)(a).

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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.

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