

EMPLOYMENT APPEALS BOARD DECISION
2021-EAB-0085

Affirmed
No Disqualification

PROCEDURAL HISTORY: On November 17, 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 January 26, 2020 (decision # 131207). Claimant filed a timely request for hearing. On December 2, 2020, the Office of Administrative Hearings (OAH) mailed to the parties notice of a telephone hearing scheduled for December 16, 2020 at 9:30 a.m. On December 16, 2020, claimant failed to appear for the hearing, and, on December 17, 2020, ALJ Wyatt issued Order No. 20-UI-157758 dismissing claimant's request for hearing for failure to appear.

On December 29, 2020, claimant filed a timely request to reopen the hearing. On January 13, 2021, OAH mailed to the parties notice of a telephone hearing scheduled for January 26, 2021 at 4:30 p.m. to consider claimant's request to reopen the December 16, 2020 hearing, and if granted, the merits of decision # 131207. On January 26, 2021, ALJ Frank conducted a hearing, at which the employer failed to appear, and on January 28, 2021, issued Order No. 21-UI-160017, concluding that claimant showed good cause for reopening the December 16, 2020 hearing, canceling Order No. 20-UI-157758, and reversing decision # 131207 by concluding that the employer discharged claimant, but not for misconduct. On February 2, 2021, the employer filed an application for review of 21-UI-160017 with the Employment Appeals Board (EAB). The employer's application for review did not set forth the reason(s) for missing the January 26, 2021 hearing in a written statement. Therefore, pursuant to OAR 471-041-0060(4) & (5) (May 13, 2019), EAB treated the application for review as an application for review rather than as a request to reopen the hearing under ORS 657.270.

WRITTEN ARGUMENT: EAB considered claimant's written argument to the extent it was based on the hearing record.

Based on a *de novo* review of the entire record in this case, and pursuant to ORS 657.275(2), the portion of the order under review granting claimant's request to reopen the December 16, 2020 hearing is **adopted**. The remainder of this decision addresses the nature of the work separation and whether claimant is disqualified from receiving benefits based on the work separation.

FINDINGS OF FACT: (1) The employer, At Home Senior Solutions, employed claimant from November 4, 2019 until January 7, 2020. Claimant worked for the employer as a caregiver.

(2) By early January 2020, the clients for whom claimant provided care on behalf of the employer had opted to stop using the employer's services, which left claimant without any work. The last day claimant worked was January 7, 2020.

(3) Claimant contacted the employer on multiple occasions throughout January 2020 to request the assignment of new clients but the employer did not respond to claimant's requests. During this period, claimant "wanted to keep working," but the employer "w[asn't] talking to [her]." Audio Record at 26:11. After weeks without work or communication from the employer, claimant sent the employer an email in which she stated that she was resigning from her position as caregiver. Claimant phrased the email as a resignation because she was concerned that if she mentioned that the employer had stopped communicating with her, it would be viewed as "bad mouthing them," and claimant would not be able to use the employer as a job reference in the future. Audio Record at 29:47.

CONCLUSIONS AND REASONS: The employer discharged claimant, 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 record lacks evidence indicating that continuing work was available to claimant after her last day worked on January 7, 2020. Following that date, the employer failed to provide claimant with any work and failed to respond to the multiple attempts claimant made to request work. Although, following weeks without work or communication from the employer, claimant sent the employer an email phrased as a resignation, claimant plausibly explained that she chose to phrase the email that way to avoid the appearance of "bad mouthing" the employer by mentioning their lack of communication. Audio Record at 29:47. Claimant otherwise consistently testified that she wanted to continue working but could not do so because the employer did not respond to her requests for work. Audio Record at 26:11. Given claimant's explanation for the phrasing of her email, and the otherwise unrebutted testimony that claimant wished to continue working for the employer, the evidence is not sufficient to conclude that claimant voluntarily left work. On this record, the preponderance of the evidence supports that claimant was willing to continue to work for the employer but was not allowed to do so because no work was available. Thus, the work separation was a discharge.

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 fails to show that the employer discharged claimant because she had engaged in conduct the employer considered a willful or wantonly negligent violation of the standards of behavior the employer had the right to expect of her or a disregard of the employer’s interests. Accordingly, the employer did not discharge claimant for misconduct under ORS 657.176(2)(a).

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

DECISION: Order No. 21-UI-160017 is affirmed.

S. Alba and D. P. Hettle.

DATE of Service: March 10, 2021

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 ໂດຍປະຕິບັດຕາມຄໍາແນະນໍາທີ່ບອກໄວ້ຢູ່ຕອນຫ້າຍຂອງຄໍາຕັດສິນນີ້.

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 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 دستور العمل موجود در پایان آن، از دادگاه تجدید نظر اورگان درخواست تجدید نظر کنید.

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