

EMPLOYMENT APPEALS BOARD DECISION
2021-EAB-0175

Reversed
Disqualification

PROCEDURAL HISTORY: On January 19, 2021, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant was discharged but not for misconduct, and was not disqualified from receiving unemployment insurance benefits based on the work separation (decision # 132919). The employer filed a timely request for hearing. On March 3, 2021, ALJ Frank conducted a hearing at which claimant failed to appear, and on March 8, 2021 issued Order No. 21-UI-162267, affirming decision # 132919. On March 10, 2021, 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) Pacific Benefit Consultants employed claimant as an account manager from November 24, 2018 until November 3, 2020. Claimant typically worked a schedule of 8 a.m. to 5 p.m.

(2) The employer maintained an attendance policy that required employees to provide the employer's business manager with advance notice of unplanned absences or tardies, preferably at least one hour prior to the scheduled shift. At or around the time claimant was hired, the employer provided her with a copy of this policy.

(3) On October 18, 2020, claimant notified the business manager that someone in her granddaughter's daycare facility had tested positive for COVID-19, and that claimant and her family needed to quarantine. Between October 19, 2020 and October 30, 2020, claimant was absent from work, largely as a result of being quarantined due to possible COVID-19 exposure. The parties exchanged additional messages regarding claimant's status and potential eligibility for a subsidy for those affected by COVID-19 in prescribed ways.

(4) On October 22, 2020, the manager sent claimant an inquiry by text message. Claimant responded, indicating that her test had come back negative. The employer confirmed that claimant was thus cleared to return to work the following day.

(5) On October 23, 2020, claimant neither reported to work nor provided notice of the absence. In response to a voicemail message left for her by the manager that day, claimant sent a text message to the business manager stating that she “need[ed] some time from anything stressful” and felt like she was “going to have a nervous breakdown.” Audio Record at 15:44 to 17:17. On October 26, 2020, the business manager e-mailed claimant with paperwork for COVID-19-related leave pay, and directed claimant to return the completed paperwork by October 30, 2020. On October 30, 2020, claimant sent a text message to the business manager asking about her paycheck that had been deposited that morning. Claimant did not send in the paperwork by October 30, 2020 as the business manager had directed her to do.

(6) On November 2, 2020 and November 3, 2020, claimant was a no-call no-show for work. On both dates, the business manager left voicemails and sent text messages asking claimant if she would be coming into work, but claimant did not respond. On November 3, 2020, as a result of claimant’s failure to report for work or notify the business manager of the absences, the business manager sent claimant an e-mail in which she informed claimant that she was discharged. The business manager also advised claimant that she had not yet received claimant’s leave paperwork.

(7) On the evening of November 3, 2020, after the business manager sent the e-mail discharging her, claimant turned in the paperwork as requested.

CONCLUSIONS AND REASONS: Claimant was discharged for misconduct.

Nature of the 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 employer asserted in their written argument that they “did not terminate employment” with claimant, but that she “voluntarily resigned” because the employer’s “job abandonment” policy states that “if an employee fails to show up for work or call in for two consecutive days the employee will be considered to have voluntarily resigned,” and claimant “did not rebuke this statement” when the employer provided it to her. Employer’s Written Argument at 1. The employer’s business manager also testified at hearing that claimant could have returned to work if claimant had expressed a desire to do so. Audio Record at 21:25. These assertions notwithstanding, the record does not contain sufficient evidence to conclude either that claimant was unwilling to return to work at some point or that continuing work was available to her.

For instance, the record contains no evidence that claimant ever told the employer that she was quitting or no longer wished to work there, submitted a resignation letter, or entirely stopped communicating with the employer. On the contrary, shortly before the separation while claimant was on leave as a result of possible exposure to COVID-19, claimant continued to communicate with the business manager, if not as frequently or directly as the employer might have preferred. Claimant’s statements about the state of her mental health about a week prior to her absences on November 2, 2020 and November 3, 2020 suggests that, more likely than not, claimant was simply not yet ready to return to work after a stressful period of time rather than intending to sever the employment relationship.

Further, the employer's unilateral declaration to claimant that they considered her to have resigned, and the fact that claimant did not refute what the employer told her, does not mean that claimant ratified or assented to the employer's determination. Regardless of how the employer characterized the separation at the time it occurred, the record shows that the employer chose the date and manner by which to sever the employment relationship. For these reasons, the employer discharged claimant on November 3, 2020.

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) (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 P2d 1233 (1976).

The employer discharged claimant because claimant was a no-call no-show for two consecutive days, on November 2, 2020 and November 3, 2020. The employer expected their employees to notify the business manager of unplanned absences, in accordance with a policy that the employer had previously provided to claimant. The employer had a right to expect claimant to comply with this policy, and the record shows that claimant failed to comply with it. The record does not conclusively show why claimant was absent from work for those two days, but it may be reasonably inferred from the business manager's testimony that claimant was still suffering from the effects of stress that made her feel as if she was going to have a "nervous breakdown." Thus, to the extent that claimant's absences from work led the employer to discharge her, the evidence is insufficient to show that the absences were the result of claimant's wanton negligence.

The same cannot be said for claimant's failure to notify the business manager of her absences. The record does not show why claimant did not notify the business manager that she would be absent on November 2, 2020 or November 3, 2020, or respond to the business manager's calls requesting information on her attendance those days. However, the record shows that claimant was or had reason to be aware of the employer's attendance policy. It further shows that shortly before the dates of the absences in question, claimant generally responded to the business manager's inquiries about her attendance or otherwise notified the business manager if she was planning to be out. That claimant returned the COVID-19 leave paperwork to the business manager on November 3, 2020, after being notified by the business manager that she was discharged, further suggests that claimant was capable of contacting her regarding the absences. Without any evidence to show that claimant was incapable of notifying the business manager of her absences on those two days, the record shows that, more likely than not, claimant was so capable and chose not to do so without regard to the consequences. Thus, claimant's failure to notify the business manager of her absences on November 2, 2020 and November 3, 2020 were the result of her wantonly negligent violation of the employer's standards of behavior.

For the above reasons, claimant was discharged for misconduct, and is disqualified from receiving benefits effective November 1, 2020.

DECISION: Order No. 21-UI-162267 is set aside, as outlined above.

S. Alba and D. P. Hettle.

DATE of Service: April 15, 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.

NOTE: This decision denies payment of your Unemployment Insurance (UI) benefits.

However, you may be eligible for Pandemic Unemployment Assistance (PUA) benefits for the period you are not eligible for other benefits as long as you are unable to work, unavailable for work, or unemployed due to the COVID-19 public health emergency. PUA is a new unemployment benefits program available through the Oregon Employment Department in response to the COVID-19 pandemic.

Visit <https://unemployment.oregon.gov> for more information, to apply for PUA, or to contact the Oregon Employment Department using the “Contact Us” form. You can also apply for PUA by calling 1-833-410-1004, but please be aware that the PUA staff cannot answer questions about this decision that denies payment of regular Unemployment Insurance (UI) benefits.

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 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 ໄດ້ໂດຍປະຕິບັດຕາມຄຳແນະນຳທີ່ບອກໄວ້ຢູ່ຕອນທ້າຍຂອງຄຳຕັດສິນນີ້.

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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