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

EMPLOYMENT APPEALS BOARD DECISION
2021-EAB-0206

Reversed
No Disqualification

PROCEDURAL HISTORY: On November 3, 2020, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant quit working for the employer without good cause and was disqualified from receiving unemployment insurance benefits effective March 8, 2020 (decision # 82812). Claimant filed a timely request for hearing. On March 10, 2021, ALJ Murdock conducted a hearing at which the employer failed to appear, and on March 19, 2021 issued Amended Order No. 21-UI-163082, affirming decision # 82812.[1] On March 24, 2021, claimant filed an application for review with the Employment Appeals Board (EAB).

WRITTEN ARGUMENT: Claimant's argument contained information that was not part of the hearing record, and did not show that the information is material to EAB's determination of whether claimant is disqualified from receiving benefits based on his work separation from the employer, or that factors or circumstances beyond claimant's reasonable control[2] prevented him from offering the information during the hearing. Under ORS 657.275(2) and OAR 471-041-0090 (May 13, 2019), EAB considered only information received into evidence at the hearing when reaching this decision. EAB considered claimant's argument to the extent it was based on the record.

[1] The order under review amended Order No. 21-UI-162977, issued on March 18, 2021, to correct a typographical error made in the date of disqualification.

[2] Claimant also asserted in his written argument that the offered information, regarding the date of the separation, was "necessary to complete the record" per OAR 471-041-0090(2). However, because claimant was discharged but not for misconduct, as discussed below, the date of separation is not material to the outcome and therefore not necessary to complete the record.

FINDINGS OF FACT: (1) Premium Medicine of Oregon LLC employed claimant as an executive manager from August 2018 until March 13, 2020.

(2) During the time that claimant worked for the employer, he oversaw operations for the employer's two locations in Portland and Hood River, Oregon. At the time, the owner of the company lived in California.

(3) In late February 2020, following a series of robberies and after claimant reported to the owner that he felt "overwhelmed," the owner "insisted" that claimant take two weeks off from work to recover from stress. Transcript at 17. The owner flew to Oregon and covered claimant's duties while claimant took time off.

(4) On March 13, 2020, when claimant was expecting to return to work, the owner sent claimant a text message instructing him to meet with the owner at a restaurant that day instead of going to work. During the meeting at the restaurant, the owner repeatedly asked claimant if he was still happy working for the employer, and suggested to claimant that perhaps the job was not right for him. Claimant responded by confirming that he still wished to continue working for the employer. The owner did not tell claimant if he would be permitted to return to work, and stated to claimant that it would be "best if we go our separate ways." Transcript at 25. Claimant responded that he wished to continue working for the employer but would respect the owner's decision. Transcript at 25. Claimant did not tell the employer that he had quit, and the employer did not tell claimant that he was discharged.

(5) After the meeting, claimant sent an e-mail to the employer's other employees advising them that he and the employer had mutually agreed to separate. Exhibit 3 at 3. At some point after the meeting, the owner sold one of the employer's two locations. The owner also moved to Oregon full-time, assumed claimant's former responsibilities, and did not hire anyone to fill claimant's former position.

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 found that while "claimant asserted that he was discharged . . . the record is persuasive that the separation was mutually agreed upon." Order No. 21-UI-163082 at 2. In so concluding, the order relied on *Employment Department v. Shurin*, 154 Or App 352, 959 P2d 637 (1998) for the proposition that "when an employee and an employer mutually agree upon a separation date, the separation is a quit and not a discharge." Order No. 21-UI-163082 at 2 to 3. In *Shurin*, however, the claimant was one of two directors of the corporation for which he worked, and he separated from work when he and the other director both voted to dissolve the corporation. 154 Or App 352, 354. The Court of Appeals characterized the transaction as "claimant and his professional corporation [having] 'agreed to a mutually acceptable date of termination,'" and noted that claimant "effectively 'fired himself,'" thereby voluntarily quitting. 154 Or App 352, 356.

The facts in this matter do not, as in *Shurin*, show that claimant's work separation was mutually agreed-upon by the parties, and the order under review therefore incorrectly relies upon *Shurin* in concluding that the separation was a voluntary quit. Unlike *Shurin*, the record here fails to show that claimant's decisions directly led to the work separation, or that he had a meaningful choice in the matter. In concluding that the separation was mutually agreed-upon by the parties, the order under review appears to have relied primarily on the parties' statements to the Department's representative during the fact-finding which led to the issuance of decision # 82812. During the fact-finding, the owner told the Department representative that claimant had sent an e-mail stating that the two had mutually agreed to separate. Exhibit 3 at 5. Claimant told the Department that he felt like he was "pressure[d] that this was mutual and [the owner] doesn't like people filing unemployment," and testified similarly at hearing. Exhibit 3 at 6; Transcript at 23, 29. However, the words that the parties used to characterize the separation are not determinative of whether claimant voluntarily quit or was discharged. Instead, the question is whether claimant could have continued to work for the employer for an additional period of time. *See* OAR 471-030-0038(2).

Because claimant did not explicitly tell the employer that he quit, and the employer did not explicitly discharge claimant, the totality of the circumstances surrounding the separation must be considered.[3] Here, the record shows that claimant was willing to continue working for the employer. The record further shows that the owner repeatedly suggested to claimant that claimant might be unhappy with the job; that the owner suggested that the two "go [their own] separate ways"; and that, following claimant's separation, the owner downsized the business, assumed claimant's duties, and did not replace claimant. More likely than not, the owner would not have permitted claimant to continue working for the employer, despite claimant's express willingness to do so. The preponderance of the evidence therefore shows that the employer discharged claimant.

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 does show that claimant was discharged for misconduct. The employer did not appear at the hearing and, during the Department's fact-finding interview, the owner did not admit to having discharged claimant, and therefore offered no explanation for doing so. Exhibit 3 at 5. However, in the course of fact-finding, the Department's representative also interviewed one of the employer's managers, who suggested that the employer might have discharged claimant to "cut down expenses."

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[3] *See Van Rijn v. Employment Dep't.*, 237 Or App 39, 238 P3d 419 (2010) (claimant's supervisor told claimant to "fucking leave," and nothing else in the record "would support a finding that claimant was welcome to remain at work"); *Roadhouse v. Employment Department*, 283 Or App 859, 391 P3d 887 (2017) (analysis of whether an individual quit or was discharged, and recitation of recent appellate cases examining that issue).

Exhibit 3 at 1. Considering the owner's decisions after claimant's discharge to downsize the business and take over claimant's duties himself, the record therefore shows that, more likely than not, the employer discharged claimant for that reason. The record therefore fails to show that the employer discharged claimant for a willful or wantonly negligent violation of the standards of behavior which an employer has the right to expect of an employee, a willful or wantonly negligent disregard of the employer's interest.

The record therefore fails to establish that claimant's discharge was for misconduct. Claimant is not disqualified from receiving benefits based on his work separation from the employer.

DECISION: Order No. 21-UI-163082 is set aside, as outlined above.

S. Alba and D. P. Hettle.

DATE of Service: April 28, 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 reverses an order that denied benefits. Please note that payment of benefits, if any are owed, may take approximately a week for the Department to complete.

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 ໄດ້ໂດຍປະຕິບັດຕາມຄຳແນະນຳທີ່ບອກໄວ້ຢູ່ຕອນທ້າຍຂອງຄຳຕັດສິນນີ້.

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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