

EMPLOYMENT APPEALS BOARD DECISION
2021-EAB-0488

Reversed
No Disqualification

PROCEDURAL HISTORY: On January 22, 2021, 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 14, 2021 (decision # 131603). Claimant filed a timely request for hearing. On June 1, 2021, ALJ L. Lee conducted a hearing at which the employer failed to appear, and on June 8, 2021, issued Order No. 21-UI-168313, affirming decision # 131603. On June 16, 2021, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) 1800Flowers Team Services Inc., fka Harry and David, employed claimant as a full-time forklift operator from approximately February of 2020 until June 16, 2020.

(2) Claimant worked a warehouse graveyard shift from 10:45 p.m. to 7:00 a.m., Sunday night through Friday morning. Claimant had asthma, a pre-existing condition from which claimant periodically experienced symptoms.

(3) During the first week of June 2020, claimant became ill with fever and vomiting. Around that time, seven to nine coworkers at the warehouse where claimant worked tested positive for COVID-19. Claimant consulted with his medical provider by phone and although he was not administered a COVID-19 test, was advised to isolate at home for seven to ten days. Claimant contacted his supervisor and reported his illness and the medical advice he had received. The supervisor agreed that claimant should stay away from work and claimant stayed home for several days.

(4) After missing those days from work, but while still within his seven to ten day physician recommended isolation period, claimant's supervisor requested that claimant return to the warehouse because they were short-handed due to COVID-19. He also told claimant that if he missed "any more time," the employer would have to "let [him] go." Transcript at 18, 21.

(5) Claimant contacted the employer's human resources (HR) department, spoke to an administrator there, and explained his reluctance to return to work due to his illness and his concern about the employer's failure to enforce masking and other COVID-19 protocols at work. The administrator told claimant to "[t]ake your time" and "[d]on't rush it." Transcript at 22. However, when claimant next spoke to his supervisor, he told claimant that he had never received an email from anyone regarding the timing of claimant's return to work. Claimant was concerned about losing his job and so he returned to work although he still felt sick. He contacted the HR administrator he had spoken to and asked the administrator to send his supervisor an email about what the administrator had previously told him. The administrator agreed to do so, but never did.

(6) After claimant finished his shift the morning of June 16, 2020, he left his supervisor a message that he would not be at work that evening because he was "not doing well" and was concerned about the employer not enforcing the COVID-19 safety protocols at work. Transcript at 36. He asked the supervisor to return his call. Until that day, the supervisor had never failed to contact claimant after claimant left him a message. Based on his supervisor's previous warning to claimant that if he missed any more time, he would have to "let [him] go," claimant concluded he had been discharged.

(7) During the next several days, claimant left messages on the HR administrator's voicemail and with his assistant for him to contact claimant about what had occurred and claimant's desire to return to work. Claimant never received a return call from his supervisor or the HR administrator.

(8) The employer paid their employees by direct deposit every two weeks. Approximately one week after claimant called in sick, he received his final check in the mail.

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).

Order No. 21-UI-168313 concluded that claimant quit work on June 16, 2020, reasoning,

Claimant called in sick on June 16, 2020. He testified that he was willing to continue working for the employer once he was feeling better, but he did not return to work because he believed he had been discharged or fired. His belief was based on the fact that he did not receive a return call from his supervisor before or during his missed shift. Claimant was never informed that he had been discharged or fired; after calling in sick for a single day, he simply stopped showing up for work. His failure to return to work as scheduled and his ongoing absence from work without notice constituted a voluntary leaving.

Order No. 21-UI-168313 at 3. However, the record does not support the order's conclusion that claimant quit.

The record shows that claimant was willing to continue to work for the employer after June 16, 2020. When asked at hearing whether claimant was willing to return to work “once [he] felt better,” despite his concern about coworkers not wearing masks, claimant replied, “[y]es,” explaining that he “needed to work.” Transcript at 47, 48. Also, after claimant’s supervisor failed to respond to claimant’s message, claimant left several messages on the HR administrator’s voicemail and with his assistant for him to contact claimant about what had occurred and claimant’s desire to return to work.

The record fails to show that the employer was willing to allow claimant to return to work after he called in sick on June 16, 2020. Until that day, claimant’s supervisor had “never once” failed to contact claimant after claimant left him a message about his work attendance. Transcript at 49. Based on his supervisor’s previous warning to claimant that if he missed any more time, he would have to “let [him] go,” claimant believed he had been discharged. Thereafter, despite claimant’s attempts to communicate with the HR administrator about what had occurred and his desire to return to work, claimant never received a return call from his supervisor or the administrator. Claimant’s final paycheck was not paid to him by direct deposit as had been the employer’s practice, but was mailed to him approximately one week after he called in sick. The preponderance of the evidence in the record shows that claimant was willing to continue to work for the employer after June 16, 2020, but the employer was not willing to allow him to do so. More likely than not, the work separation was a discharge that occurred on June 16, 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). “[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). Absences due to illness 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).

The employer discharged claimant on June 16, 2020 after he called in sick. The employer had the right to expect claimant to report for work as scheduled. Claimant’s testimony at hearing showed that he knew that his absence from work that day probably violated the employer’s expectation because he had been told by his supervisor previously that if claimant missed any more time, he would have to “let [him] go.” However, claimant did not miss work because he was indifferent to the consequences of his actions. Claimant’s absence from work that day was due to the fact he was “not doing well” after returning to work during his physician recommended isolation period, although he still felt sick. Thus, the preponderance of evidence supports that claimant’s absence on June 16, 2020 was due to illness and therefore the absence was not misconduct.

The employer discharged claimant, but not for misconduct and claimant is not disqualified from receiving unemployment insurance benefits on the basis of his work separation.

DECISION: Order No. 21-UI-168313 is set aside, as outlined above.

D. Hettle and A. Steger-Bentz;
S. Alba, not participating.

DATE of Service: July 23, 2021

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.

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 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 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 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.

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