

EMPLOYMENT APPEALS BOARD DECISION
2021-EAB-0549

Reversed
No Disqualification

PROCEDURAL HISTORY: On February 24, 2021, 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 August 16, 2020 (decision # 104340). Claimant filed a timely request for hearing. On June 29, 2021, ALJ Amesbury conducted a hearing, and on July 6, 2021 issued Order No. 21-UI-169838, affirming decision # 104340. On July 8, 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 factors or circumstances beyond claimant's reasonable control 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.

FINDINGS OF FACT: (1) Fred Meyer Stores, Inc. employed claimant from April 16, 2020 until August 20, 2020. Claimant worked in a department which processed and fulfilled online grocery orders.

(2) The employer expected employees who were unable to work a scheduled shift to contact a manager on duty prior to the start of the shift to let them know they would be absent.

(3) Claimant typically worked shifts scheduled from midnight to 8:30 a.m. The days on which he worked varied. Claimant's department typically made schedules available to employees one to two weeks in advance. The schedules were posted on a wall at the store, as well as on the employer's scheduling website, and would frequently change prior to the date on which the shifts were scheduled to begin.

(4) Around May 2020, the department claimant worked in lost its dedicated manager. While other department managers would occasionally assist with administrative issues, the lack of a manager led to some confusion regarding the schedule in claimant's department.

(5) Around July or August 2020, the employer decided to discontinue scheduling the midnight to 8:30 a.m. shift for claimant's department, and to instead schedule employees for shifts that started later. Claimant asked the employer if he could work one of these later shifts, but he was told that no such shifts were available.

(6) On August 6, 2020, claimant noticed that the next two-week schedule had not yet been posted. Claimant asked his lead worker about it, but the lead worker told claimant that it was not yet available. Claimant also spoke to the store's human resources department about the issue, but they told him that they did not "know what's going on," and that he should speak to his incoming manager who was currently in training. Transcript at 40. Claimant was unable to locate contact information for the incoming manager.

(7) On August 13, 2020, claimant worked his last shift for the employer. Later that day, claimant contacted his lead worker to find out if he had been scheduled for any additional shifts, but the lead worker told him that he "didn't have anything for [claimant] or any night shift currently." Transcript at 44.

(8) At some point after August 13, 2020, the employer scheduled claimant for shifts on August 17, 18, and 19, 2020. Claimant was not aware that he had been scheduled for these shifts, and therefore neither reported for them nor notified the employer that he would be absent. On August 20, 2020, the employer "terminated" claimant because he had not reported for three consecutive shifts without notifying them, which the employer took to mean that he had abandoned his job. Transcript at 31. In September 2020, about "a couple weeks after" claimant's last shift, the human resources department notified claimant that he and the other night shift employees in his department had been "let go." Transcript at 19.

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 concluded that because claimant stopped reporting to work after his last shift on August 13, 2020, and because he did not make additional efforts after that point to follow up with the employer and determine if he was scheduled for more shifts while the employer "was willing to continue employing claimant," claimant voluntarily quit work. Order No. 21-UI-169838 at 3. The record does not support that conclusion. At hearing, claimant denied having quit, and his testimony suggested that he understood his job to have ended because the employer no longer had positions for the employees in his department who had been working night shifts. Transcript at 9-10. Claimant also testified to a number of attempts that he made to determine whether he was scheduled for additional shifts after August 13, 2020, including multiple conversations with his lead worker and discussions with human resources.

Transcript at 39–40, 44. Additionally, claimant’s testimony established that the employer notified him in September 2020 that he had been “let go,” and the employer’s witness testified that the employer “terminated” claimant on August 20, 2020 after claimant had three “no call/no shows” for his shifts on August 17, 18, and 19, 2020. Transcript at 19, 31. In sum, the record does not show that claimant was unwilling to continue working for the employer for an additional period of time. Instead, the record shows that claimant did not work his shifts on August 17, 18, and 19, 2020 because he was unaware that he was scheduled for them; and that because claimant was a no call/no show for those shifts, the employer was no longer willing to allow claimant to work for the employer. For that reason, the employer discharged claimant on August 20, 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). 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 he was a no call/no show for shifts on August 17, 18, and 19, 2020, which violated the employer’s expectation that employees would notify them in advance if they planned to be absent from work. However, the employer has not met their burden to show that claimant’s failure to report for work or notify the employer he would be absent on those dates constituted a willful or wantonly negligent violation of those expectations. The record shows that claimant typically had notice of when he was scheduled to work one to two weeks in advance; that he made several unsuccessful attempts to find out when, if at all, he was scheduled to work after August 13, 2020; and that he had no actual knowledge that the employer had scheduled him to work. The employer did not offer evidence to show that anyone from the store contacted claimant to notify him that he had been scheduled to work for those shifts, or that he otherwise had any reason to know that he had been scheduled. Because claimant had no knowledge of the shifts for which he was scheduled, and because he had made several prior attempts to find out his schedule, the record shows that claimant’s no call/no shows for those three shifts were not the result of a deliberate decision to miss work without notifying the employer, or indifference to the consequences of his failure to do so. Therefore, claimant’s no call/no shows on August 17, 18, and 19, 2020 were neither willful nor wantonly negligent violations of the employer’s expectations, and thus were not misconduct.

For the above reasons, claimant was discharged, but not for misconduct, and is not disqualified from receiving benefits based on this work separation.

DECISION: Order No. 21-UI-169838 is set aside, as outlined above.

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

DATE of Service: August 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.

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 ໂດຍປະຕິບັດຕາມຄໍາແນະນໍາທີ່ບອກໄວ້ຢູ່ຕອນທ້າຍຂອງຄໍາຕັດສິນນີ້.

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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