

EMPLOYMENT APPEALS BOARD DECISION
2021-EAB-0631

Reversed
No Disqualification

PROCEDURAL HISTORY: On November 16, 2020, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant voluntarily quit work without good cause and was disqualified from receiving unemployment insurance benefits effective April 5, 2020 (decision # 80454). Claimant filed a timely request for hearing. On July 14, 2021, ALJ Kaneshiro conducted a hearing, and on July 15, 2021 issued Order No. 21-UI-170414, modifying decision # 80454 by concluding that claimant quit work without good cause and was disqualified from receiving benefits effective April 26, 2020.² On August 3, 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) Extreme Clean Inc. employed claimant as a cleaner from 2003 until April 26, 2020.

(2) In early March 2020, claimant became ill with a respiratory disease with symptoms that included coughing, chest pain, and loss of taste. The respiratory disease caused claimant to be absent from work from March 3, 2020 through March 9, 2020. After March 9, 2020, claimant's symptoms remained but showed improvement and claimant returned to work.

¹ Based on the way claimant spelled his name in submissions filed with EAB, decision # 80454 and Order No. 21-UI-170414 appear to have misspelled claimant's name. References to claimant's name in this decision shall use the same spelling of claimant's name that claimant used in his submissions filed with EAB.

² Although Order No. 21-UI-170414 characterized its disposition as affirming decision # 80454, it modified the administrative decision because it changed the effective date of claimant's disqualification.

(3) On or about April 13, 2020, claimant consulted with his doctor about his symptoms. The doctor told claimant that his symptoms were consistent with COVID-19 and recommended that claimant quarantine until he no longer had symptoms. Claimant continued working after receiving the advice to quarantine.

(4) By April 17, 2020, however, claimant noticed his symptoms were intensifying and started to become concerned that by continuing to work, he risked potentially spreading COVID-19 to clients and coworkers.

(5) Thereafter, claimant “made a decision . . . that [he] needed to take it easy and follow [his] doctor’s recommendation [to quarantine].” Transcript at 40. On the evening of April 26, 2020, claimant discussed with the employer’s owner his concerns about potentially exposing others to COVID-19 by working. Claimant was scheduled to work the next day, on April 27, 2020. During the discussion, claimant presented options for the owner to consider, including that claimant take a month off from work or work only part-time hours in non-enclosed spaces. The owner stated that it was company policy that if an employee does not report for a scheduled shift, they are terminated, but that if claimant provided a doctor’s note confirming that he was at “high risk” for COVID-19, claimant could “do whatever [he] needed to do.” Transcript at 28. Claimant responded that he could not provide a doctor’s note that evening. The owner then stated, “[I]f you don’t come to work on Monday that’s you quitting.” Transcript at 25. Claimant responded, “I’m not coming into work tomorrow because I . . . want to be totally better and figure out what . . . to do.” Transcript at 7. The owner then asked claimant to return his work keys and uniform and the two stopped communicating. Claimant did not report for work on April 27, 2020 and never worked for the employer again.

CONCLUSIONS AND REASONS: The employer discharged claimant because of a COVID-19 related situation and claimant is not disqualified from receiving benefits based on the work separation.

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) (December 23, 2018). 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 preponderance of the evidence shows that the employer discharged claimant on April 26, 2020. Claimant was willing to work for the employer for an additional period of time on that date. This is supported by the fact that both options claimant presented to the owner to address claimant’s concerns regarding potentially exposing others to COVID-19, taking a month off from work and working only part-time hours in non-enclosed spaces, involved claimant maintaining the employment relationship by either remaining employer-attached while on leave or continuing to work under modified conditions. While claimant informed the employer on April 26, 2020 of his intention to not report for work the next day, more likely than not, this reflected claimant’s plan to begin to quarantine the next day rather than an unwillingness to continue working for the employer or a desire to sever the employment relationship. Likewise, the record shows that the employer was not willing to allow claimant to continue working on April 26, 2020, given that the owner requested that claimant return his work keys and uniform that evening, before claimant’s April 27, 2020 shift began. Because the record shows that, more likely than not, claimant was willing to continue working for the employer for an additional period of time but was

not allowed to do so by the employer, the work separation was a discharge that occurred on April 26, 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).

However, Oregon temporary rules set out unemployment insurance provisions applicable to the unique situations arising due to COVID-19 and the actions to slow its spread. OAR 471-030-0070(2)(a) (effective March 8, 2020 through September 12, 2020) provides that an individual who is discharged from work because of a COVID-19 related situation is not disqualified from receiving unemployment insurance benefits. Under OAR 471-030-0070(1), a COVID-19 related situation includes the following:

* * *

(c) A person is unable to work because they have been advised by their health care provider or by advice issued by public health officials to self-quarantine due to possible risk of exposure to, or spread of, the novel coronavirus[.]

Here, the record shows that claimant was advised by his doctor on or about April 13, 2020 to quarantine due to having symptoms consistent with COVID-19. Although claimant continued working for a short period after receiving this advice, his symptoms soon worsened and he decided to “take it easy and follow [his] doctor’s recommendation” to quarantine. Transcript at 40. Given that he decided to follow his doctor’s recommendation to quarantine, the record shows, more likely than not, that claimant intended not to report for his shift on April 27, 2020 because he planned to begin a quarantine that day, thereby rendering him unable to work. That claimant intended to begin a quarantine on April 27, 2020 is supported by the fact that taking a month off from work was one of the options claimant presented to the owner on April 26, 2020, which suggests claimant was contemplating taking a leave of absence of sufficient length to accommodate a quarantine. Further, when claimant informed the owner that he did not intend to report for his shift on April 27, 2020, he stated it was because he wished “to be totally better,” which was consistent with his doctor’s advice to quarantine until he no longer had symptoms. Transcript at 7. Accordingly, the preponderance of evidence shows that claimant intended to miss work on April 27, 2020 because he planned to begin to quarantine that day, which made him unable to work. After claimant stated his intention to not report for work on April 27, 2020, the employer discharged him. Thus, the record supports that the employer discharged claimant because he was unable to work because he was advised by his doctor to quarantine due to the risk of potentially spreading COVID-19 to others. Claimant therefore meets the criteria of OAR 471-030-0070(1)(c) and (2)(a). Because

claimant was discharged because of a COVID-19 related situation, the discharge does not disqualify claimant from receiving benefits.

The employer discharged claimant because of a COVID-19 related situation. Claimant is not disqualified from receiving benefits based on the work separation.

DECISION: Order No. 21-UI-170414 is set aside, as outlined above.

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

DATE of Service: September 3, 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.

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 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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