

EMPLOYMENT APPEALS BOARD DECISION
2021-EAB-0645

Affirmed
No Disqualification

PROCEDURAL HISTORY: On June 15, 2021, 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 March 28, 2021 (decision # 122953). Claimant filed a timely request for hearing. On July 13, 2021, ALJ S. Lee conducted a hearing, and on July 20, 2021 issued Order No. 21-UI-170628, reversing decision # 122953 by concluding that claimant was discharged, but not for misconduct, and was not disqualified from receiving unemployment insurance benefits based on the work separation. On August 7, 2021, the employer filed an application for review with the Employment Appeals Board (EAB).

WRITTEN ARGUMENT: EAB did not consider the employer's August 7, 2021 written argument when reaching this decision because they did not include a statement declaring that they provided a copy of their argument to the opposing party or parties as required by OAR 471-041-0080(2)(a) (May 13, 2019). The employer's August 9, 2021 argument contained information that was not part of the hearing record, and did not show that factors or circumstances beyond the employer's reasonable control prevented them 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 the employer's August 9, 2021 argument to the extent it was based on the record.

FINDINGS OF FACT: (1) DLSMA Enterprises LLC employed claimant, most recently as an assistant manager, from April 4, 2016 until March 31, 2021. The employer operated several McDonald's franchises, and claimant worked at the employer's Keizer Station restaurant.

(2) The employer maintained an attendance policy which required employees to report to work as scheduled, and to notify the employer if they were unable to work a scheduled shift. The employer's policy also required managers to arrange for coverage if they were unable to work a scheduled shift.

(3) On March 31, 2021, claimant worked her last shift for the employer. During the shift, claimant felt ill and could "barely walk or maneuver or anything like that." Transcript at 6. Claimant attempted,

unsuccessfully, to get her shift covered. Because claimant felt too ill to perform her duties, she left work on her lunch break. Claimant notified her supervisor, the general manager, and the shift manager that she was leaving work.

(4) On the evening of March 31, 2021, CV, who was claimant's stepmother as well as part-owner of the business, visited claimant at her home to speak with her. Based on, among other things, reports that claimant had been falling asleep on her feet at work, CV was concerned that claimant was suffering from substance-abuse issues. CV also believed that claimant's illness that day was the result of claimant detoxing from such substances. CV did not personally witness claimant having used any such substances at work. CV attempted to convince claimant to enter a rehabilitation program. CV did not require claimant to submit to drug or alcohol testing. Based on her concern that claimant could not safely perform her job duties after having left work feeling ill earlier that day, CV told claimant that she would be placed on a leave of absence, which claimant agreed to.

(5) On April 3, 2021, claimant was feeling better, and logged onto the employer's employee portal, where she was able to view her paystubs, employee status, and the like. When claimant did so, she saw that her employee status in the system was "terminated" as of March 31, 2021. Exhibit 1 at 5.

(6) Based on their suspicion about claimant's substance abuse, the employer terminated claimant from the Keizer Station restaurant where she worked as an assistant manager. The employer intended the "terminated" status in their system to apply only to the Keizer Station restaurant where claimant worked, rather than the entire franchise operation, because CV felt that claimant was not well-suited to work at that location and decided she would not be allowed to return to that location. The employer did not notify claimant of this distinction, and claimant understood herself to have been discharged. The employer would have allowed claimant to work¹ at one of the employer's other restaurants later in April 2021, and offered claimant the opportunity to do so, but claimant was ultimately not willing to work at one of the other restaurants.

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). "Work" means "the continuing relationship between an employer and an employee." OAR 471-030-0038(1)(a) (September 22, 2020).

Based on the preponderance of the evidence, the record shows that the employer severed the employment relationship by terminating claimant's employment in their system on March 31, 2021. Despite the employer's characterization of the transaction as a "leave of absence," the employer offered claimant no return to work date, shift, or work location at the time, and the employer did not allow claimant to return to her regular place of work—the Keizer Station restaurant—after claimant felt better. Such an arrangement cannot be reasonably construed as a leave of absence, even if the employer was,

¹ It is unclear from the record as to whether the employer would have permitted claimant to continue working at one of their other restaurants in the same capacity as an assistant manager.

some time later, willing to allow claimant to work at another of their restaurants. Therefore, the employer discharged claimant on March 31, 2021 with the possibility of rehire, and any subsequent offers to return claimant to work at another of the employer's restaurants constituted new offers of work² after the work separation occurred.

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). Isolated instances of poor judgment, good faith errors, unavoidable accidents, absences due to illness or other physical or mental disabilities, or mere inefficiency resulting from lack of job skills or experience are not misconduct. OAR 471-030-0038(3)(b).

ORS 657.176(2)(f) requires a disqualification from benefits if the employer discharged or suspended claimant for being absent or tardy in reporting to work and the absence or tardiness occurred as a result of the unlawful use of any drug unless the person was participating in a recognized drug rehabilitation program at the time of the absence or tardiness, or is so participating within 10 days after the date of the discharge or suspension, and the person provides to the Employment Department documentation of program participation. As used in this paragraph, "unlawful use" does not include the use of a drug taken under the supervision of a licensed health care professional and in accordance with the prescribed directions for consumption, or other uses authorized by the laws of this state

The final incident which led the employer to discharge claimant was claimant's having left work early on March 31, 2021 because she was feeling ill. To the extent that the employer discharged claimant for the absence itself, the absence was due to illness and therefore not misconduct under OAR 471-030-0038(3)(b). To the extent that the employer discharged claimant for failing to arrange coverage for the absence, the employer has not shown that claimant's failure to do so was the result of her willful or wantonly negligent violation of their standards of behavior. At hearing, claimant credibly testified that she notified several managers that she had to leave, and made an unsuccessful effort to find coverage for her shift. Transcript at 6. It is reasonable to conclude from the record that no other managers were available to cover claimant's shift. Therefore, claimant's failure to adhere to the employer's policy was due to impossibility, rather than claimant's indifference to the consequences of her actions, and was not misconduct.

Finally, to the extent that the employer discharged claimant due to being absent from work as a result of unlawful drug use per ORS 657.176(2)(f), the employer has not met their burden to show that claimant

² As the order under review correctly noted, any such offers of work which claimant refused are beyond the scope of the hearing. Order No. 21-UI-170628 at 4. Therefore, EAB lacks jurisdiction to consider them in this decision.

was actually absent from work as a result of unlawful drug use. At hearing, CV broadly testified that claimant told her on the evening of March 31, 2021 that claimant was sick because she was “detoxing,” and that CV offered to get claimant into “a treatment program of some kind.” Transcript at 18–19. The employer did not offer evidence of any specific substances that claimant had allegedly used, and CV neither explicitly testified at hearing that she had witnessed claimant using such substances nor even used the word “drug” or “substance” during her testimony. By contrast, claimant denied that she was ever told to seek, or offered, help for substance abuse issues. Transcript at 10, 29. In sum, the evidence is equally balanced regarding whether claimant’s illness and subsequent absence on March 31, 2021 was the result of substance use or withdrawal. Because the employer bears the burden of proof in a discharge case, the employer has not met their burden here to show that claimant was actually discharged for an absence due to unlawful drug use.

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

DECISION: Order No. 21-UI-170628 is affirmed.

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

DATE of Service: September 14, 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.

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 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 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.

Employment Appeals Board - 875 Union Street NE | Salem, OR 97311
 Phone: (503) 378-2077 | 1-800-734-6949 | Fax: (503) 378-2129 | TDD: 711
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