EO: 200
BYE: 202210

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

324
VQ 005.00

EMPLOYMENT APPEALS BOARD DECISION
2021-EAB-0688

Modified
No Disqualification

PROCEDURAL HISTORY: On May 7, 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 based on the work separation effective November 15, 2020 (decision # 83059). Claimant filed a timely request for hearing. On July 22, 2021, ALJ Messecar conducted a hearing, and on August 13, 2021 issued Order No. 21-UI-172506, modifying decision # 83059 by concluding that claimant quit work without good cause and was disqualified from receiving benefits effective February 21, 2021.[1] On August 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 factors or circumstances beyond claimant's reasonable control prevented him from offering the information during the hearing. The new information is also not material to EAB's determination. 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) Southern Oregon Elmers, LLC employed claimant as a server beginning June 16, 2019. Claimant's last full day of work with the employer was November 17, 2020.

(2) On November 18, 2020, the employer temporarily laid off claimant and several other employees after the Governor of Oregon elevated COVID-19 restrictions to "extreme risk," which required the employer to discontinue dine-in service.

[1] Although Order No. 21-UI-172506 stated that it affirmed decision # 83059, it modified that decision by changing the effective date of the disqualification from November 15, 2020 to February 23, 2020. Order No. 21-UI-172506 at 3. However, EAB has inferred from the record and timeframe at issue in this case that Order No. 21-UI-172506's modification to February 23, 2020 as the effective date of the denial was a scrivener's error, and that Order No. 21-UI-172506 meant to state that the effective date of denial was February 21, 2021.

(3) On November 25, 2020, claimant called the assistant manager to see if the COVID-19 restrictions had been reduced to "high risk," which would allow the employer to resume indoor dining services, and might allow claimant to return to work. The assistant manager told claimant that the Governor had not reduced the COVID-19 restriction level, and that claimant should discontinue calling the employer to check for changes from the Governor, but instead monitor on his own the Governor's biweekly restriction level updates for any changes in risk levels that might allow claimant to return to work. The assistant manager told claimant that when the restriction level returned to "high risk" and indoor dining was permitted, the employer would contact all the employees they had laid off work to ask them to return to work.

(4) On February 23, 2021, claimant learned that the COVID-19 restrictions were going to be reduced from "extreme risk" to "high risk" on February 26, 2021, thus allowing the employer to restart indoor dining on that date. Based on his prior conversation with the assistant manager, claimant waited for a telephone call from the employer to discuss a return to work date, but did not receive a call from the employer.

(5) On February 27 and 28, 2021, claimant called the employer's main line repeatedly to inquire whether he could return to work, but no one from the employer answered the telephone. During at least one of his calls, claimant left a voicemail with the employer stating, "I noticed that we're reduced to high risk, that we're allowing dining, and I am just seeing if [the employer is] allowing anybody back." Audio Record at 19:53. Claimant did not receive a return call from the employer. After not receiving a call back, claimant decided not to go to the employer's workplace to ask about returning to work because he believed that the employer "didn't want [him] back" due to an incident that previously occurred at the employer's workplace. Audio Record at 20:30. In that incident, claimant believed the employer blamed claimant when a manager decided to quit due to the employer's decision to discharge claimant's brother from employment.

CONCLUSIONS AND REASONS: The employer discharged claimant but not for misconduct.

Nature of the work separation. The first issue in this case is the 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 claimant quit work, accepting the employer's hearsay testimony that they tried to call claimant to recall him to work on five occasions on or after February 22, 2021, and concluding that although claimant did not receive the calls, claimant knew that the employer was reopening and made no effort to contact or go to the restaurant. Order No. 21-UI-172506 at 2. The order under review found claimant's testimony that he tried to call the employer on February 27 and 28, 2021 not credible because claimant did not support this testimony with corroborating telephone records. Order No. 21-UI-172506 at 2. Based on this reasoning, the order under review concluded that claimant was not willing to continue working for the employer and, hence, that claimant voluntarily left work. Order No. 21-UI-172506 at 2. In their administrative decision, the Department found that claimant's work separation occurred on November 17, 2020, during the week of November 15, 2020 through November 21, 2020 (week 47-20). Decision # 83059. The order under review correctly found that the work

separation occurred three months later, during the week of February 21 through 27, 2021 (week 08-21). However, the record does not support the order's conclusion that claimant voluntarily left work.

Claimant's firsthand testimony showed that the work separation was a discharge and was more persuasive than the hearsay testimony Order No. 21-UI-172506 relied on to conclude that the work separation was a voluntary quit. The employer's assertion that they tried to contact claimant on five occasions after February 22, 2021 was hearsay testimony from an employer witness who did not make the alleged calls. Audio Record at 11:20 to 12:00. Nor was the employer's witness at hearing able to confirm that the number used to allegedly call claimant was claimant's correct number at the time. Audio Record at 12:00, 27:50 to 28:26. Meanwhile, claimant provided firsthand testimony that when he learned that the employer would reopen, but had not heard from the employer about returning to work, claimant tried to speak with the employer on February 27 and 28, 2021, but no one at the employer's workplace answered his telephone calls. Audio Record at 19:20 to 19:45. At the end of at least one of those unsuccessful calls claimant left a voicemail asking about returning to work, but "never heard anything" back from the employer. Audio Record at 19:30, 19:48 to 20:02. Furthermore, claimant plausibly testified that he did not return to the workplace when the employer failed to respond to his voicemail because, at that point, he believed the employer "didn't want [him] back" due to a prior incident involving his brother and a manager. Audio Record at 20:32 to 20:49. Claimant's firsthand testimony is credible and it is entitled to greater weight than the hearsay evidence from the employer. Claimant was willing to continue working for the employer after their workplace reopened, but the employer's failure to respond to his calls and voicemail led claimant to reasonably infer that he would not be allowed to continue working for the employer. Therefore, 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) (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).

The record shows that the employer discharged claimant when they did not recall claimant to work after dining restrictions were lifted on February 26, 2021. Because the employer incorrectly believed that claimant had quit work, the employer did not introduce any evidence that suggested that claimant had committed a willful or wantonly negligent violation of any reasonable employer expectations during his employment, nor does the record otherwise suggest that he did. Because the employer failed to meet their burden to show that claimant engaged in misconduct, claimant was discharged but not for misconduct and claimant is not disqualified from receiving benefits based on this work separation.

DECISION: Order No. 21-UI-172506 is modified, as outlined above.

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

DATE of Service: September 30, 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 ໄດ້ ໂດຍປະຕິບັດຕາມຄຳແນະນຳທີ່ບອກໄວ້ຢູ່ຕອນທ້າຍຂອງຄຳຕັດສິນນີ້.

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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