

EMPLOYMENT APPEALS BOARD DECISION
2021-EAB-0719

Affirmed
No Disqualification

PROCEDURAL HISTORY: On August 2, 2021, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that the employer discharged claimant, but not for misconduct, and that claimant was not disqualified from receiving unemployment insurance benefits on the basis of the work separation (decision # 175837). The employer filed a timely request for hearing. On August 31, 2021, ALJ Wardlow conducted a hearing, and on September 1, 2021 issued Order No. 21-UI-173826, affirming decision # 175837. On September 7, 2021, the employer filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Beaverton School District employed claimant as a special education teaching assistant from November 8, 2016 until January 28, 2020.

(2) The employer had written attendance policy that required employees to report for work as scheduled or notify the employer if they were unable to do so. The policy provided that employees were to miss no more than one day per month unless the employee was on a protected medical leave. The employer gave claimant a copy of the employer's policy upon hire and claimant was aware of it.

(3) Beginning in late November 2019, claimant experienced severe depression, post-traumatic stress disorder (PTSD), suicidal ideation, and experienced difficulty responding rationally to requests. For at least the next two months, claimant remained mainly in bed and was unable to complete typical day-to-day tasks or activities.

(4) From December 2, 2019 through December 6, 2019, claimant was absent from work for five consecutive days. In accordance with their practice in such situations, on December 9, 2019, the employer mailed a letter to claimant with a medical certification packet for her to complete if she wanted to request a leave of absence under the Family Medical Leave Act (FMLA) or the Oregon Family Leave Act (OFLA). The letter requested that any leave request be returned to the employer by December 24, 2019. Claimant received the letter and packet from the employer.

- (5) On December 16, 2019 claimant sent an email to employer that indicated to the employer that claimant was faxing in her leave request and medical certification that day. On December 16, 2019, claimant's husband faxed an incomplete medical certification packet to the employer on behalf of claimant. The documents faxed included a page that indicated that claimant was requesting a medical leave of absence until January 6, 2020, but did not include a certification completed by a medical provider. Exhibit 1. For unknown reasons, the employer did not receive the fax transmission.
- (6) On December 24, 2019, the employer sent a letter to claimant in which the employer denied claimant a leave of absence.
- (7) On January 6, 2020, claimant left a message for her manager that she would be at work on January 7, 2020.
- (8) On January 7, 2020, and thereafter, claimant did not report for work.
- (9) On January 14, 2020, the employer sent claimant a letter stating that claimant had been absent for 21 days, had not consistently reported her absences in accordance with the employer's policy, and had not returned the medical certification documents. The letter gave claimant until January 17, 2020 to respond and indicated that if she did not, the employer would consider her failure to respond and her absence to constitute job abandonment.
- (10) On January 17, 2020, claimant sent an email to the employer that notified them that she was experiencing depression, "thought her FMLA paperwork had gone through," and that "she wouldn't purposely abandon her job." Transcript at 14.
- (11) On January 21, 2020, the employer received a doctor's note regarding claimant that indicated that claimant had "received professional medical attention from a Kaiser physician" on two separate days. Transcript at 9. The employer considered the note insufficient for requesting a medical leave because it did not specify why claimant had been unable to report for work, or for how long, and it did not address the period during which claimant had already missed work.
- (12) The employer attempted to contact claimant by phone on January 22, 23 and 27, 2020. On January 23, 2020 employer sent claimant an email that her job abandonment would be processed if there was no response by January 27, 2020. Claimant did not respond to the employer by January 27, 2020 because, due to the severity of her mental condition and "other major health problems," she remained unable to "rationally . . . communicate." Transcript at 26.
- (13) On January 28, 2020, the employer sent claimant a letter stating that her employment was terminated due to "job abandonment." Transcript at 15. The employer concluded that claimant had abandoned her job by not successfully submitting required paperwork for obtaining a protected leave of absence in a timely manner, or notifying the employer when she would be absent from work, or return to work.

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). “Work” means “the continuing relationship between an employer and an employee.” OAR 471-030-0038(1)(a).

The parties disagreed on the nature of the work separation. The employer asserted that claimant “resigned” by abandoning her job, and claimant disputed that she had abandoned her job or quit. Transcript at 5, 30. The record shows that claimant communicated with the employer, or arranged for her physician to do so, on December 16, 2019, January 6, 2020, January 17, 2020, and January 21, 2020 in response to the employer’s telephone contacts, emails or letters about whether she would be returning to work. It also shows that on January 17, 2020, claimant specifically stated in her email that she was experiencing depression, “thought her FMLA paperwork had gone through,” and that she did not intend to “abandon her job.” Following those communications, on January 28, 2020, the employer notified claimant that her job had been terminated due to “job abandonment.” Because the record shows that in late January of 2020 claimant was willing to continue to work for the employer, but that as of January 28, 2020 the employer was not willing to allow claimant to do so, the work separation was a discharge that occurred on that date.

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). Absence due to illness or other physical or mental disabilities is 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 after concluding that she had had abandoned her job by missing 21 days of work, failing to successfully submit required paperwork for obtaining a protected leave of absence, and failing to notify the employer when she would be absent from work, or return to work. However, the record shows that claimant was unable to perform typical day-to-day activities or tasks or communicate rationally during December of 2019 and January of 2020 due to the severity of the symptoms from her health conditions during that period. Although claimant missed 21 days of work, under OAR 471-030-0038(3)(b), absences due to illness or other physical or mental disabilities are not misconduct. Although claimant failed to successfully submit the required paperwork for obtaining a protected leave of absence, the record fails to show that her failure to do so was willful, and by attempting to submit the required paperwork on December 16, 2019, claimant demonstrated that she was not indifferent to the consequences of her absences for the employer. The record also shows that claimant was not aware at that time that the paperwork was not received by the employer. Although claimant failed to notify the employer about her absences from work, the record shows that claimant’s

symptoms of her depression, suicidal ideation, and PTSD were so severe that she spent most of her days in bed, and fails to show that she was conscious of her conduct or failures to act in submitting the required paperwork or contacting the employer about her absences in a timely manner. Accordingly, the record fails to show that claimant willfully or with wanton negligence violated the standards of behavior that the employer had the right to expect of her and for which she was discharged.

The employer discharged claimant, but not for misconduct, and claimant is not disqualified from receiving unemployment insurance benefits based on her work separation.

DECISION: Order No. 21-UI-173826 is affirmed.

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

DATE of Service: October 15, 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.

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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 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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