

EMPLOYMENT APPEALS BOARD DECISION
2021-EAB-0746

Reversed
No Disqualification

PROCEDURAL HISTORY: On April 8, 2021, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant was discharged for misconduct and was disqualified from receiving unemployment insurance benefits effective January 3, 2021 based on the work separation (decision # 134940). Claimant filed a timely request for hearing. On September 2, 2021, ALJ Scott conducted a hearing, and on September 8, 2021 issued Order No. 21-UI-174227, affirming decision # 134940. On September 16, 2021, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Transportation Media Inc. employed claimant as a production worker from July 12, 2019 to January 14, 2021.

(2) The employer expected its employees to report for work as scheduled or notify the employer in advance if they would be absent. Claimant was aware of the employer's expectations.

(3) On December 31, 2020, claimant was arrested and incarcerated for violating a "no contact" order regarding his girlfriend. Audio Record at 17:05 to 17:30. Claimant was aware that he was scheduled to work on January 4, 2021, and while incarcerated, asked his father to contact claimant's supervisor to report that claimant would not be at work on January 4, 2021. On January 3, 2021, claimant's father went to the employer's workplace and told claimant's lead worker that claimant would not be at work on January 4, 2021.

(4) On January 6, 2021, claimant was released from jail, contacted his supervisor, and requested to return to work. Claimant's supervisor told claimant to speak to claimant's lead worker. When claimant contacted the lead worker, he told claimant that he "needed to go take a COVID test in order to come back." Audio Record at 13:00 to 13:35. Claimant immediately arranged to take the COVID-19 test.

(5) On January 13, 2021, claimant was tested for COVID-19. Exhibit 1.

(6) On January 14, 2021, claimant learned that his test results were negative for COVID-19. That day, he sent a text message to his supervisor that included a copy of his negative COVID-19 test result. Claimant asked his supervisor when he could return to work, and the supervisor told him to contact the employer's vice president. Exhibit 1 at 3. Claimant then contacted the employer's vice president, who told claimant "maybe [claimant] should figure out what's going on in [his] life . . . and get back to him." Audio Record at 13:50 to 14:00. At no time, including January 14, 2021, did the employer tell claimant he was discharged or provide claimant with a reason why he was discharged or was not permitted to 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).

Order No. 21-UI-174227 concluded that the employer discharged claimant, and that the discharge occurred on January 4, 2021 because claimant was "was a no-call, no-show" on that day. Order No. 21-UI-174227 at 2-3. However, the record does not support the conclusion that claimant was discharged on January 4, 2021.

The employer's vice president testified that their records showed that the employer discharged claimant on January 4, 2021 because he was a "no call, no show" on that day. Audio Record at 9:50 to 10:20. However, it was undisputed that when claimant contacted his supervisor on January 6, 2021 about returning to work, rather than tell claimant that he had been discharged on January 4, 2021, his supervisor referred claimant to claimant's lead worker, who then told claimant that he "needed to go take a COVID test in order to come back." It was also undisputed that on January 14, 2021, when claimant sent a text message to his supervisor that included a copy of his negative COVID-19 test result, he asked about when he could return to work, and the supervisor responded by referring claimant to the employer's vice president. When claimant contacted the employer's vice president, rather than tell claimant that he could return to work, he told claimant to "figure out what's going on in [his] life." Although the vice president acknowledged at hearing that he recalled having a conversation with claimant, he did not recall the details of their conversation. Audio Record at 19:40 to 20:00.

The record shows that claimant expressed his willingness to continue to work for the employer by contacting his supervisor on January 6, 2021, taking the requested COVID-19 test on January 13, 2021, and reporting the negative results of the test and requesting to return to work on January 14, 2021. The record also shows that claimant and the employer had a continuing employment relationship until January 14, 2021. However, as of that day and thereafter, the employer was not willing to allow claimant to return to work. Neither claimant's supervisor, nor the employer's vice president, told claimant on January 14, 2021 that he would be allowed to return to work, advise him of additional steps he could take to continue working, or that he had been discharged from his employment on January 4, 2021. More likely than not, the work separation was a discharge that occurred on January 14, 2021.

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 record shows that the employer discharged claimant on January 14, 2021 when the vice president told claimant to “figure out what’s going on in [his] life.” If the employer had discharged claimant on that day because he was a “no-call, no-show” on January 4, 2021, more likely than not, the employer would have notified claimant on January 6, or soon thereafter, that employer was discharging him for attendance reasons and claimant would not have been asked to take a COVID test to return to work. Instead, on January 14, 2021, the vice president made a statement to claimant that suggested the employer was dissatisfied for some reason with claimant’s personal life. Employer failed to present evidence that the employer discharged claimant for violating a reasonable employer expectation or disregarding the employer’s interest after claimant had been instructed to take a COVID test before returning to work on January 6, 2021.

Accordingly, the employer discharged claimant, but not for misconduct under ORS 657.176(2)(a). Claimant is not disqualified from receiving unemployment insurance benefits on the basis of his work separation.

DECISION: Order No. 21-UI-174227 is set aside, as outlined above.

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

DATE of Service: October 26, 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.

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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.

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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