

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

EMPLOYMENT APPEALS BOARD DECISION
2021-EAB-0845

Reversed
No Disqualification

PROCEDURAL HISTORY: On August 19, 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 July 18, 2021 (decision # 110827). Claimant filed a timely request for hearing. On October 5, 2021, ALJ Griffin conducted a hearing, and on October 8, 2021 issued Order No. 21-UI-176726, affirming decision # 110827 by concluding that claimant was discharged for misconduct and was disqualified from receiving benefits effective July 18, 2021.¹ On October 15, 2021, claimant filed an application for review with the Employment Appeals Board (EAB).

WRITTEN ARGUMENT: Claimant included a hand-written argument on the front and back of his application for review form. Claimant did not declare that he provided a copy of his argument to the opposing party or parties as required by OAR 471-041-0080(2)(a) (May 13, 2019). The argument also 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 as required by OAR 471-041-0090 (May 13, 2019). EAB considered only information received into evidence at the hearing when reaching this decision. *See* ORS 657.275(2).

FINDINGS OF FACTS: (1) S&R Yard Maintenance LLC employed claimant as a yard maintenance worker from July 22, 2020 until July 19, 2021.

(2) Claimant worked a weekly schedule for the employer that began on Tuesdays and ended on Saturdays, with Sundays and Mondays off work.

(3) On Friday July 16, 2021, claimant, the employer's owner, and a coworker were working on a lawn maintenance job. Claimant became annoyed with the coworker, who was a new hire and asked many

¹ The order under review characterized its disposition as modifying decision # 110827. Order No. 21-UI-176726 at 5. In fact, it affirmed the administrative decision because the effect of the order was to change the reason for the administrative decision's outcome, but not the result of the administrative decision.

questions. Claimant called the coworker names and complained about working with him. The owner thought claimant's behavior toward the coworker was unprofessional and, once the job was complete, sent claimant home for the remainder of the day. The owner also told claimant to stay home from work the next day, Saturday July 17, 2021, so that claimant could "cool down" after his outburst toward the coworker and so that claimant could rest his feet, which claimant had complained were causing him pain. Transcript at 11.

(4) On Saturday July 17, 2021, claimant stayed home from work per the owner's instructions.

(5) On Sunday July 18, 2021, claimant sent the owner several texts in succession. Claimant's first text stated, "I'm not doing what I do for 13 bucks . . . an hour anymore. . . you can either give me \$15.00 or fire me[.]" Transcript at 17. Claimant sent three more texts that went unanswered and then another that stated, "hey, do you wanna talk about this? What do we – what do you wanna do? We need to figure something out[.]" Transcript at 17. The owner responded stating, "I'm not paying you \$15.00 an hour; therefore you're quitting . . . I'm not doing that, therefore, according to you, you are quitting and then [the owner's spouse] can get your final check together." Transcript at 18. Claimant replied, "I'm not quitting, but if I have to come get my final check then you're firing me." Transcript at 18.

(6) On Monday July 19, 2021, claimant texted the owner inquiring what "the plan" was for the next day, Tuesday July 20, 2021, which was typically the first day of claimant's work week. Transcript at 18. The owner responded that the employer did not place claimant on the work schedule.

(7) The owner did not place claimant on the schedule because claimant "wanted the \$15.00 an hour, and [the employer] w[asn't] willing to give him \$15.00 an hour at th[at] moment, based on his behavior." Transcript at 19. The employer never scheduled claimant for work again.

(8) On the evening of July 19, 2021, claimant sent another text to the owner apologizing for his behavior toward the coworker. Thereafter, claimant continued sending the owner texts through July 23, 2021 insisting he had not quit and inquiring when the employer would schedule him for work again.

CONCLUSIONS AND REASONS: The employer discharged claimant, 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).

The preponderance of evidence shows that the employer discharged claimant on July 19, 2021. The record indicates, more likely than not, that claimant was willing to continue to work for the employer given his multiple texts over several days inquiring about when he could expect to report to work. Although claimant stated in a July 18, 2021 text that the employer could either grant him a pay raise or discharge him, the weight of the evidence supports the conclusion that claimant's statement was an invitation to negotiate and claimant remained willing to continue to work. This is because the text was sent in succession with several other texts that day including one urging the employer to "talk about

this” with claimant and “figure something out[.]” That claimant was willing to continue to work is further bolstered by the fact that claimant sent texts to the owner on July 19, 2021 asking what “the plan” was for working on July 20, 2021 and apologizing for his treatment of the coworker. Claimant also persisted in sending texts maintaining that he had not quit through July 23, 2021, which is consistent with someone who is willing to continue working. The record further shows that the employer was unwilling to allow claimant to continue to work because on July 19, 2021, the owner declined to schedule claimant to work on July 20, 2021, and did not ever again schedule claimant for work, due to claimant’s text regarding a pay raise. That the employer intended to deny continuing work to claimant beginning July 19, 2021 when he informed claimant that he was not on the work schedule is supported by the owner’s July 18, 2021 text stating that the owner interpreted claimant’s text to mean he was quitting and that the owner’s spouse can get claimant’s “final check together.” Transcript at 18. Accordingly, because claimant was, more likely than not, willing to continue working but was not allowed to do so by the employer, the work separation was a discharge that occurred on July 19, 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) (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).

As a preliminary matter, it is necessary to identify the final incident resulting in claimant’s discharge. The record shows that the reason the employer discharged claimant on July 19, 2021 was claimant’s texts seeking a pay raise to \$15 per hour. The preponderance of evidence supports this conclusion because, at hearing, the employer’s witness testified that the employer did not schedule claimant for work on July 20, 2021 because claimant “wanted the \$15.00 an hour, and [the employer] w[asn’t] willing to give him \$15.00 an hour at th[at] moment, based on his behavior.” Transcript at 19. This conclusion is further supported by the statement the owner conveyed to claimant in his July 18, 2021 text that “I’m not paying you \$15.00 an hour; therefore you’re quitting[.]” Transcript at 18. The record also shows that the employer sent claimant home early on July 16, 2021 for his conduct toward the coworker and told claimant to stay home on July 17, 2021, so that he could “cool down” after his outburst toward the coworker and so that he could rest his feet. However, given the above-quoted testimony of the employer’s witness, the statement conveyed in the owner’s July 18, 2021 text, and the fact that claimant’s discharge occurred shortly after he had insisted on a pay raise, the final incident resulting in claimant’s discharge was more likely than not his insistence on a pay raise, rather than his conduct toward the coworker.

The record therefore shows that the employer discharged claimant because he had insisted on a pay raise. The employer did not establish that claimant’s insistence on a pay raise amounted to a willful or wantonly negligent violation of the standards of behavior the employer had the right to expect of him or a disregard of the employer’s interests. There is no indication from the record that claimant knew or

should have known that insisting on a pay raise violated any employer expectation. As such, the employer did not meet their burden to show that claimant's discharge was for misconduct under ORS 657.176(2)(a).

For the foregoing reasons, claimant was discharged but not for misconduct. Claimant is not disqualified from receiving benefits based upon this work separation.

DECISION: Order No. 21-UI-176726 is set aside, as outlined above.

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

DATE of Service: November 18, 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 ໄດ້ໂດຍປະຕິບັດຕາມຄໍາແນະນໍາທີ່ບອກໄວ້ຢູ່ຕອນທ້າຍຂອງຄໍາຕັດສິນນີ້.

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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