

EMPLOYMENT APPEALS BOARD DECISION
2021-EAB-1022

Reversed
No Disqualification

PROCEDURAL HISTORY: On June 18, 2021, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant quit working for the employer without good cause and was disqualified from receiving unemployment insurance benefits effective August 2, 2020 (decision # 130213). Claimant filed a timely request for hearing. On November 3, 2021, ALJ Amesbury conducted a hearing at which the employer failed to appear, and on November 10, 2021 issued Order No. 21-UI-179419, affirming decision # 130213. On November 30, 2021, claimant filed an application for review with the Employment Appeals Board (EAB).

EVIDENTIARY MATTER: Claimant offered into evidence documents identified by the ALJ as Exhibits 1 and 2 at the outset of the hearing, but the ALJ did not admit them because claimant failed to provide copies of the documents to the employer, and because claimant could testify to contents of the documents, Audio Record at 5:40 to 10:25, and claimant testified about portions of the exhibits at hearing. OAR 471-041-0090(1)(a) (May 13, 2019) provides that EAB may consider information not received into evidence at the hearing if necessary to complete the record. The documents submitted by claimant are relevant, and their admission into evidence is necessary to complete the record in this case. Accordingly, claimant's documents, marked as Exhibits 1 and 2, are admitted into the record and a copy provided to the parties with this decision. Any party that objects to the admission of Exhibits 1 and 2 into the record must submit such objection to this office in writing, setting forth the basis of the objection, within ten days of our mailing this decision. OAR 471-041-0090. Unless such objection is received and sustained, the exhibits will remain in the record.

WRITTEN ARGUMENT: Claimant submitted written arguments to EAB on November 27, 2021 and December 29, 2021. EAB did not consider claimant's November 27, 2021 written argument when reaching this decision because he did not include a statement declaring 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). Claimant's December 29, 2021 written 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. Under ORS 657.275(2) and OAR 471-041-0090 (May 13, 2019), EAB considered only information received into the record when reaching this decision. EAB considered claimant's December 29, 2021 argument to the extent it was based on the record.

FINDINGS OF FACT: (1) Wyndham Vacation Ownership Inc. employed claimant as a sales representative from October 13, 2018 through August 8, 2020.

(2) Claimant was one of employer's top sales representatives. Prior to March 2020, he conducted his sales meetings sitting at a circular table approximately two feet away from interested purchasers at one of the employer's resorts. Claimant was compensated based on a structure that guaranteed a minimum hourly wage, which could be increased significantly through commissions.

(3) In March of 2020, in response to the COVID 19 pandemic, the employer decided to reduce their operations. By a letter dated March 26, 2020, employer informed claimant that effective April 3, 2020, they would be increasing his guaranteed minimum wage, but suspending their operations indefinitely, which would prevent claimant from earning commissions. In essence, claimant would be paid to remain at home, waiting until the pandemic abated to the point where employer could resume their operations. In early May 2020, the employer stopped paying claimant the guaranteed minimum wage and laid him off.

(4) On or about July 2, 2020, claimant's regional manager contacted claimant about returning to work for the employer at their Depoe Bay office when it reopened. Claimant explained that he had a severe sinus condition and that his doctor had recommended that he avoid all exposure to the general public due to his increased risk for contracting COVID-19. The regional manager responded that the employer intended to hire some sales representatives to work from home until the office reopened using video conferencing software, which claimant was willing to do.

(5) The regional manager also suggested that claimant submit a request for a leave of absence under the Family Medical Leave Act (FMLA) so that if the office reopened, and claimant was unable to return to work due to his medical condition, he would be able to maintain his employment until his situation improved. On July 9, 2020, claimant received a text message from the regional manager notifying him that a leave of absence request had been submitted on his behalf. Exhibit 1 at 8, 9.

(6) On July 10, 2020, claimant received a letter from a company working on the employer's behalf, which acknowledged their receipt of a leave request for him and informed him that he had 144 hours of unpaid FMLA leave available to him. Exhibit 1 at 7. Shortly thereafter, claimant submitted the required paperwork to obtain FMLA leave. On July 14, 2020, the employer approved claimant's request for FMLA leave.

(7) After July 14, 2020, claimant did not hear back from the regional manager. On July 30, 2020, claimant sent a text message to the regional manager inquiring about his “situation” with the employer and requested a return call or message. Exhibit 1 at 9. Claimant also left messages with the employer’s human resources manager. Claimant never received any text message or other written notification from the regional manager, human resources manager or anyone else at the employer about his employment status.

(8) Between July 14, 2020 and August 8, 2020, claimant’s 144 hours of FMLA leave were exhausted and his protected leave ended.

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

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).

Order No. 21-UI-179419 concluded that claimant quit work on August 8, 2020, reasoning, “[w]hen claimant's FMLA leave ran out he was. . . unwilling to return to work, although employer was still willing to employ him.” Order No. 21-UI-179419 at 4. The order’s conclusion was based, in part, on the negative effect claimant’s “apparent inability to accurately read from documents in his possession” had on the credibility of his testimony. Order No. 21-UI-179419 at 1. However, the record, including the referenced documents in claimant’s possession, does not support the order’s conclusion or reasoning.

One of the documents shows that claimant had 144 hours of FMLA leave available to him when he applied for FMLA leave. Exhibit 1 at 7. Assuming a standard eight-hour workday, 18 workdays elapsed after July 14, 2020, when the leave was granted. Thus, the 144 hours of protected leave in question likely expired on August 7, 2020. On July 30, 2020, claimant sent a text message to the regional manager inquiring about his employment “situation” and requesting a return call or message, which he never received. Claimant also left messages with the employer’s human resources manager, but never received written notification from the employer in response to his inquiries. Viewed objectively, based on the record as a whole, it reasonably may be inferred that claimant was willing to continue to work for the employer, at least remotely, after his protected leave ended on August 7, 2020, but the employer was not willing to allow him to do so under any circumstances. Accordingly, under OAR 471-030-0038(2)(b), the work separation was a discharge that occurred on August 8, 2020.

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 fails to identify a specific reason why the employer discharged claimant on August 8, 2020. However, viewing the record as a whole, the employer discharged claimant based on their continued reduction in operations in response to the COVID 19 pandemic. Moreover, the employer was in possession of claimant's FMLA leave documents, which showed that claimant's medical provider had recommended that claimant "avoid all exposure to the general public" for an "indefinite period" after July 14, 2020. Exhibit 1 at 5. That recommendation effectively precluded claimant from conducting in person sales meetings at one of the employer's resort locations. More likely than not, the employer discharged claimant for one or both of these reasons. Regardless of the reason, the record fails to show that the employer discharged claimant for willfully or with wanton negligence violating a standard of behavior the employer had the right to expect of him or for disregarding the employer's interests.

The employer discharged claimant, but not for misconduct under ORS 657.176(2)(a). Claimant is not disqualified from receiving unemployment insurance benefits based on this work separation.

DECISION: Order No. 21-UI-179419 is set aside, as outlined above.

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

DATE of Service: January 10, 2022

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 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 دستور العمل موجود در پایان آن، از دادگاه تجدید نظر اورگان درخواست تجدید نظر کنید.

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