

EMPLOYMENT APPEALS BOARD DECISION
2022-EAB-0011

Affirmed
No Disqualification

PROCEDURAL HISTORY: On October 1, 2021, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that the employer discharged claimant for misconduct, disqualifying claimant from receiving unemployment insurance benefits effective June 13, 2021 (decision # 113808). Claimant filed a timely request for hearing. On November 30, 2021, ALJ Lucas conducted a hearing, and on December 3, 2021 issued Order No. 21-UI-181033, reversing decision # 13808 by concluding that the employer discharged claimant, but not for misconduct, and that claimant was not disqualified from receiving benefits based on the work separation. On December 22, 2021, the employer filed an application for review with the Employment Appeals Board (EAB).

WRITTEN ARGUMENT: EAB did not consider the employer's written argument when reaching this decision because they did not include a statement declaring that they provided a copy of their argument to the opposing party or parties as required by OAR 471-041-0080(2)(a) (May 13, 2019).

FINDINGS OF FACT: (1) Washman LLC employed claimant as a lot attendant from August 6, 2016 to June 15, 2021.

(2) Claimant worked for the employer as an on-call employee. The employer expected claimant to contact the employer each morning prior to 8:00 a.m. during the days claimant was on call so that the employer could tell claimant if he was needed for work or, if he was not needed, to remain on call until noon in case the employer's needs changed. The employer considered any failure by claimant to contact the employer on the days that he was on call to be a violation of their no call/no show policy. Claimant was aware of and understood the employer's policy and their expectations.

(3) In January 2021, claimant asked his manager whether he would still have "a job to come back to" if claimant took 30 to 60 days off "to deal with [his] problems." Transcript at 34. The manager told claimant that he would not lose his job in such a scenario.

(4) On April 28, 2021, claimant's father passed away. Claimant requested time off to grieve the death of his father, and the employer granted the request. Claimant maintained intermittent text communication with his manager over the next several days, including telling his manager on April 30, 2021, "I can't stop crying. This is fucking huge." Transcript at 8. Claimant's manager responded to claimant's texts in a manner supportive of claimant.

(5) On May 5, 2021, claimant's manager texted claimant to ask him if he was ready to return to work. Claimant responded by expressing frustration that the manager had not called him in to work the previous two days. Claimant's manager responded by expressing their own frustration toward claimant and telling him that he needed to better "[c]ommunicate with [the manager]." Transcript at 10. After several more contentious text communications between the two, the manager told him, "Stop texting me. Let me know when you're ready to come back to work." Transcript at 11. Claimant understood the manager's last text to constitute an approval for a leave of absence that would terminate when claimant informed the employer he was ready to return to work. The employer did not consider claimant to be on a leave of absence. Between May 5, 2021 and May 29, 2021, claimant and the employer had no communication.

(6) On or about May 7, 2021, claimant entered into a "treatment and detoxing" program "to work on [his] sobriety." Transcript at 11, 43. Claimant's treatment program included meetings, counseling, and acupuncture, and concluded on August 12, 2021.

(7) On May 29, 2021, claimant's manager texted claimant to ask claimant how he was doing. Claimant responded on June 1, 2021 that he was doing "good," that he was "getting treatment and detoxing," and that "[he will] get back to [the employer] soon, [and was] on a strict schedule for now." Transcript at 5. Claimant's manager responded, "Good to hear," and understood claimant's text to mean that claimant was ready to return to work and to "fall back into line as normal" with respect to checking in with the employer each morning. Transcript at 11, 23. Claimant and the employer did not communicate again after June 1, 2021.

(8) On June 14, 2021, claimant's manager texted claimant to ask him the name of the facility where he was being treated and the length of his program. The text "did not go through" and was "undelivered." Transcript at 11.

(9) On June 15, 2021, the employer removed claimant from their payroll system because claimant had not made contact with the employer for over two weeks in violation of the no call/no show policy. Claimant did not learn of the work separation until August 10, 2021 when he was informed by a third party. Claimant intended to work for the employer for "the rest of [his] life," and would have returned to work prior to June 15, 2021, if the employer had told him they were going to separate him. Transcript at 46-47.

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

Nature of the work separation. The first issue 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 record shows that the employer discharged claimant. Here, claimant testified that at the time of the June 15, 2021 work separation he believed that he was on an approved leave of absence and that had the employer informed him that this was not the case, he would have immediately returned to work. Transcript at 39. Furthermore, although the employer testified somewhat inconsistently as to whether they discharged claimant or whether they believed he voluntarily quit¹, the record shows that the employer ultimately prevented claimant from returning to work after June 15, 2021, when they terminated his employment and removed him from their payroll. As such, the nature of claimant's work separation was a discharge because claimant was willing to continue working for the employer after June 15, 2021, but the employer did not allow him to do so.

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). Good faith errors are not misconduct. OAR 471-030-0038(3)(b).

The record shows that the employer discharged claimant on June 15, 2021 after claimant had failed to make contact with the employer for the previous two weeks despite remaining in an on-call status. By failing to make contact with the employer on a daily basis after June 1, 2021, claimant violated the employer's expectation that he do so and, consequently, violated the employer's no call/no show policy. However, claimant's actions did not constitute a willful or wantonly negligent disregard of the employer's policy or expectations because the preponderance of the evidence shows that claimant's failure to make daily contact with the employer after June 1, 2021 was the result of a good faith error.

The record shows that claimant erroneously believed that the employer had approved a leave of absence for claimant on May 5, 2021, when claimant's manager texted claimant to "let [the manager] know when [claimant was] ready to come back to work." Claimant believed that his approved leave of absence would extend until he determined he was ready to return to work, and that it did not require him to maintain contact with the employer during the duration of his leave. Although the employer did not consider claimant to be on a leave of absence and that they expected him to maintain daily contact, the record shows that claimant had a good faith basis for his erroneous belief that he was on a leave of absence for multiple reasons. First, the employer's May 5, 2021 text was sent to claimant shortly after

¹ For example, when asked whether claimant quit or was discharged, the employer testified, "We consider him to have quit." Transcript at 5. Later in the hearing, however, the employer testified that when they did not hear from claimant after June 1, 2021, they "decided that [claimant] had quit or was not going to improve his attendance . . . [s]o we terminated him for unimproved attendance." Transcript at 12.

the death of his father when claimant was in a state of heightened emotions and after the manager had been supportive of claimant in their prior texts. Given this context, and the record evidence showing that claimant's manager had previously told claimant he could take 30 to 60 days off (if needed) to address personal problems, it was reasonable for claimant to believe that the employer would approve him for a leave of absence, that he would not be required to maintain daily contact, and that he would be allowed to return to work when ready.

The record also shows that on May 29, 2021, *the employer re-initiated* contact via text with claimant to see how claimant was doing. When claimant responded on June 1, 2021 that he doing well, was in treatment, and would get back to work soon, the employer *did not* respond by telling claimant that they considered him at that point to be back on-call and that he would be expected to resume his required daily contact with the employer. Instead, the employer simply told claimant, "Good to hear." In light of this context and these circumstances, claimant had a good faith basis to believe that after June 1, 2021 he was still on an approved leave of absence, that he remained in good standing with the employer, and that until claimant was ready to return to work any communication thereafter would continue to be initiated by the employer. As such, claimant's conduct was the result of a good faith error and not misconduct. Claimant therefore is not disqualified from receiving unemployment insurance benefits based on this work separation.

DECISION: Order No. 21-UI-181033 is affirmed.

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

DATE of Service: February 1, 2022

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 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 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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