EO: 200
BYE: 202244

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

764
DS 005.00

EMPLOYMENT APPEALS BOARD DECISION
2022-EAB-0105

Affirmed
No Disqualification

PROCEDURAL HISTORY: On December 1, 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 November 7, 2021 (decision # 120108). Claimant filed a timely request for hearing. On January 4, 2022, ALJ Wardlow conducted a hearing, and issued Order No. 22-UI-183205, reversing decision # 120108 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 January 12, 2022, the employer filed an application for review with the Employment Appeals Board (EAB).

WRITTEN ARGUMENT: The employer did not declare 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). The argument also contained information that was not part of the hearing record, and did not show that factors or circumstances beyond the employer's reasonable control prevented them 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 FACT: (1) Colvin Oil I LLC. employed claimant in their deli from March 10, 2020 to November 10, 2021.

(2) Claimant's manager would customarily prepare the work schedule for employees two weeks in advance. Claimant worked all days of the week except for Mondays and Tuesdays. On Mondays and Tuesdays claimant worked a different job in a location where he had no phone service. Claimant's manager had been aware of claimant's other job since May 2021, and was also aware of his lack of phone service on the days he worked at the other job.

(3) Prior to November 5, 2021, claimant's manager removed claimant from the work schedule for a period of two weeks. As a result, claimant was not scheduled to work for the employer for a two week period which included (but was not limited to) Monday November 8, 2021 through Thursday, November 11, 2021.

(4) On November 5, 2021, the employer suspended claimant for failure to comply with the employer's mask policy. The employer informed claimant that his suspension would run from November 5, 2021 through November 7, 2021 and that the employer would contact claimant when they placed him back on the work schedule.

(5) On Monday, November 8, 2021, while claimant was working at his other job, the employer attempted to call claimant two times and left a voicemail on each occasion asking claimant to return their call immediately. The employer's intent was to discuss claimant's return to the work schedule. Claimant was unaware of either voicemail due to the lack of phone service where he was working and he therefore did not respond.

(6) On Tuesday, November 9, 2021, the employer attempted to call claimant again and left a voicemail asking claimant to return their call immediately. Claimant was unaware of the voicemail due to the lack of phone service where he was working and he therefore did not respond.

(7) On Wednesday, November 10, 2021, the employer terminated claimant's employment based on job abandonment after claimant did not respond to their voicemails from November 8 and 9, 2021.

(8) On Thursday, November 11, 2021, claimant returned to an area with phone service and learned for the first time of the employer's voicemails from November 8 and 9, 2021. Claimant contacted the employer's main office with the intent to discuss the possibility of transferring stores due to a conflict with his manager but was informed of the employer's decision to terminate claimant's employment as of November 10, 2021.

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

Nature of the work separation. The first issue in this case is the nature of claimant's 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 work separation in this case occurred on November 10, 2021, when the employer determined that claimant's lack of responsiveness to their voicemails on November 8 and 9, 2021, meant that claimant had abandoned his job with the employer. Claimant learned about his work separation on November 11, 2021 when he contacted the employer's main office to inquire about a transfer, but was informed he had already been separated. Because the record shows that at the time of the employer's November 10, 2021 decision to separate claimant, he was willing to continue working for the employer (albeit with hopes of a transfer to another store), but the employer was unwilling to allow him to do so as of that date, the nature of claimant's work separation was a discharge.

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 employer discharged claimant, but not for misconduct. As an initial matter, the record shows that although the employer suspended claimant on November 5, 2021 for violating their mask policy, the employer did not intend to discharge him based on this violation. Rather, the employer notified claimant at the time of his three-day suspension for the mask violation that they would contact him when they were ready to place him back on the work schedule. Instead, the record shows that on November 10, 2021, the employer discharged claimant for job abandonment after he failed to timely respond to their voicemails on November 8 and 9, 2021, which had asked claimant to return their calls immediately (apparently to discuss claimant's return to the work schedule). Further, the preponderance of the evidence shows that claimant had no way of knowing of the employer's attempts to contact him on Monday, November 8, 2021 and Tuesday, November 9, 2021, nor did he learn of their attempts until Thursday, November 11, 2021, when he had already been discharged.[1]

The record shows that consistent with his scheduling since May 2021, claimant was working his other job on Monday, November 8, 2021 and Tuesday, November 9, 2021, and that claimant's other job was in an area that had no phone service. Furthermore, the record shows that the employer had been aware of claimant's other job, had routinely provided him Mondays and Tuesdays off so that he could work the other job, and was aware that claimant had no phone service while working the other job. Likewise, claimant did not receive the employer's voicemails until Thursday, November 11, 2021, which stands to reason given the record evidence showing that the employer had removed claimant from their work schedule from at least November 8, 2021 through November 11, 2021. Because claimant was not on the work schedule during this time period, he would have no obvious reason to return to an area with phone service prior to the time that he did so. As such the preponderance of the evidence shows that claimant could not have known of the employer's attempts to contact him on November 8 and 9, 2021, and that he acted reasonably in not responding to the employer's attempts prior to November 11, 2021. Because claimant acted reasonably during this time period, claimant's failure to respond to the employer's voicemails was not misconduct because it was not a willful failure to act or the result of a failure to act where claimant should have known that his actions would probably result in a violation of the employer's expectations. As such, the employer discharged claimant, but not for misconduct, and claimant is therefore not disqualified from receiving benefits based on the work separation.

DECISION: Order No. 22-UI-183205 is affirmed.

[1] Relying on notes from claimant's manager, the employer's senior human resources employee testified that at the time the employer imposed claimant's November 5, 2021 suspension, the manager told claimant they would contact claimant "with [a] management decision." Transcript at 16. However, claimant testified that he was not specifically told he would be contacted on November 8, 2021. Transcript at 22. Rather, he was told he would be contacted when the employer had decided to return him to the work schedule. Transcript at 23. Because claimant provided first-hand testimony as to this discussion with his manager, his testimony is entitled to greater weight than the hearsay testimony offered by the employer's witness.

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

DATE of Service: February 24, 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.

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 ໄດ້ ໂດຍປະຕິບັດຕາມຄຳແນະນຳທີ່ບອກໄວ້ຢູ່ຕອນທ້າຍຂອງຄຳຕັດສິນນີ້.

Arabic

هذا القرار قد يؤثر على منحة البطالة الخاصة بك، إذا لم تفهم هذا القرار، إتصل بمجلس منازعات العمل فورا، 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 دستورالعمل 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
www.Oregon.gov/Employ/eab