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

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DS 005.00

EMPLOYMENT APPEALS BOARD DECISION
2022-EAB-0370

Affirmed
No Disqualification

PROCEDURAL HISTORY: On November 16, 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 March 22, 2020 (decision # 65450). Claimant filed a timely request for hearing. On March 10, 2022, ALJ Roberts conducted a hearing, and on March 11, 2022 issued Order No. 22-UI-188435, reversing decision # 65450 by concluding that the employer discharged claimant, but not for misconduct, and claimant was therefore not disqualified from receiving benefits based on the work separation. On March 14, 2022, the employer filed an application for review with the Employment Appeals Board (EAB).

WRITTEN ARGUMENT: The employer's argument 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. Under ORS 657.275(2) and OAR 471-041-0090 (May 13, 2019), EAB considered only information received into evidence at the hearing when reaching this decision. EAB considered the employer's argument to the extent it was based on the record.

FINDINGS OF FACT: (1) West Coast Finishers, Inc. employed claimant as a painter from August 23, 2016 until May 14, 2020. Claimant worked for the employer Monday through Friday.

(2) On March 19, 2020, claimant worked his full night shift painting at a Goodwill location. Claimant contacted his foreman and told he was not feeling well and was going to get a doctor's note. Claimant did not report to work the next day because he was not feeling well.

(3) On March 23, 2020, prior to his night shift, claimant texted his foreman that he had continued to feel ill throughout the weekend and was not going to make it to his night shift. The foreman responded, "Well if you're coughing and sneezing, we don't know what you have. . . . I don't know whether you're supposed to stay home for two weeks now . . . [c]all me when you can." Transcript at 74.

(4) On March 24, 2020, claimant's foreman texted claimant that the Goodwill location had been closed and that the Governor of Oregon had implemented a stay-at-home order within the State. Claimant met with his medical provider and his medical provider prepared a note stating that claimant had an upper respiratory infection and should remain off work on March 23 and 24, 2020, but was cleared to return to full duty on March 25, 2020. Claimant's girlfriend faxed the doctor's note to the employer the next day.

(5) From March 25, 2020 through March 27, 2020, claimant did not report to work for his shifts because he believed that the Governor's stay-at-home order meant he should stay home for a couple of days, and claimant believed that the employer would make contact with him. When claimant failed to report for his shift on March 25, 2020, despite having been cleared by his provider to return to work, the employer believed that claimant had voluntarily quit work. The employer still had work available for claimant to perform. Claimant never told the employer that he was quitting work.

(6) On March 30, 2020, claimant texted the foreman to "touch base" and to let the foreman know that he was "still alive" and "still work[ed] for the company." Transcript at 60. The foreman did not respond to claimant.

(7) On April 15, 2020, claimant texted his foreman again to touch base "and to find out if [the foreman] had fired [him] or not." Transcript at 54. The foreman did not respond to claimant.

(8) On April 16, 2020, the employer sent a letter to claimant requesting reimbursement for a $100 loan provided to claimant. Upon receiving the letter, claimant texted the foreman that he could not pay back the loan because he had not been working and asked the foreman to call him back. The foreman did not respond to claimant's text. Because the foreman had not responded to his March 30, April 15, or April 16 texts, claimant believed that he had been discharged.

(9) On May 14, 2020, the employer sent claimant a letter offering him "one last chance" to return to work and receive a $2 raise in the process. Claimant did not receive the employer's letter. Transcript at 57. Because the employer received no response to the letter, and because they had not heard from claimant since March 25, 2020, they removed claimant from their system.

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) (December 23, 2018). 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 employer believed that claimant voluntarily quit work on March 25, 2020, when he failed to report to work that day, despite being cleared by his medical provider to return to work, and despite the fact that the employer had work available for him. However, the record shows that claimant never told the employer he was quitting work. Furthermore, the preponderance of the evidence shows that claimant remained willing to work for the employer, but the employer prevented him from doing so. First, although claimant did not report to work on March 25, 2020 or for the remainder of that week, claimant reasonably believed that he should stay at home in light of the March 24, 2020 text from his foreman

indicating that the Governor had imposed a stay-at-home order. When claimant did not hear from the foreman thereafter, he attempted to "touch base" via text message with his foreman on March 30, 2020, April 15, 2020, and April 16, 2020, but received no response.[1] Claimant's three unsuccessful attempts to communicate with the employer demonstrated that, more likely than not, claimant did not quit work on March 25, 2020, but instead remained willing to continue work for the employer for an additional period of time.

The record shows that, notwithstanding their position at hearing that claimant quit work on March 25, 2020, the employer did not actually remove claimant from their system until after May 14, 2020, and only after claimant failed to respond to their last chance offer to return to work. However, the record also shows that claimant did not receive the May 14, 2020 letter.[2] In light of this evidence, and the evidence of claimant's multiple unsuccessful attempts to communicate with his foreman between March 30, 2020 and April 16, 2020, the preponderance of the evidence shows that claimant remained willing to work for the employer, but was prevented by the employer from doing so. As such, the record shows that the nature of the 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). "'[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 after he failed to respond to their May 14, 2020 letter offering him "one last chance" to return to work and in light of his failure to communicate with the employer since March 25, 2020. While it was reasonable for the employer to expect claimant to respond to their letter, the record shows that claimant did not receive the employer's letter. Therefore, because claimant did not receive the May 14, 2020 letter, the employer has failed to show that claimant's failure to respond to the letter resulted from any willful or wantonly negligent behavior on claimant's part. Furthermore, contrary to the employer's view that claimant had failed to communicate with them since March 25, 2020, the record shows that claimant made multiple attempts to contact his foreman via text between March 30, 2020 and April 16, 2020, with each attempt going unanswered. As such, the record shows that claimant

[1] At hearing, the employer's bookkeeper disputed that claimant had actually sent these three text messages to the foreman, but also testified that she did not actually know if the claimant had sent the text messages. Transcript at 62, 66. Regardless, claimant's first-hand testimony that he sent the text messages to the foreman is entitled to greater weight than the bookkeeper's hearsay testimony that he did not send them.

[2] At hearing, the employer's bookkeeper testified that in addition to sending the May 14, 2020 letter to claimant via regular mail, she also emailed the letter to claimant's girlfriend and received a "read receipt." Transcript at 39-41. However, claimant testified that he never received the May 14, 2020 letter. Transcript at 57. Claimant's first hand-testimony that he did not receive the letter is entitled to greater weight than any inference that might be drawn from the "read receipt" the employer received to their email sent to the claimant's girlfriend.

was not indifferent to the employer's expectation that he maintain communication. Furthermore, the record evidence, including claimant's several attempts to establish communication with his foreman via text, suggests that had claimant received the employer's May 14, 2020 letter he would have, more likely than not, responded to it. Accordingly, the employer has failed to meet their burden to show that claimant's discharge resulted from a willful or wantonly negligent disregard of the employer's standards of behavior. Claimant was therefore discharged, but not for misconduct, and is not disqualified from receiving unemployment insurance benefits based on the work separation.

DECISION: Order No. 22-UI-188435 is affirmed.

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

DATE of Service: May 26, 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.

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