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BYE: 202302

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

543
VQ 005.00

EMPLOYMENT APPEALS BOARD DECISION
2022-EAB-0409

Reversed
No Disqualification

PROCEDURAL HISTORY: On February 9, 2022, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant voluntarily quit work without good cause and was therefore disqualified from receiving unemployment insurance benefits effective January 16, 2022 (decision # 110828). Claimant filed a timely request for hearing. On March 23, 2022, ALJ Demarest conducted a hearing, and on March 24, 2022 issued Order No. 22-UI-189554, affirming decision # 110828.[1] On March 26, 2022, claimant filed an application for review with the Employment Appeals Board (EAB).

WRITTEN ARGUMENT: Claimant did not declare that she provided a copy of her 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 her 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) Peak Heating and Air, LLC employed claimant from October 2021 until January 20, 2022. In October 2021, the employer acquired the business from their predecessor in interest, who had until that point employed claimant since October 2017. Claimant performed clerical and administrative work for the employer, such as answering phones, taking service calls, and providing estimates for construction contractors, and had been helping the employer with the transition after they acquired the business.

(2) On January 20, 2022, the owner of the company met with claimant and informed her that he and his business partner had decided to eliminate claimant's position because they no longer needed her. The owner believed that claimant had another two or three months' worth of work to complete on the

[1] The order under review concluded that claimant was disqualified from receiving benefits effective January 16, 2021. Order No. 22-UI-189554 at 3. However, as the facts of the case support the conclusion that claimant separated from work in January 2022, the conclusion in the order under review is presumed to be scrivener's error.

projects she had been working on, and intended for claimant to continue working during that time. However, the owner did not explicitly tell claimant that she could continue working for that long, nor did he tell her that she could continue working until a specific date, nor did he explicitly ask her to continue to work.

(3) Claimant did not believe that she had any more work to do on any of the projects the employer had assigned to her. When the owner notified claimant that her position would be eliminated, he asked her if there was "anything that [she] needed to do," and claimant confirmed that she did not need to do anything else, other than to forward him some business information from her home computer. Audio Record at 9:40. Thereafter, the owner asked claimant how she would like her final check delivered. Claimant then went home, forwarded the owner the emails they had discussed, sent the owner an accounting of her final hours, and never worked for the employer again. If claimant had known that the employer would have allowed her to continue working for them for another two or three months, claimant would have continued working for the employer.

CONCLUSIONS AND REASONS: Claimant was discharged, 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) (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 order under review concluded that claimant voluntarily quit work. Order No. 22-UI-189554 at 2. The record does not support this conclusion. Claimant separated from work following a meeting with the owner of the company in which he told her that her position was to be eliminated. The record shows that both parties would have continued the employment relationship beyond claimant's separation date of January 20, 2022. However, the employer testified at hearing that he had told claimant that that day did not have to be her last day, and that "if there are projects that you are currently working on that you wanna finish, you're more than welcome to do so," and claimant responded by saying, "No, that's fine." Audio Record at 16:05. By contrast, claimant testified that the owner asked her if there was anything that she needed to do—to which she said "no"—and that she did not recall if the owner had told her that January 20, 2022 did not have to be her last day. Audio Record at 9:40, 25:44. Additionally, while claimant testified that there were "really no projects to finish," the employer testified that claimant had been working on multiple projects and could have continued working on them for two or three additional months. Audio Record at 12:55, 17:08.

Both parties agreed that the owner of the company told claimant he was eliminating her position and never explicitly told claimant that she could continue working for another two or three months. The main points of contention between the parties were whether claimant was still working on ongoing projects at the time, and whether the owner told claimant that she did not have to leave on January 20, 2022. Both parties testified credibly and neither party offered any corroborating evidence outside of their testimony. Therefore, it is most reasonable to conclude from the record that the parties miscommunicated during their meeting on January 20, 2022 and that claimant's work separation that day was the result of employer's decision to eliminate claimant's position.

In *J.R. Simplot Co. v. Employment Division*, 102 Or App 523, 795 P2d 579 (1990), the claimant notified the employer of his intent to resign on a particular date, and the employer thereafter established an earlier separation date. Claimant testified in that case that he neither objected to the earlier separation date nor insisted that he be allowed to continue working through his notice period. Reversing EAB's decision that concluded that the employer discharged claimant by moving up the date of the separation, the Court of Appeals held that claimant's "agreement" to the new separation date could be inferred because claimant did not voice disagreement with the new date or otherwise insist upon working until the original resignation date.

In this case the employer, rather than claimant, intended to sever the employment relationship. Because of a miscommunication about *when* the employer was severing the employment relationship, claimant stopped working on the same day she learned the employer was eliminating her position. Claimant credibly testified that she would have continued to work for the employer had she known she could do so. As in *J.R. Simplot Co.*, the record does not show that the party who moved to sever the employment relationship objected to the work separation that day, or insisted on a different date. Under *J.R. Simplot Co.*, therefore, the record supports the inference that the employer assented to the work separation occurring that day, and that the nature of the separation remained 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 record shows that the employer discharged claimant because they no longer needed her position and therefore decided to eliminate it. As this was not attributable to any act or omission on claimant's part, claimant was not discharged due to a willful or wantonly negligent violation of the employer's standards of behavior. As such, claimant was discharged, but not for misconduct, and is not disqualified from receiving unemployment insurance benefits based on the work separation.

DECISION: Order No. 22-UI-189554 is set aside, as outlined above.

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

DATE of Service: <u>June 14, 2022</u>

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 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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