

EMPLOYMENT APPEALS BOARD DECISION
2022-EAB-0458

Reversed
No Disqualification

PROCEDURAL HISTORY: On February 4, 2022, 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 January 16, 2022 (decision # 83336). Claimant filed a timely request for hearing. On March 23, 2022, ALJ Ramey conducted a hearing, and on March 25, 2022 issued Order No. 22-UI-189700, affirming¹ decision # 83336 by concluding that claimant quit working for the employer without good cause and was disqualified from receiving unemployment insurance benefits effective January 16, 2022. On April 11, 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) Wal Mart Associates, Inc. employed claimant, most recently as a "digital shopper," from around November 2008 until January 21, 2022. Transcript at 8.

(2) The employer's attendance policy required employees who were going to be absent from work to notify the employer of the absence at least two hours prior to the start of the shift, if possible. Claimant was aware of that expectation.

¹ The order under review stated that "the administrative decision mailed February 4, 2022 is MODIFIED." Order No. 22-UI-189700 at 3 (emphasis in original). However, as the order under review concluded that claimant's effective disqualification date was the same as the date found in decision # 83336, the order *affirmed* the administrative decision.

(3) From December 5, 2021 until January 19, 2022, claimant missed about 16 scheduled shifts, first because she was caring for her significant other who had COVID-19, and then because claimant became sick herself. On all but one occasion, claimant notified the employer in advance that she was going to be absent. On one occasion, claimant either forgot to notify the employer of her absence or did so after the start of her scheduled shift. Prior to that incident, claimant had never failed to notify the employer of an absence. Claimant's absences exhausted all medical leave to which she was entitled.

(4) On January 19, 2022, claimant met with the employer's human resources representative and her supervisor about her absences from work. The human resources representative told claimant that she would be discharged unless she obtained approval for a personal leave of absence that could be applied retroactively to her absences from December 2021 and January 2022. The employer required that claimant obtain approval for the leave of absence from Sedgwick, the third-party administrator that handled leaves of absence and related matters for the employer. During the meeting, claimant attempted to submit a leave request via Sedgwick's online portal but was unable to do so.

(5) After the meeting, claimant spoke to the store manager, who reiterated that claimant would need to obtain a leave of absence to remain employed. The store manager also told claimant that he would approve a leave of absence if claimant submitted a request to Sedgwick, and that the leave of absence would be applied retroactively to her absences. Claimant subsequently attempted to contact Sedgwick by phone several times, but was unable to reach them to file a leave request. Claimant had previously experienced difficulties in dealing with Sedgwick, such as significantly late payments of short-term disability benefits and issues with a previous leave of absence.

(6) On January 20, 2022, claimant again spoke to the store manager, explained to him that she was "frustrated" because she had been unable to submit the leave request to Sedgwick, and told the store manager to "forget it." Transcript at 39. The store manager responded by telling claimant that he would get claimant's final check ready. Claimant understood this to mean that she had been discharged. Claimant did not return to work for the employer. Claimant did not tell the employer that she quit, and the employer did not tell claimant that she was discharged.

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). "Work" means "the continuing relationship between an employer and an employee." OAR 471-030-0038(1)(a). The date an individual is separated from work is the date the employer-employee relationship is severed. OAR 471-030-0038(1)(a).

The parties disagreed on the nature of the work separation. At hearing, the employer's witness testified that claimant "chose to terminate" her employment, while claimant testified that she was discharged. Transcript at 7, 18. The order under review found that claimant "was frustrated and did not want to continue working for the employer" due to her difficulty in attempting to file the leave request, and therefore concluded that claimant quit working for the employer on January 20, 2022 when she told the

store manager to “just forget it.” Order No. 22-UI-189700 at 2–3. The record does not support that conclusion or the finding on which it rests.

At hearing, when asked if she wanted to continue working for the employer as of January 20, 2022, claimant did respond, “not necessarily, no,” because she “felt like [she] was being singled out by” the human resources representative when she told claimant that she needed to file for a leave of absence to remain employed. Transcript at 23. However, claimant did not otherwise suggest that she was unwilling to continue working for the employer. Although claimant’s statement, viewed in isolation, might suggest that she was unwilling to do so, it is more accurately assessed in the context of her circumstances. Specifically, claimant had been out sick for several weeks, had attempted to comply with the employer’s attendance policy, had made multiple unsuccessful attempts to request a leave of absence, and had been told that she would be discharged if she could not request one. Further, claimant testified that by telling the store manager on January 20, 2022 to “forget it,” she meant merely that she was frustrated with the process of requesting a leave of absence. Transcript at 39. As a whole, the record shows that claimant made several attempts to preserve her employment, and felt that the steps she was required to take to do so were unfair. In light of this, it is reasonable to construe claimant’s testimony that she was not “necessarily” willing to continue working for the employer to be a further expression of that frustration, rather than to convey an unwillingness to continue employment.

As soon as claimant expressed this frustration to the store manager by telling him to “forget it,” the store manager apparently determined that claimant was not going to continue trying to request a personal leave of absence, and advised claimant that they would get claimant’s final check ready. The employer’s action, coupled with their requirement that claimant obtain a leave of absence to remain employed, which claimant as of that point in time had tried but failed to request, shows that the employer was severing the employment relationship, thereby preventing claimant from continuing to work for the employer for an additional period of time. The record therefore establishes that the employer discharged claimant on January 20, 2022.

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). Absences due to illness or other physical or mental disabilities are not misconduct. OAR 471-030-0038(3)(b).

The employer discharged claimant on January 20, 2022 because she did not request a personal leave of absence to cover her absences from December 2021 and January 2022. To the extent that the employer discharged claimant for the failure to request the leave of absence itself, the employer has not met their burden to show that claimant was discharged for misconduct. In order to establish misconduct, the employer must show that claimant willfully, or with wanton negligence, violated their standards of

behavior. The record shows that claimant made several attempts, both by phone and through Sedgwick's online portal, to request a leave of absence, but that she was unable to do so. Claimant's inability to request a leave of absence was not the result of either her willful refusal to request a leave of absence or her indifference to the consequences of failing to do so, but was the apparent result of Sedgwick's inefficiencies or errors. Thus, claimant's failure to request a leave of absence was not misconduct.

To the extent that the employer discharged claimant for the absences that were unexcused because claimant did not obtain a leave of absence, the employer has also not met their burden to show that the absences were misconduct. Here, claimant's period of absences were caused first by the need to care for her significant other, who had contracted COVID-19, and then because she became sick herself. Absence due to illness or other such exigent circumstances are not misconduct.

For the above reasons, 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-189700 is set aside, as outlined above.

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

DATE of Service: June 28, 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.

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.

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 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 الاستئناف 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.

Employment Appeals Board - 875 Union Street NE | Salem, OR 97311
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