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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-0724

Modified
Eligible Week 41-20
Disqualification Effective Week 42-20

PROCEDURAL HISTORY: On April 30, 2021, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant quit working for the employer with good cause and was not disqualified from receiving unemployment insurance benefits based on the work separation (decision # 145912). The employer filed a timely request for hearing. On June 21, 2022, ALJ Buckley conducted a hearing, and on June 22, 2022 issued Order No. 22-UI-196594, affirming[1] decision # 145912. On June 27, 2022, the employer filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Party Time Enterprise, Inc. employed claimant as a lot attendant from September 8, 2020 until October 5, 2020. Claimant originally applied for a position as a small-engine mechanic, but the employer hired him as a lot attendant because they already had a small-engine mechanic on staff.

(2) Claimant's mother suffered from Parkinson's disease, and as a result was more susceptible to complications from COVID-19. Claimant did not live with his mother, but visited her daily to help care for her. Claimant's girlfriend, with whom he lived, had chronic obstructive pulmonary disease. As a result, claimant's girlfriend was more susceptible to complications from COVID-19.

(3) On October 2, 2020, the general manager of the facility asked claimant if he could work on the following Sunday, which was claimant's day off, to set up and take down a "bouncy house castle." Transcript at 6. The manager had previously asked claimant to work on his days off, which claimant had refused. Claimant was concerned about the possibility of exposure to COVID-19 if he were to work the "bouncy house" event. In response to the general manager's request, claimant gave the employer "two

[1] The order under review stated that "the administrative decision mailed April 30, 2021 is *modified*." Order No. 22-UI-196594 at 4 (emphasis added). However, the order under review concluded that claimant was discharged, but not for misconduct, and that claimant therefore was not disqualified from receiving benefits. Because the order under review did not change the outcome of the case, the order *affirmed* the administrative decision.

weeks" notice that he was quitting. Transcript at 6. The general manager had previously found other employees to work on Sundays when claimant refused to work on his days off, and did not take issue with claimant's having refused to work those days.

(4) Claimant decided to quit because the employer had asked him to work during days off several weeks in a row, because of his concerns about contracting COVID-19 at work and infecting at-risk people in his life, and because he wished to work as a small-engine mechanic instead of as a lot attendant. Prior to giving notice, claimant did not raise his concerns about COVID-19 safety with the employer. Had he done so, the employer would have kept him from working in situations that put claimant at risk.

(5) On October 5, 2020, the employer discharged claimant because they found another person to fill claimant's position.

CONCLUSIONS AND REASONS: Claimant was discharged, but not for misconduct, within 15 days of a planned voluntary quit without good cause.

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).

However, ORS 657.176(8) states:

For purposes of applying subsection (2) of this section, when an individual has notified an employer that the individual will leave work on a specific date and it is determined that: (a) The voluntary leaving would be for reasons that do not constitute good cause; (b) The employer discharged the individual, but not for misconduct connected with work, prior to the date of the planned voluntary leaving; and (c) The actual discharge occurred no more than 15 days prior to the planned voluntary leaving, then the separation from work shall be adjudicated as if the discharge had not occurred and the planned voluntary leaving had occurred. However, the individual shall be eligible for benefits for the period including the week in which the actual discharge occurred through the week prior to the week of the planned voluntary leaving date.

Claimant gave the employer "two weeks" notice of his intent to resign on October, 2, 2020, and the employer discharged claimant on October 5, 2020. The order under review concluded that ORS 657.176(8) did not apply here because claimant did not provide the employer with a "specific date" on which he intended to resign. Order No. 22-UI-196594 at 3. However, the record does not support this conclusion.

For ORS 657.176(8) to apply to a work separation, per the terms of the statute, the individual must have given the employer notice that they intend to quit "on a specific date." In the present matter, claimant told the employer that he was giving "two weeks" notice. While the record does not show that claimant explicitly stated the date on which he would quit, it is reasonably ascertainable from his statement that he intended to quit on the date two weeks after the date on which he gave notice. As claimant gave his notice on October 2, 2020, the record shows that he notified the employer that he intended to resign on October 16, 2020. Because claimant gave notice of his intent to quit on a specific date, and because the employer discharged claimant within 15 days of that date, both the actual discharge and the planned quit may need to be considered to determine if claimant is eligible for benefits based on the work separation.

Actual discharge. The employer discharged claimant on October 5, 2020 because they found another individual to fill claimant's position. The record does not show that the employer discharged claimant due to any specific act or omission on claimant's part, other than his having given two weeks' notice a few days prior. Therefore, the record fails to show that the employer discharged claimant because he had engaged in conduct the employer considered a willful or wantonly negligent violation of the standards of behavior the employer had the right to expect of him or a disregard of the employer's interests. Accordingly, the employer discharged claimant, but not for misconduct.

Planned quit. A claimant who leaves work voluntarily is disqualified from the receipt of benefits unless they prove, by a preponderance of the evidence, that they had good cause for leaving work when they did. ORS 657.176(2)(c); *Young v. Employment Department*, 170 Or App 752, 13 P3d 1027 (2000). "Good cause . . . is such that a reasonable and prudent person of normal sensitivity, exercising ordinary common sense, would leave work." OAR 471-030-0038(4) (September 22, 2020). "[T]he reason must be of such gravity that the individual has no reasonable alternative but to leave work." OAR 471-030-0038(4). The standard is objective. *McDowell v. Employment Department*, 348 Or 605, 612, 236 P3d 722 (2010). A claimant who quits work must show that no reasonable and prudent person would have continued to work for their employer for an additional period of time.

Per OAR 471-030-0038(5)(b)(A), leaving work without good cause includes leaving suitable work to seek other work. In determining whether any work is suitable for an individual, the Department shall consider, among other factors, the degree of risk involved to the health, safety and morals of the individual, the physical fitness and prior training, experience and prior earnings of the individual, the length of unemployment and prospects for securing local work in the customary occupation of the individual and the distance of the available work from the residence of the individual. ORS 657.190.

Claimant intended to quit on October 16, 2020 for three reasons: because he would have preferred to work in a different position for the employer, his general manager had asked him to work on claimant's day off, and concerns relating to COVID-19 at work.

To the extent that claimant intended to quit work for the first two reasons, the voluntary quit would have been without good cause because claimant's circumstances were not grave. It is understandable that claimant would have preferred a different position than the one for which he was hired. However, claimant did not allege that he was actually hired for the small-mechanic position—merely that he had "applied" for it—nor did he allege that work as a lot attendant was unsuitable or that he was harmed in any way by working for the employer as a lot attendant. Transcript at 6. Likewise, although it is understandable that claimant did not wish to work on his days off, he did not show at hearing that he

was harmed in any way merely because the general manager asked him to work on his days off, or that he faced any repercussions for refusing to do so. As neither of these reasons for quitting constituted grave circumstances, claimant's planned quit to the extent that he planned to quit for these reasons was without good cause.

To the extent that claimant planned to quit because he was concerned about contracting COVID-19 at work and spreading it to vulnerable people in his life, he also would have quit without good cause. Here, claimant's concern was grave, as the vulnerable people in his life could have gotten seriously ill or died had he infected them with COVID-19. However, claimant did not seek reasonable alternatives prior to quitting. At hearing, claimant testified that he did not speak to the employer about his COVID-19 concerns before quitting because he felt that there were individuals at work who did not take COVID-19 seriously or believe that it was real, and he got "laughed at and ridiculed by a couple [of] employees for wearing a mask." Transcript at 11, 13. Claimant also testified that he *did* raise his concerns with the general manager when he gave his notice. Transcript at 13. By contrast, the general manager testified that he was not aware of claimant's concerns until claimant testified about them at hearing. Transcript at 19. The general manager also testified that their office followed COVID-19 safety protocols such as requiring employees to wear masks and enforcing social-distancing with six-foot guidelines on the floors. Transcript at 19, 20.

Because the evidence is equally balanced regarding whether claimant raised his COVID-19-related concerns with the employer before giving his notice, claimant has not met his burden to show that he actually did so, and the facts have been found accordingly. Further, had claimant raised the issue with the employer before giving his notice, the record shows that the employer would have taken steps to mitigate claimant's risk. Raising the issue with the employer prior to giving notice would have been a reasonable alternative to quitting. Because claimant did not do so, his planned voluntary quit would have been without good cause.

Claimant was discharged on October 5, 2020, but had intended to quit on October 16, 2020. Because claimant was discharged, but not for misconduct, within 15 days of the date on which he had planned to quit without good cause, ORS 657.176(8) applies to claimant's circumstances. Accordingly, ORS 657.176(8) requires that claimant be disqualified from receiving unemployment insurance benefits effective October 11, 2020 (week 42-20). Claimant is eligible for benefits for the week of October 4, 2020 through October 10, 2020 (week 41-20).

DECISION: Order No. 22-UI-196594 is modified, as outlined above.

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

DATE of Service: <u>September 27, 2022</u>

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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