

EMPLOYMENT APPEALS BOARD DECISION
2022-EAB-0948

Affirmed
No Disqualification

PROCEDURAL HISTORY: On January 14, 2021, 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 August 20, 2020 (decision # 75212). Claimant filed a timely request for hearing. On August 23, 2022, ALJ McGorin conducted a hearing and on August 25, 2022 issued Order No. 22-UI-201259, 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 September 9, 2022, the employer filed an application for review with the Employment Appeals Board (EAB).

EVIDENTIARY MATTER: EAB has considered additional evidence when reaching this decision under OAR 471-041-0090(1) (May 13, 2019). The additional evidence consists of thirteen pages originally submitted by the employer to the Office of Administrative Hearings (OAH) on August 23, 2022, a letter of explanation as to why EAB should consider the evidence, and a fax transmission report documenting when the thirteen pages of evidence were originally submitted to OAH. These documents show the employer timely submitted this portion of the evidence while the hearing record remained open for its receipt, however it was not forwarded to or considered by ALJ McGorin. The admission of this evidence is necessary to complete the record under OAR 471-041-0090(1)(a).

The employer also requested that EAB consider an e-mail dated August 23, 2022, as additional evidence. The employer did not attempt to submit it prior to the close of the hearing record because the employer did not discover it until after the record was closed. The timestamp of the email indicates it was sent prior to the record being closed, but the employer states that its receipt was delayed by a spam filter. As a result, factors or circumstances beyond the employer's reasonable control prevented them from offering the evidence into the record. Under OAR 471-041-0090(1)(b) this additional evidence is relevant and material to the EAB's determination.

These documents have been marked as EAB Exhibit 1. Any party that objects to our admitting EAB Exhibit 1 must submit such objection to this office in writing, setting forth the basis of the objection in

writing, within ten days of our mailing this decision. OAR 471-041-0090(2). Unless such objection is received and sustained, the exhibit will remain in the record.

FINDINGS OF FACT: (1) Wyeast Laboratories Inc. employed claimant as a laboratory lead from May 10, 2016, through September 1, 2020.

(2) On March 23, 2020, the employer announced new policies regarding COVID-19 for its employees, stating, “If you feel you can no longer work for any reason . . . we will hold your position here through the critical time of the pandemic.” Exhibit 1 at 3.

(3) On March 24, 2020, claimant emailed the employer to state that his child’s daycare had closed due to COVID-19 and that he was unable to work due to the need to provide childcare. The employer responded on March 28, 2020, stating that claimant would therefore be considered furloughed as of March 26, 2020, and that his position would be held through the “critical time of the pandemic.” The letter stated that claimant continued to be an at-will employee and that the employer planned to revisit workforce decisions on a monthly basis and would be in touch as necessary. Exhibit 1 at 9.

(4) On March 30, 2020, claimant learned of new legislation that potentially made him eligible for paid leave for a portion of his indefinite furlough, and emailed the employer to inquire further. The employer responded on April 7, 2020, that because of the new legislation, claimant would retroactively be placed on ten days of paid COVID-19 leave beginning April 1, 2020, immediately followed by ten weeks of leave under the Families First Coronavirus Response Act (FFCRA). The specific end date of the leave was not stated, nor was any expectation with regard to maintaining contact between claimant and the employer. The expectation of the parties that claimant would remain on unpaid furlough after the payments ceased until he was available to resume work remained unchanged.

(5) On April 27, 2020, claimant emailed the employer to request a meeting about his return to work. He indicated that his childcare issues were ongoing and that he was expecting a new baby in June 2020. The employer responded on May 8, 2020, that they would be in touch “within the next couple of weeks or so” to discuss the matter. Exhibit 1 at 16.

(6) On July 13, 2020, claimant emailed the employer that his new child had been born and he wanted to discuss returning to work in September 2020. The employer replied on July 17, 2020, that they would “let [him] know what they would like to do in terms of a meeting etc.” Exhibit 1 at 19. The employer had not notified claimant of the end date of his leave, nor that he had to report back on a certain day.

(7) On September 1, 2020, the employer emailed claimant that they considered him to have abandoned his job when he did not contact them “immediately upon expiration of [his] leave, June 17, 2020.” Exhibit 1 at 21. The employer invited him to apply for a different position. Claimant’s position was not open for him to return to on September 1, 2020.

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

The parties dispute the nature of the work separation. If an 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).

Claimant desired to maintain his relationship with the employer from March 2020 through September 2020 as evidenced by his emails. He told the employer in July 2020 of his intention to return to work in September 2020, as the issues requiring his absence had resolved. In the email of September 1, 2020, the employer informed claimant for the first time that they no longer considered him employed, and suggested he re-apply for a different position with them. The record shows that claimant was willing to continue working for the employer as of September 1, 2020, but was not allowed to do so by the employer. Therefore, the nature of the separation was a discharge.

The employer contends that claimant had not been employed by them since June 17, 2020. Exhibit 1 at 21. However, the employer testified this decision regarding his employment status was only made as of September 1, 2020. Transcript at 14. There was no communication from the employer to claimant on or after June 17, 2020, inquiring as to his availability to return to work or notifying him of a change in employment status. On July 17, 2020, the employer made no mention of claimant’s alleged work separation, which had supposedly occurred one month prior, when responding to claimant’s request for a meeting to negotiate the date of his return from leave. Instead, the employer delayed the meeting, as they had done before on May 8, 2020, leaving claimant to reasonably believe that he remained employed and on unpaid leave. The employer first communicated to claimant that he was no longer allowed to continue working for them on September 1, 2020, making that the date of 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 contended that claimant’s failure to contact the employer immediately upon the expiration of his leave constituted a violation of their attendance policy. Transcript at 18. There is no evidence that claimant was at any time informed that this was the end date of his paid leave, nor that the employer expected him to contact them on that or any other specific date. At hearing, the employer conceded that claimant had no duty under their policy to contact the employer every day he was on leave, as they originally contended, and ultimately could not answer whether claimant violated their attendance policy at all. Transcript at 27. The employer’s email communications with claimant in May 2020 and July 2020 further support claimant’s contention that he had not violated any of the employer’s expectations, as they imply that both parties intended for claimant to return to work as soon as he was available.

The employer's invitation to apply for a different position in their email of September 1, 2020, is further evidence the employer did not believe that claimant committed any misconduct in connection with his employment. The employer has failed to prove that claimant violated any expectation known to him.

The employer discharged claimant, but not for misconduct, and claimant is not disqualified from receiving unemployment insurance benefits based on his work separation.

DECISION: Order No. 22-UI-201259 is affirmed.

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

DATE of Service: December 2, 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 ໄດ້ໂດຍປະຕິບັດຕາມຄໍາແນະນໍາທີ່ບອກໄວ້ຢູ່ຕອນທ້າຍຂອງຄໍາຕັດສິນນີ້.

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 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 دستور العمل موجود در پایان آن، از دادگاه تجدید نظر اورگان درخواست تجدید نظر کنید.

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