

EMPLOYMENT APPEALS BOARD DECISION
2022-EAB-1002

Reversed
No Disqualification

PROCEDURAL HISTORY: On July 21, 2022, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that the employer discharged claimant, but not for misconduct, and that claimant was not disqualified from receiving unemployment insurance benefits based on the work separation (decision # 144429). The employer filed a timely request for hearing. On September 22, 2022, ALJ Goodrich conducted a hearing, and on September 28, 2022 issued Order No. 22-UI-203709, reversing decision # 144429 by concluding that claimant quit work without good cause and was disqualified from receiving benefits. On October 3, 2022, claimant filed an application for review with the Employment Appeals Board (EAB).

WRITTEN ARGUMENT: EAB did not consider claimant's written argument when reaching this decision because claimant did not declare that he provided a copy of his argument to the opposing party or parties as required by OAR 471-041-0080(2)(a) (May 13, 2019).

FINDINGS OF FACT: (1) Rugby Holdings LLC employed claimant as a door shop worker from August 17, 2019 to July 1, 2022.

(2) The employer expected that their employees would attend work as scheduled, and not be absent, if given reasonable notice of the work schedule.

(3) On April 4, 2022, claimant received a written warning regarding absences from work. The reasons for these absences included pre-approved leave, bereavement leave, and sick leave at the advice of a doctor. The employer was properly notified by claimant of each absence and excused these absences. Claimant recorded the conversation regarding the warning, but refused to sign the warning because he believed he had not violated any of employer's policies. Transcript at 29.

(4) On June 3, 2022, claimant and the employer reached an agreement that for the following sixty days, claimant would be permitted to work a four-day weekly schedule consisting of Monday through Friday with Thursday off. They agreed that if another employee had a scheduled vacation during a week,

claimant would be required to work five days and would not have Thursday off. The agreement was reduced to writing and signed by both parties.

(5) On Tuesday, June 28, 2022, claimant was ill with flu symptoms and was advised by his doctor to stay home from work. He promptly notified the employer, and returned to work on Wednesday, June 29, 2022. He did not report to work on Thursday, June 30, 2022, as he was not scheduled to work per the agreement.

(6) On Friday, July 1, 2022, claimant reported for work as scheduled. Approximately two hours into his shift, he was summoned to the manager's office. The manager stated that he was voiding the agreement regarding the four-day work schedule and claimant was to return to working every weekday, effective immediately. He stated that if claimant did not appear for work the following Thursday, he would be terminated. Claimant protested the premature ending of the agreement and would not commit to coming to work on Thursday because he had made other plans for that day. The manager discharged claimant, effective immediately.

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

The parties disputed 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). The date an individual is separated from work is the date the employer-employee relationship is severed. OAR 471-030-0038(1)(a).

The order under review concluded that claimant quit work immediately after being told that the employer was requiring claimant to resume a five-day work schedule. Order No. 22-UI-203709 at 4. However, Order No. 22-UI-203709 did not sufficiently weigh the employer's testimony on which this finding was based against other inconsistent statements by the employer, and against claimant's testimony that he was discharged prior to leaving the worksite and not permitted to continue working that day despite his desire to do so.

The parties' testimony was in conflict regarding their discussion on claimant's final day of work. Claimant testified that when he told the manager on July 1, 2022 that he needed the following Thursday off before returning to a five-day work schedule, the manager responded that he would be terminated if he did not appear for work that Thursday. Transcript at 22. When claimant would not commit to working the following Thursday, claimant testified that the manager "made it clear" that he was terminated, effective that morning. Transcript at 23. In contrast, the manager testified that after he told claimant that he would be discharged if he failed to appear for work the following Thursday, claimant said, "I'm just leaving now," and left the worksite. Transcript at 12. The manager testified that he expected claimant to continue working, at least until the previously scheduled Thursday off. Transcript at 16.

While claimant was largely consistent in his account of these events, the employer gave differing statements. The manager first testified that the written agreement regarding the four-day workweek

contained a clause that if claimant missed a day of work during the week, he had to make it up by working Thursday. Transcript at 8. After it was pointed out that this was not in the written agreement, he testified that it was part of a verbal agreement reached the same day as the written agreement. Transcript at 33-34. However, he had previously testified that the only verbal modification to the written agreement was that claimant would not have to work on a Thursday if an employee besides claimant called in sick. Transcript at 19-20. He later testified that the employer's expectation, based on the agreement, was that claimant would not have to work on a Thursday if he called out sick another day that week unless he was told otherwise. Transcript at 32. These inconsistencies indicate that the employer's recollections of this agreement and events surrounding it are likely less accurate than claimant's, and therefore entitled to less weight.

Significantly, claimant's evidence included a portion of the employer's written statement to the Department in their request for hearing. Claimant testified the employer wrote that, "[Claimant] had not been terminated because he declined to make up [sick] hours on Thursday. It was due to excessive absences." Transcript at 24. The employer's written assertion that they discharged claimant is partially supported by the manager's testimony that what he considered to be the final incident leading to separation was that the employer told claimant he would have to make up the missed sick day on his scheduled day off, and claimant failed to come in. Transcript at 12. The employer offered no explanation for why they told the Department that claimant had been discharged if he had quit as they maintained during the hearing. This portion of the written statement is therefore more credible than the employer's testimony contradicting it. More likely than not, the employer discharged claimant.

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).

Claimant testified that he told the employer he was not going to report to work on the following Thursday because he believed the employer had violated their written agreement. Transcript at 23-24. However, the signing of this agreement did not change the at-will nature of the employment relationship. Though not written in the agreement, by operation of law, the employer retained the right to modify claimant's schedule as they wished, though claimant was likely unaware of this. The manager testified that if claimant had asked for one final Thursday off to accommodate existing obligations, he would have allowed it. Audio Record at 46:11 to 46:40. However, this contradicts other testimony by the manager that claimant would be terminated if he did not work that Thursday.¹ Transcript at 12, 15. The manager also testified that he did not expect claimant to work on his planned day off on "short

¹ During his initial testimony, the manager repeatedly referred to claimant's agreed day off as Wednesday rather than Thursday, but later corrected this. Transcript at 31.

notice.” Transcript at 19. However, informing claimant on a Friday that he must work the following Thursday can reasonably be interpreted as “short notice.” The employer therefore failed to show that claimant’s refusal to immediately commit to working that day violated the employer’s reasonable expectations. Thus, to the extent the employer discharged claimant for that reason, misconduct has not been established.

Claimant testified that prior to that final incident, he missed work on some occasions due to illness, bereavement, and pre-approved leave. Transcript at 29-30. Claimant disputed being absent 15 times in a three-month period, as asserted by the employer. Transcript at 29. On cross-examination, the employer questioned claimant about receiving a “final notice” regarding his attendance on April 4, 2022, which claimant testified he disagreed with and refused to sign. Transcript at 29. The employer did not offer other testimony as to the frequency of claimant’s absences, nor did they dispute the reasons given by claimant for them. When asked about claimant’s absence on June 28, 2022, the manager testified that claimant “. . . was always good about calling in or notifying. That wasn’t – that wasn’t the problem. That was never a problem.” Transcript at 13.

Pursuant to OAR 471-030-0038(3)(b), absences from work that are caused by illness, physical disability or mental disability are not misconduct. Thus, to the extent the employer discharged claimant for absences prior to employer has not shown that claimant had unexcused absences for reasons other than those covered by this rule. Accordingly, the employer has not met their burden of proving misconduct.

The employer therefore discharged claimant, but not for misconduct. Claimant is not disqualified from receiving benefits based on the work separation.

DECISION: Order No. 22-UI-203709 is set aside, as outlined above.

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

DATE of Service: December 14, 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.

Employment Appeals Board - 875 Union Street NE | Salem, OR 97311
 Phone: (503) 378-2077 | 1-800-734-6949 | Fax: (503) 378-2129 | TDD: 711
www.Oregon.gov/Employ/eab

The Oregon Employment Department is an equal opportunity employer/program. Auxiliary aids and services are available upon request to individuals with disabilities. Language assistance is available to persons with limited English proficiency at no cost.

El Departamento de Empleo de Oregon es un programa que respeta la igualdad de oportunidades. Disponemos de servicios o ayudas auxiliares, formatos alternos y asistencia de idiomas para personas con discapacidades o conocimiento limitado del inglés, a pedido y sin costo.