EO: 200
BYE: 202211

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

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VQ 005.00

EMPLOYMENT APPEALS BOARD DECISION
2022-EAB-1017

Affirmed
No Disqualification

PROCEDURAL HISTORY: On April 30, 2021, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant, but not for misconduct, and claimant was not disqualified from receiving benefits based on the work separation (decision # 73708). The employer filed a timely request for hearing. On September 16, 2022, ALJ Nyberg conducted a hearing, and on September 22, 2022 issued Order No. 22-UI-203351, affirming decision # 73708. On October 5, 2022, the employer filed an application for review with the Employment Appeals Board (EAB).

WRITTEN ARGUMENT: The employer did not declare that they provided a copy of their 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 the employer's reasonable control prevented them 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) De Terra LLC employed claimant as a facilities lead technician until March 22, 2021.

(2) Around January 2021, claimant decided that he wanted end his employment with the employer. Claimant and the employer discussed this and agreed claimant would continue working until May 14, 2021 in order for the employer to obtain and train his replacement.

(3) Throughout his employment, the employer permitted claimant to bring his dogs to work. Claimant had always brought one dog with him into work. Toward the end of his employment, claimant began bringing a second dog into work with him. When claimant did this, his initial dog became more aggressive, charging at several people and biting four people, including one of the owners.

(4) On the evening of Sunday, March 21, 2021, claimant received a text message from the employer's operations manager that informed claimant that he was no longer allowed to bring his dogs to work with

him. This was the first time claimant learned of the employer's policy change prohibiting him from bringing his dogs into work. Claimant was scheduled to work the following morning.

(5) Claimant responded to the employer that he would not be able to arrange for his dogs to be somewhere else before his next shift. Claimant informed the employer that he could not afford daycare and that because of the late notice, he would likely need to be take some time off in order to build a shelter or come up with other accommodations for his dogs.

(6) On Monday, March 22, 2022, the employer responded that "I think it may be best at this point to just end the working agreement early… I'll have Lori get your check ready today when she gets in." Transcript at 14.

CONCLUSIONS AND REASONS: The employer discharged claimant, 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).

Before the work separation on March 22, 2021, claimant gave the employer notice that he would be leaving his position. Claimant and the employer agreed upon May 14, 2021, as the last day of employment. When a claimant gives notice, agrees to work until a set date, and then works until that date, the work separation is a voluntary leaving. Additionally, if the claimant and the employer later agree to an earlier date, the work separation remains a voluntary leaving. *J.R. Simplot Co. v. Employment Division*, 102 Or App 523, 795 P2d 579 (1990) (where claimant notified the employer of his intent to resign on a particular date, and the employer established a different separation date, claimant's "agreement" to the new separation date can be inferred if claimant did not voice disagreement with the new date or otherwise insist upon working until the original resignation date); see also *Smith v. Employment Division*, 34 Or App 623, 579 P2d 310 (1978). Here, however, claimant did not work until May 14, 2021, and he and the employer did not mutually agree to end claimant's employment on March 22, 2021. Whether the work separation was a voluntary leaving or a discharge therefore depends on the events that accelerated the separation.

Here, the parties disagreed about the details of the final conversation that created this separation. According to the employer's witness, the employer told claimant that he could no longer bring his dogs to work, and claimant responded with an "ultimatum. If – if I can't bring my dogs then I can't come to work." Transcript at 8. Because of recent incidents, the employer would not allow claimant to bring the dogs to work, and understood this message to be claimant's refusal to continue to work. Claimant, on the other hand, testified that after learning he couldn't bring his dogs into work, he sent a text to his employer that he would need to build a shelter for his dogs, and that he likely would need time off to do that. Transcript at 28. Claimant testified that he was willing to make these arrangements, but the employer texted him back that, "I think it may be best at this point to just end the working

agreement…I'll have Lori get your check ready today." Transcript at 14. Claimant took this message as a discharge and did not show up to work afterwards.

The weight of the evidence supports claimant's account of the facts. Claimant presented his evidence of the final conversation through text messages read into the record. The employer's witness corroborated these messages by testifying that he believed these messages were "fairly accurate." Transcript at 30. This corroboration lends credibility to claimant's account, and thus the record supports claimant's account of the final conversation. Based on this record, the work separation was a discharge. Claimant's willingness to arrange for his dog's care evinced his willingness to continue working. The employer's message stating that they believed it best to end the employment is a direct statement that claimant is no longer allowed to work for them. Because claimant was willing to work, but the employer would not allow it, the work separation is 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) (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).

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. On Sunday, March 21, 2022, the employer informed claimant that they had updated their pet policy, and claimant was no longer allowed to bring his dogs to work. This was a reasonable policy for the employer to implement, especially given the previous incidents with claimant's dogs. However, the employer has not shown that claimant violated this policy or that any such violation was done willfully or with wanton negligence.

After the employer informed claimant of the policy, the employer discharged him before he ever returned to work. Claimant never broke this policy regarding bringing pets to work because he never returned to work. Further, once claimant became aware of the updated policy, he immediately informed the employer that he could not afford daycare for his dogs, and would require time to build the dogs a shelter. He also sought clarification of the policy by inquiring whether the dogs could remain in his truck throughout the workday. These actions demonstrate that claimant was not indifferent to the policy, but rather was making efforts to comply with it. The employer did not respond to these inquires and instead discharged claimant. Because the claimant never broke the policy and was making efforts to comply with it, the employer discharged claimant, not for misconduct.

ORS 657.176(8). Because the employer discharged the claimant, not for misconduct, before a planned voluntary leaving, it is necessary to assess whether ORS 657.176(8) applies to this case. 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."

ORS 657.176(8) does not apply here because the employer discharged claimant more than 15 days prior to claimant's planned voluntary leaving. When claimant gave the employer his notice the parties agreed claimant would continue working until May 14, 2021. Transcript at 16. The employer discharged the claimant on March 22, 2022, more than 15 days prior to the planned voluntary leaving date ORS 657.176(8) therefore does not apply.

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

DECISION: Order No. 22-UI-203351 is affirmed.

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

DATE of Service: December 15, 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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