

EMPLOYMENT APPEALS BOARD DECISION
2022-EAB-1028

Reversed
No Disqualification

PROCEDURAL HISTORY: On July 25, 2022, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant quit working for the employer without good cause and was disqualified from receiving unemployment insurance benefits effective July 3, 2022 (decision # 145646). Claimant filed a timely request for hearing. On September 20, 2022, ALJ Frank conducted a hearing, and on September 22, 2022 issued Order No. 22-UI-203297, affirming decision # 145646. On October 7, 2022, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Arbor Memory Care LLC employed claimant as a caregiver from June 24, 2022 through July 8, 2022.

(2) On August 18, 2021, claimant was injured in a motor vehicle accident, and her injuries restricted her ability to lift more than ten pounds. Claimant's doctor released her from this restriction effective June 23, 2022, the day before she began working for the employer.

(3) On July 8, 2022, claimant awoke unable to move her left arm, which was swollen. She sought urgent treatment and timely notified the employer that she would not be at work that day. Claimant's doctor reinstated the ten-pound lifting restriction.

(4) Later on July 8, 2022, claimant informed the employer of the new restriction. Both parties agreed claimant was therefore incapable of performing her work as a caregiver. Claimant requested other work that she could perform with the restriction, such as medication technician, but the employer had recently filled that position so no such work was available. The employer told claimant that they would "find somebody else to do the job that [they] hired [her] for." Transcript at 11. This led claimant to believe she had been discharged. At no time did claimant say that she was quitting the work.

(5) On July 9, 2022, claimant texted the employer inquiring, "Due to you letting me go when will I get my final paycheck?" Transcript at 25. The employer replied, "It's not me letting you go. You told me you can't do the job." Transcript at 25. The employer also wrote, "If they clear you I will still have you

back as a caregiver . . . If you want a check we can process it on payday.” Transcript at 26-27. When claimant picked up her paycheck the following day, claimant told the employer she did not believe she would ever be capable of working as a caregiver again.

CONCLUSIONS AND REASONS: Claimant was discharged, 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). 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 order under review concluded that claimant moved to sever the employment relationship by reporting that she was unable to perform the duties of her position, even as she sought accommodations to continue working for the employer. Order No. 22-UI-203297 at 2-3. However, the order failed to recognize that the employer’s response to claimant that they would find somebody else to do her job would have led any reasonable person to believe that they had been discharged. Claimant was willing to continue to work for the employer on July 8, 2022, and sought transfer to positions compatible with the restrictions placed on her by her doctor, but no such positions were available. The employer agreed that claimant never told them that she was quitting. Transcript at 22. The employer commented to claimant on July 8, 2022, that they “will find somebody else to do the job.” Transcript at 24. This reasonably led claimant to believe she had been discharged. Claimant’s request for her final paycheck the following day due to the employer “letting [her] go” made the employer aware of claimant’s understanding of her employment status. Transcript at 25.

On July 9, 2022, the employer replied to claimant’s assertion that she had been discharged by saying that they had not let her go, but that she could no longer do the job. Transcript at 25. The employer wrote to claimant, “If they clear you I will still have you back as a caregiver.” Transcript at 26. The employer asserted at hearing that they intended this to mean that they considered claimant to be on indefinite unpaid leave. Transcript at 27. Claimant believed she would never be released to do caregiver work, and told the employer as much when she picked up her final paycheck. Claimant did not interpret the employer’s statement to mean she remained employed and on leave.

The record shows that claimant intended to keep working for the employer on July 8, 2022, and made every effort to do so. Claimant suggested positions that she could perform despite her medical restrictions and that she thought the employer was looking to fill. The employer’s response of declining to consider claimant for other positions and telling her that they would find someone else to do her job reasonably led claimant to believe that she had been discharged. The employer’s intent to place claimant on indefinite unpaid leave from which she was unlikely to be able to return was not conveyed to claimant, and her response would not reasonably have been construed as allowing claimant to continue working for an additional period of time. The work separation therefore is properly considered a 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 has raised no doubts as to the veracity of claimant's assertion that she was indefinitely restricted by her doctor from lifting more than ten pounds due to illness or physical disability, and that her job required such lifting. Claimant attempted to find alternatives to allow her to continue working for the employer to no avail. An inability to perform the duties of a position due to illness or physical disabilities is not a willful or wantonly negligent violation of the standards of behavior an employer has the right to expect of an employee.

Claimant's discharge therefore was not for misconduct. She is not disqualified from benefits based on the work separation.

DECISION: Order No. 22-UI-203297 is set aside, as detailed above.

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

DATE of Service: December 20, 2022

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.

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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