

EMPLOYMENT APPEALS BOARD DECISION
2022-EAB-1103

Affirmed
No Disqualification

PROCEDURAL HISTORY: On January 10, 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 May 31, 2020 (decision # 164911). Claimant filed a timely request for hearing. On October 24, 2022, ALJ Fraser conducted a hearing, and on October 26, 2022 issued Order No. 22-UI-205929, reversing decision # 164911 by concluding that claimant quit work with good cause and was not disqualified from receiving unemployment insurance benefits based on the work separation. On November 3, 2022, the employer filed an application for review with the Employment Appeals Board (EAB).

WRITTEN ARGUMENT: The employer's argument 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. Under ORS 657.275(2) and OAR 471-041-0090 (May 13, 2019), EAB considered only information received into evidence at the hearing when reaching this decision. EAB considered the employer's argument to the extent it was based on the record.

FINDINGS OF FACT: (1) Tara Labs Inc. employed claimant from March 2017 until July 2, 2020.

(2) Claimant had a hyperactive immune system disorder that required him to take an immunosuppressant medication. This medication weakened claimant's immune system and placed him at a high risk for developing complications if he were to contract COVID-19. Claimant also was diabetic and had psoriasis, each of which was a high risk factor for developing complications if he were to contract COVID-19.

(3) On April 13, 2020, claimant's physician advised that he take a leave of absence from work so that he could quarantine because of the risks posed by COVID-19. This recommendation did not list a specific end date. Based on this advice, claimant took a leave of absence from the employer.

(4) Around late April 2020, the employer called claimant and requested that he return to work. Claimant responded that he needed to continue quarantining on the advice of his physician. Claimant offered to work remotely, or during off hours when other employees would not be present. The employer rejected this offer.

(5) On May 12, 2020, the employer texted claimant requesting information regarding when he would be returning to work. Claimant replied that he was still self-quarantining under the order of his physician.

(6) On May 20, 2020, claimant's physician continued his recommendation that claimant remain quarantined because of the risks posed by COVID-19. The doctor also recommended that the employer consider upgrading their air filtration system. Based on this recommendation, claimant continued to quarantine and forwarded the recommendation to the employer.

(7) The employer purchased and installed the air filtration system that claimant's doctor recommended, as well as additional air purifiers.

(8) On May 29, 2020, the employer sent claimant a text stating that they needed claimant to return to work and that if he did not they would need to find someone else who could do claimant's position.

(9) On June 2, 2020, the employer sent claimant another message reiterating the request that claimant return to work.

(10) On June 11, 2020, claimant's physician provided a third letter continuing the recommendation that claimant quarantine. This recommendation stated that claimant "should not be in situations where social distancing is not practiced nor face coverings used." Transcript at 11. Based on this recommendation, claimant continued to quarantine.

(11) On June 15, 2020, the employer sent claimant a text message stating, "I can't keep holding your job. I've got to have someone in here. It's slowing production." Transcript at 28.

(11) On July 2, 2020, claimant's direct supervisor arrived at claimant's house with claimant's final check, and asked claimant to return his key to the employer's location.

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)

The work separation was a discharge that occurred on July 2, 2020. On this date, the employer decided that they were unable to continue waiting for claimant to become able to work. The employer expressed this to claimant by texting "I've got to find someone else[,] and bringing claimant his final check and

requesting that he return company property. Transcript at 29. The record shows that claimant was willing to return to work when he became able to do so. During the quarantine period, claimant suggested alternative working arrangements that would comply with his doctor's orders, and remained in contact with the employer while he was unable to work. Claimant therefore was willing to work for the employer for an additional period of time.

At hearing, the employer maintained that the separation was a quit because they believed claimant was able but unwilling to return to work despite his doctor's ongoing recommendation to quarantine. Claimant's adherence to his doctor's recommendation to quarantine does not demonstrate an unwillingness to continue working. Though the employer took measures to mitigate claimant's risk of COVID-19 exposure, including installing the filtration system recommended by claimant's doctor, it does not follow that claimant therefore was able to work. Claimant's doctor never cleared claimant to return to work and instead continued to recommend that he quarantine. The employer eventually determined that they could not wait for a change in this recommendation. This ultimately led the employer to ask claimant to return company property and to bring claimant his final check. Both of these actions show that the employer had determined they were unable to continue waiting for claimant to return, and severed the employment relationship on July 2, 2020. Since claimant was willing to continue the employment relationship for an additional period of time, but the employer did not allow him to, the work separation was 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).

However, Oregon temporary rules set out unemployment insurance provisions applicable to the unique situations arising due to COVID-19 and the actions to slow its spread. OAR 471-030-0070(2)(a) (effective March 8, 2020 through September 12, 2020) provides that an individual who is discharged from work because of a COVID-19 related situation is not disqualified from receiving unemployment insurance benefits. Under OAR 471-030-0070(1), a COVID-19 related situation includes the following:

(c) A person is unable to work because they have been advised by their health care provider or by advice issued by public health officials to self-quarantine due to possible risk of exposure to, or spread of, the novel coronavirus;

The employer discharged claimant from work on July 2, 2020, because of a COVID-19 related situation, that he was unable to work because his doctor advised him to self-quarantine. On April 13, 2020, claimant received a recommendation from his doctor that he quarantine due to his risk of complications

if he were to contract COVID-19. His doctor continued, but modified, this recommendation on May 20, 2020, and again on June 11, 2020. The record does not show that claimant's doctor released him from quarantine status before the employer discharged him on July 2, 2020. The employer testified that on June 15, 2020, they texted claimant "I can't keep holding your job. I've got to have someone in here. It's slowing production." Transcript at 28. On July 2, 2020, the employer did not believe they could continue to wait for claimant to become able to work and discharged him because he was unable to return to work due to his doctor's recommendation to quarantine. As this was a COVID-19 related situation as defined by OAR 471-030-0070, the discharge did not disqualify claimant from receiving benefits.

The employer therefore discharged claimant because of a COVID-19 related situation while OAR 471-030-0070 was in effect, and claimant is not disqualified from receiving benefits based on the work separation.

DECISION: Order No. 22-UI-205929 is affirmed.

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

DATE of Service: January 11, 2023

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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