

EMPLOYMENT APPEALS BOARD DECISION
2023-EAB-0014

Modified
Late Request for Hearing Allowed
No Disqualification

PROCEDURAL HISTORY: On July 30, 2021, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant was discharged by the employer, but not for misconduct, and was not disqualified from receiving benefits based on the work separation (decision # 134308). On August 19, 2021, decision # 134308 became final without the employer having filed a request for hearing. On September 20, 2021, the employer filed a late request for hearing. ALJ Kangas considered the employer's request and on November 4, 2021 issued Order No. 21-UI-179065, dismissing the request as late, subject to the employer's right to renew the request by responding to an appellant questionnaire by November 18, 2021. On November 17, 2021, the employer filed a timely appellant questionnaire response. On February 17, 2022, the Office of Administrative Hearings (OAH) mailed a letter stating that Order No. 21-UI-179065 was vacated and that a new hearing would be scheduled to determine whether to allow the employer's late request for hearing and, if so, the merits of decision # 134308. On December 7, 2022, ALJ Mott conducted a hearing, and on December 9, 2022 issued Order No. 22-UI-209372, allowing the employer's late request for hearing and reversing decision # 134308 by concluding that claimant was discharged for misconduct and was disqualified from receiving benefits effective January 24, 2021. On December 22, 2022, claimant filed an application for review of Order No. 22-UI-209372 with the Employment Appeals Board (EAB).

WRITTEN ARGUMENT: Claimant's argument contained information that was not part of the hearing record, and did not show that factors or circumstances beyond claimant's reasonable control prevented him 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 claimant's argument to the extent it was based on the record.

Based on a *de novo* review of the entire record in this case, and pursuant to ORS 657.275(2), the portion of the order under review allowing the employer's late request for hearing is **adopted**. The remainder of this decision relates to whether claimant was discharged for misconduct.

FINDINGS OF FACT: (1) The employer employed claimant as a caregiver from November 2020 until January 28, 2021.

(2) The employer was a physically disabled person who required caregiving assistance for daily activities. The employer expected claimant to report for his scheduled shifts and not leave a shift without returning to work it. Claimant understood this expectation.

(3) On January 28, 2021, claimant was scheduled to begin work for the employer at about 9:30 p.m. for an overnight shift. Claimant arrived at the employer's home at 9:20 p.m. for his shift and upon his arrival discovered the employer had sent him a text changing the start time to 10:00 p.m. Claimant waited in his car until 10:00, then approached the employer's front door and knocked loudly for five minutes. While doing so, claimant, who had a medical condition that caused him to urinate frequently, felt a strong urge to urinate and checked the door but discovered it was locked. The employer did not typically lock the door. Claimant could see the employer through a side window watching television and observed that as he knocked loudly, the employer did not respond and kept watching television. Claimant concluded that the employer was purposely ignoring him, and returned to his car.

(4) Claimant called his mother for advice and spoke to her for five to seven minutes while watching the door for any sign of the employer opening it. The employer never answered the door. Claimant concluded that he should leave and go home because the employer did not answer the door, and claimant had a strong urge to urinate but felt he could only do so at home because COVID-19 restrictions limited his ability to do so elsewhere.

(5) When claimant returned home, he used the bathroom. Thereafter, he called the employer and stated that he could see that the employer did not answer the door and was purposely ignoring him. The employer replied that the January 28, 2021 shift was going to be claimant's last night working anyway because he had a new worker lined up to do claimant's job. The employer then hung up on claimant.

(6) On January 29, 2021, the employer sent claimant a text reiterating that claimant had been discharged the previous night. The employer discharged claimant because he left at the start of his shift on January 28, 2021 and did not return to work it.

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

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 employer discharged claimant for leaving at the start of his shift on January 28, 2021 and not returning to work it. At hearing, the parties offered different accounts of what occurred on January 28, 2021. The employer testified that claimant arrived for work around 9:00 p.m. and knocked on his front door for five minutes while the employer was in a back room. Transcript at 32. The employer testified that he heard the knocking faintly, answered the door, and that when he did so claimant looked upset that the employer had not answered the door immediately. Transcript at 32. The employer stated he opened the door for claimant to enter and then went to the bathroom, and when he returned from the bathroom claimant was gone. Transcript at 33. The employer further testified that he tried calling claimant multiple times over the next hour and upon reaching him, advised claimant would be discharged if he did not return. Transcript at 36. In response, claimant allegedly stated, “I guess you’re not going to be having a caregiver tonight” and hung up. Transcript at 34. The employer then called his mother, who eventually arrived and performed caregiving assistance that night. Transcript at 35.

Claimant’s telling of the events of January 28, 2021 differed significantly. Claimant testified that he had a condition that caused him to urinate frequently. Transcript at 50. Claimant further testified that his shift was scheduled to begin at 9:30 p.m. but that the employer had sent a text while claimant was driving to work that changed the start time to 10:00 p.m., thereby requiring claimant to wait in his car from when he arrived at 9:20 p.m. until 10:00 p.m. Transcript at 50. Claimant stated that at 10:00 p.m. he went to the employer’s front door and noticed it was locked, and that he could view the employer watching television from a side window. Transcript at 50-51. Claimant then knocked loudly on the employer’s door for five minutes and waited there while needing to urinate but saw through the window that the employer continued watching television. Transcript at 50. Claimant thought the employer was purposely ignoring him so he returned to his car and talked to his mother on the phone for another five to seven minutes while watching to see whether the employer answered the door. Transcript at 51-52. Claimant then departed to return home to urinate and, after doing so, called the employer. Transcript at 52. Claimant testified that he told the employer, “You were purposely ignoring me[.]” to which the employer replied that he had someone new lined up to do claimant’s job and January 28, 2021 was going to be claimant’s last shift working for the employer anyway, and then hung up. Transcript at 58.

These two accounts of why claimant departed on January 28, 2021 and did not return to work his shift are no more than equally balanced. No documentary evidence exists in the record to favor one account over the other. The employer’s mother testified, as did claimant’s mother, but each witness corroborated only what they had heard from their son and so neither witness tipped the balance of the evidence in favor of one party over the other. Transcript at 44-48; 70-73. Where the evidence is no more than equally balanced, the party with the burden of persuasion—here, the employer—has failed to satisfy their evidentiary burden. Consequently, on the disputed issue of why claimant departed and did not return to work his shift on January 28, 2021, EAB based its findings on claimant’s evidence.

Accordingly, the employer did not meet his burden to show that he discharged claimant for misconduct. The employer did not prove that claimant violated the employer’s expectations willfully or with wanton negligence when he left his shift because claimant did so after the employer failed to answer the door and due to a strong urge to urinate brought on by a medical condition. Nor did the employer establish it was a willful or wantonly negligent violation for claimant not to return to his shift after relieving himself at home because the record shows that the employer discharged claimant when the two spoke over the phone. In that conversation, the employer advised he had a new worker lined up to do claimant’s job, January 28, 2021 was going to be claimant’s last shift anyway, and then hung up on claimant. This is

sufficient to show that the employer would not allow claimant to work for an additional period of time,¹ and therefore discharged claimant during the phone call. Claimant's failure to return to work his shift after being discharged did not amount to misconduct.

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

DECISION: Order No. 22-UI-209372 is set aside, as outlined above.

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

DATE of Service: February 22, 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.

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.

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.

¹ 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) (September 22, 2020).



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، می توانید با استفاده از دستور العمل موجود در پایان آن، از دادگاه تجدید نظر اورگان درخواست تجدید نظر کنید.

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