

EMPLOYMENT APPEALS BOARD DECISION
2023-EAB-0140

Affirmed
No Disqualification

PROCEDURAL HISTORY: On June 7, 2021, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant voluntarily quit work without good cause and was therefore disqualified from receiving unemployment insurance benefits effective May 3, 2020 (decision # 145039). Claimant filed a timely request for hearing. On January 5, 2023, ALJ Taylor conducted a hearing, and on January 9, 2023 issued Order No. 23-UI-212029, reversing decision # 145039 by concluding that claimant voluntarily quit work with good cause and was not disqualified from receiving benefits based on the work separation. On January 24, 2023, the employer filed an application for review with the Employment Appeals Board (EAB).

WRITTEN ARGUMENT: EAB did not consider the employer's written argument when reaching this decision because they did not include a statement declaring that they provided a copy of their argument to the opposing party as required by OAR 471-041-0080(2)(a) (May 13, 2019).

The employer asserted that the hearing proceedings were unfair and the ALJ was biased. The employer objected to the admission of Exhibit 1, consisting of a letter and text messages offered into evidence by claimant, because the employer did not receive a copy of that exhibit prior to the hearing. Audio Record at 5:44 to 6:45. The employer's objection was sustained and Exhibit 1 was not admitted to evidence. Order No. 23-UI-212029 at 1. However, claimant was permitted to read portions of those text messages as part of her testimony. Transcript at 8-9. This does not demonstrate bias, or that the hearing was unfair, as each party was permitted to offer any relevant testimony they wished. This could have included reading portions of text messages or other documents into the record if they so desired, even if the documents themselves had not been admitted into evidence as exhibits or disclosed to the other party prior to the hearing. Audio Record at 6:46 to 6:54. The record does not show that the employer was prevented from offering any testimony or evidence they wished to present during the hearing. While some questions posed to both parties were phrased in a way that suggested the answer or may have appeared to seek agreement between the parties on certain issues, the record shows that these questions largely pertained to the parties' views on when they believed the employment relationship ended, and were likely posed in that manner merely to determine whether further inquiry was needed into those particular issues if the parties expressed disagreement. As explained later in this decision, the work

separation occurred, as a matter of law, far earlier than either party stated they believed it had occurred, and therefore this portion of the testimony had little, if any, practical effect on the decision. The employer was therefore not prejudiced by the phrasing of the questions in this manner. As to the employer's remaining allegations, there is nothing in the record to suggest that the ALJ was biased against the employer based on what the ALJ may have perceived the employer's race to be, or for any other reason. There is also nothing in the record to indicate that the ALJ had developed any relationship with claimant, or any bias in favor of claimant, prior to or during the hearing. EAB reviewed the hearing record in its entirety, which shows that the ALJ inquired fully into the matters at issue and gave all parties reasonable opportunity for a fair hearing as required by ORS 657.270(3) and (4) and OAR 471-040-0025(1) (August 1, 2004).

FINDINGS OF FACT: (1) Hazelnut Dental, LLC employed claimant as a patient coordinator at their dental clinic from approximately December 2019 until approximately March 23, 2020.

(2) On March 19, 2020, Executive Order No. 20-10 was issued, prohibiting the operation of dental clinics except for urgent procedures effective March 23, 2020 through at least June 15, 2020, due to the COVID-19 pandemic.

(3) On approximately March 23, 2020, the employer curtailed or ceased operations as a direct result of Executive Order No. 20-10, and at that time placed claimant on indefinite furlough due to a lack of work.

(4) On June 14, 2020, claimant and the employer spoke about claimant returning to work, but there was not sufficient work at that time for the employer to recall claimant to work, or provide her with a date at which she might be recalled to work. As a result, claimant began looking for other work.

(5) On July 3, 2020, claimant began the interview process for another job, which she ultimately accepted and commenced working the following week. Claimant did not return to work for the employer.

CONCLUSIONS AND REASONS: Claimant was discharged, but not for misconduct.

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 record does not show precisely when claimant last performed work for the employer, but as she was placed on furlough as a result of Executive Order No. 20-10, it can be inferred that the furlough began on the same date that order became effective, March 23, 2020. Because of that order, the employer's operations were curtailed, and they did not have work available for claimant at that time, though claimant desired to continue working for the employer. Even if characterized by the employer as a "temporary layoff," the furlough was indefinite because the employer did not know when there would be sufficient work for claimant to return, and therefore the continuing relationship between employer and employee ceased at this time. Transcript at 17. Since claimant was willing to continue to work for the

employer for an additional period of time, but was not allowed to do so by the employer due to the lack of work caused by Executive Order 20-10, the work separation was a discharge that occurred on March 23, 2020.

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).

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. *Former* 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:

* * *

(d) A person is unable to work because their employer has ceased or curtailed operations due to the novel coronavirus, including closures or curtailments based on the direction or advice of the Governor or of public health officials;

* * *

The employer discharged claimant from work because of a COVID-19 related situation. Executive Order No. 20-10 prohibited the employer from operating their dental practice except to perform urgent procedures. This understandably curtailed the employer’s operations and created a lack of work for claimant as a patient coordinator. The employer’s witness testified that at that time, there was “just no work for dental, like anyone in dental,” and they told claimant, “[E]veryone’s getting into a temporary layoff.” Transcript at 17. The employer’s witness also testified that they did not know, at the time claimant was laid off, when she might be recalled to work, stating, “We didn’t know what the next steps were going to be. We were waiting for the Governor to make the call. And so we really were just waiting to see how this progressed.” Transcript at 17. Therefore, the employer discharged claimant by placing her on indefinite furlough, as discussed above, and did so because claimant was unable to work when the employer ceased or curtailed operations due to COVID-19 based on the direction of the Governor. Accordingly, claimant is not disqualified from receiving unemployment insurance benefits, pursuant to OAR 471-030-0070(1).

Therefore, claimant was discharged, but not for misconduct, and is not disqualified from receiving benefits based on the work separation.

DECISION: Order No. 23-UI-212029 is affirmed.

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

DATE of Service: March 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.

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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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