

EMPLOYMENT APPEALS BOARD DECISION
2023-EAB-0297

Modified
Disqualification Effective November 27, 2022 (Week 48-22)

PROCEDURAL HISTORY: On December 9, 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 benefits effective November 13, 2022 (decision # 64123). Claimant filed a timely request for hearing. On February 28, 2023, ALJ Fraser conducted a hearing, and on March 1, 2023 issued Order No. 23-UI-217600, modifying decision # 64123 by concluding that claimant was discharged, not for misconduct within 15 days of a planned quit without good cause, and was disqualified from receiving benefits effective December 4, 2022. On March 9, 2023, the employer filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACTS: (1) Greenhill Reload LLC employed claimant as an equipment operator from April 20, 2022 until November 17, 2022.

(2) On November 16, 2022, a different employer, Tyree Oil, made an offer of other work to claimant. The job offered by Tyree Oil would pay claimant more than he earned working for the employer. However, the offer of work from Tyree Oil was contingent upon a background check and drug screen that would not be completed until mid-December 2022.

(3) On November 17, 2022, claimant gave the employer notice of his intent to quit work effective December 2, 2022. A few minutes after claimant gave his resignation notice, the employer discharged him.

(4) Prior to claimant tendering his resignation notice, news had reached the workplace that claimant may give a resignation notice. The employer had instructed their general manager that if claimant gave a resignation notice, the manager should discharge claimant that day. The employer instructed the manager to discharge claimant immediately upon receiving the notice because the employer feared claimant might file a worker's compensation claim during his notice period.

(5) Claimant's November 17, 2022 discharge date was 15 days prior to the date of his December 2, 2022 planned voluntary leaving.

CONCLUSIONS AND REASONS: Claimant was discharged, not for misconduct, within 15 days of a planned quit without good cause.

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).

The record shows that the employer discharged claimant on November 17, 2022. On that date, claimant gave the employer notice that he planned to quit work on December 2, 2022. Because claimant was willing to continue working for the employer until December 2, 2022, but was not allowed to do so by the employer, the work separation was a discharge that occurred on November 17, 2022.

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). 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 on November 17, 2022 because, that day, claimant tendered his notice of resignation effective December 2, 2022 and the employer had decided to discharge claimant immediately upon receiving a resignation notice from him. The employer did so because they feared claimant might file a worker's compensation claim during his notice period. At hearing, the employer's witness explained that this fear was due to a perception that claimant was a "type of person . . . that took advantage of situations," which appeared to be mainly based upon occasions where claimant had complained about mistakes in his fast food orders and received the meals free of charge. Transcript at 23, 18.

The employer did not establish that claimant's decision to tender a notice of resignation or that the risk the employer perceived that claimant might file a worker's compensation claim amounted to willful or wantonly negligent violations of the standards of behavior the employer had the right to expect of him or a disregard of the employer's interests. There is no indication from the record that claimant violated any employer expectation at the time he tendered his resignation. Claimant's discharge therefore was not for misconduct under ORS 657.176(2)(a).

ORS 657.176(8). While the record shows that claimant was not discharged for misconduct, it is necessary to determine 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.”

Here, claimant notified the employer that he would quit work on December 2, 2022. The employer discharged claimant, not for misconduct, on November 17, 2022, which was within 15 days of claimant’s planned quit on December 2, 2022.

The order under review correctly concluded that the employer discharged claimant, but not for misconduct, within 15 days of claimant’s planned quit. Order No. 23-UI-217600 at 3. However, the citation to ORS 657.176(8)(c) set forth in the order misstates the period of days as “14 days” rather than the correct 15 days. Order No. 23-UI-217600 at 3. However, the reference to “14 days” did not affect the order’s legal analysis.

Because the employer discharged claimant, but not for misconduct, on November 17, 2022, which was within 15 days of claimant’s planned quit, the applicability of ORS 657.176(8) turns on whether claimant’s planned quit on December 2, 2022 was without good cause. A claimant who leaves work to accept an offer of other work “has left work with good cause only if the offer is definite and the work is to begin in the shortest length of time as can be deemed reasonable under the individual circumstances. Furthermore, the offered work must reasonably be expected to continue, and must pay [either] an amount equal to or in excess of the weekly benefit amount; or an amount greater than the work left.” OAR 471-030-0038(5)(a). In pertinent part, the Department does not consider a job offer to be definite “if [it] is contingent upon . . . [such things as] passing a drug test, background check, credit check, and/or an employer receiving a contract.” Oregon Employment Department, UI Benefit Manual §442 (Rev. 04/01/10).

Claimant’s planned quit was without good cause. Because claimant intended to quit to accept an offer of other work, the job offer was required to be definite in order for the planned quit to be with good cause. Job offers are not considered definite if they are contingent upon a background check or drug screen. Here, claimant’s offer of work from Tyree Oil was contingent upon a background check and drug screen that would not be completed until mid-December 2022, weeks after claimant’s effective date of resignation of December 2, 2022. Thus, as the Tyree Oil offer of work was tied to contingencies that would not have resolved as of claimant’s December 2, 2022 planned resignation date, the offer was not definite, and claimant’s planned quit was without good cause.

Thus, because the employer discharged claimant, but not for misconduct, within 15 days prior to the date he planned to voluntarily leave work without good cause, ORS 657.176(8) applies to this case. Accordingly, ORS 657.176(8) requires that claimant be disqualified from receiving unemployment insurance benefits effective November 27, 2022 (week 48-22), the beginning of the week in which his planned quit on December 2, 2022 would have occurred.

The order under review concluded that claimant was disqualified from receiving benefits effective December 4, 2022 (week 49-22). Order No. 23-UI-217600 at 3. In so doing, the order erred as to the date of disqualification.

ORS 657.176(8) provides that, first, “the individual shall be eligible for benefits for the period including the week in which the actual discharge occurred[.]” Here, the discharge occurred on November 17, 2022, meaning that claimant is eligible for the week of November 13, 2022 through November 19, 2022 (week 46-22). Second, ORS 657.176(8) provides that the eligibility extends “through the week **prior to** the week of the planned voluntary leaving date.” (emphasis added). The planned voluntary leaving date is December 2, 2022, which is contained in the week of November 27, 2022 through December 3, 2022 (week 48-22). The week prior to that is the week of November 20, 2022 through November 26, 2022 (week 47-22), meaning claimant’s eligibility extends through week 47-22 as well.

For these reasons, claimant eligible for benefits for the weeks of November 13, 2022 through November 26, 2022 (weeks 46-22 through 47-22). Claimant is disqualified from receiving benefits beginning November 27, 2022 (week 48-22). Order No. 23-UI-217600 is modified to reflect this date of disqualification.

DECISION: Order No. 23-UI-217600 is modified, as outlined above.

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

DATE of Service: April 17, 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

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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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