

EMPLOYMENT APPEALS BOARD DECISION
2023-EAB-0489

Affirmed
No Disqualification

PROCEDURAL HISTORY: On February 16, 2023, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant quit working for the employer with good cause and was not disqualified from receiving benefits based on the work separation (decision # 151030). The employer filed a timely request for hearing. On April 4, 2023, ALJ Enyinnaya conducted a hearing, and on April 7, 2023 issued Order No. 23-UI-221495, affirming decision # 151030 by concluding that claimant was discharged, but not for misconduct, and was not disqualified from receiving benefits based on the work separation. On April 26, 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 or parties as required by OAR 471-041-0080(2)(a) (May 13, 2019).

FINDINGS OF FACT: (1) Leslie's Poolmart, Inc. employed claimant as a vice-president from September 18, 2007 until January 22, 2023.

(2) In June 2022, the employer granted claimant permission to work remotely in Wisconsin. Claimant told the employer when seeking permission to work remotely that she was relocating her family there to care for her ailing father. Both parties signed a remote work agreement effective July 25, 2022, that was subject to review in 90 days.

(3) In October 2022, the parties renewed the remote work agreement through January 22, 2023.

(4) On January 17, 2023, claimant's supervisor told claimant that the remote work agreement would not be renewed, and two days later sent her an email stating that she would have to return to Oregon to work in person beginning January 23, 2023. The employer gave claimant the additional option of resigning effective February 15, 2023, in which case she would be permitted to work remotely until that date. The employer decided not to renew the remote work agreement due to feedback from other employees that

claimant's absence from the premises was impairing business operations. The employer expected that claimant would agree to one of the options presented in the email.

(5) Claimant could not relocate to Oregon by January 23, 2023 and refused to resign her position. She did not agree to either option presented in the email.

(6) On January 22, 2023, because claimant refused to agree to either option presented in the email, the employer considered claimant to have separated from employment, and notified her as such.

CONCLUSIONS AND REASONS: Claimant was discharged, 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).

In their January 19, 2023 email, the employer offered claimant work for an additional period of time. Claimant would have been permitted to work indefinitely if she agreed to do so in-person beginning January 23, 2023. She also would have been permitted to work remotely until February 15, 2023, but only if she agreed to resign as of that date. Claimant was willing to continue working for the employer indefinitely under the remote work arrangement in effect at the time. On January 22, 2023, when claimant refused to agree to either of the options with which she had been presented, the employer revoked both options and notified claimant that the employment relationship had been severed. As of that date, there was no work available to claimant despite her willingness to continue to work, albeit on terms that the employer had been unwilling to continue offering her. Accordingly, the separation was a discharge that occurred on January 22, 2023.

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). A conscious decision not to comply with an unreasonable employer policy or expectation is not misconduct. OAR 471-030-0038(1)(d)(C).

The employer discharged claimant because she refused to agree to return to in-person work in Oregon on January 23, 2023, or to resign. The employer expected that claimant would report for work in person if so instructed. Generally, this is a reasonable expectation. However, the employer permitted claimant to work remotely with the knowledge that claimant was moving her family to Wisconsin to care for her

father in reliance on that permission. Though both parties agreed to review the remote work arrangement after 90 days, and again after a further 90 days, the nature of claimant's distant move and familial responsibilities likely implied to both parties that the remote work arrangement would continue indefinitely, subject to these periodic reviews. Nonetheless, it can be inferred from the options which the employer presented to claimant on January 19, 2023 that the employer, at that time, was asserting that the agreement was not indefinite in nature, and that claimant knew or should have known during the execution of the agreement that she would be expected to return to work in person the day after the 90-day period (or subsequent 90-day periods) expired. *See* Exhibit 1 at 7.

The employer bears the burden of proving this assertion by a preponderance of evidence. The agreement itself is not in the record, and the employer's only witness was not a party to its negotiation and did not review documents concerning those negotiations. Transcript at 14-15. The employer has therefore failed to show that claimant likely knew or should have known that she would be expected to move back to Oregon by January 23, 2023. Rather, it was not until the employer informed claimant on January 17, 2023 that the remote work agreement would not be renewed, that claimant learned she was expected to return to work in person by January 23, 2023. The question of misconduct therefore turns on whether, under the circumstances, the employer's expectation that claimant find alternate care arrangements for her father and move her family from Wisconsin to Oregon with less than a week's notice was reasonable.

Claimant testified that it "was not physically possible" for her to move back to Oregon before January 23, 2023. Transcript at 9. As of January 17, 2023, the employer was willing to allow claimant to work remotely for approximately an additional month, but only if she agreed to resign, evincing that the employer's need to have claimant working in person was not so urgent that they were unable to allow her sufficient time to arrange her affairs and move back to Oregon. In making the move to Wisconsin, claimant made a significant change in her and her family's lives with the knowledge and apparent assent of the employer, and the employer, despite the ability to continue operations without her there for one additional month, would not give her more than one week to move back if she decided to do so. Under the circumstances, an employer's expectation that an employee would arrange other care for her father and return to in-person work in a distant state with less than a week's notice was not reasonable. Nor is it reasonable for an employer to expect an employee to agree to resign as an alternative to complying with an unreasonable expectation.

For these reasons, claimant's refusal to agree to one of the options presented in the employer's January 17, 2023 email was a conscious decision not to comply with an unreasonable expectation, and not misconduct. Claimant therefore is not disqualified from receiving benefits based on the work separation.

DECISION: Order No. 23-UI-221495 is affirmed.

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

DATE of Service: June 2, 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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