

EMPLOYMENT APPEALS BOARD DECISION
2023-EAB-0876

Affirmed
Disqualification

PROCEDURAL HISTORY: On June 27, 2023, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant was discharged for misconduct and disqualified from receiving unemployment insurance benefits effective April 30, 2023 (decision # 150651). Claimant filed a timely request for hearing. On July 24, 2023, ALJ Fraser conducted a hearing and issued Order No. 23-UI-231256, affirming decision # 150651 by concluding that claimant voluntarily left work without good cause and was disqualified from receiving unemployment insurance benefits effective April 30, 2023.¹ On August 8, 2023, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) The Knappa School District employed claimant as a school bus driver from October 2000 until May 5, 2023.

(2) The employer expected bus drivers to inspect their buses when they finished their route and when they returned to the bus yard, to ensure that all students had exited the bus. Claimant knew and understood this expectation.

(3) On April 25, 2023, claimant drove a route picking up preschool students and taking them to preschool. When claimant completed the route, she did not inspect the bus by walking to the back of the bus to ensure that all students were off the bus. A four-year-old preschool student remained on the bus and did not get off the bus when claimant dropped off the students at preschool. When claimant then returned the bus to the bus yard, she again did not inspect the bus by walking to the back of the bus to ensure that all students were off the bus. When claimant returned the bus to the bus yard, the child remained on the bus. Claimant left the bus yard premises. The young child was later found wandering around the bus yard depot looking for help. On both occasions, claimant knew she was supposed to

¹ Although Order No. 23-UI-231256 stated that it modified decision # 150651, it affirmed that decision because, although the order reasoned that the nature of the work separation was a voluntary leaving and not a discharge, the effective date of the disqualification remained the same. Order No. 23-UI-231256 at 3.

inspect the bus but chose not to because she assumed she would see or hear any students that remained on the bus because the bus was small.

(4) The employer placed claimant on paid administrative leave and scheduled a pre-termination meeting for April 27, 2023. On April 26, 2023, claimant, through her union representative, informed the employer's superintendent that she would not attend the pre-termination meeting and the employer canceled the meeting.

(5) On May 1, 2023, the superintendent emailed claimant's union representative advising that claimant would be eligible for future employment as a classroom aide. However, the classroom aide job would not become available until the fall of 2023 because a different employee, who was soon to retire, held the job at the time.

(6) On May 1, 2023, claimant emailed the employer notice of her intent to resign effective May 5, 2023. On May 5, 2023, claimant resigned as planned. Claimant resigned because she believed if she did not resign, she would be discharged. This belief was based on claimant's supervisor telling claimant that the superintendent had told the supervisor that if claimant did not resign, the superintendent would discharge claimant. In fact, however, the superintendent did not tell claimant's supervisor that.

(7) At the time claimant notified the employer of her intent to resign, the superintendent had not made a final decision whether to discharge claimant. However, discharging claimant was probable because the superintendent "didn't think it was likely that she'd continue as a bus driver." Transcript at 8. Further, the superintendent typically considered an employee's views presented at a pre-termination meeting before deciding whether to discharge an employee, but claimant's views on the matter were not under consideration because claimant's pre-termination meeting had been canceled.

CONCLUSIONS AND REASONS: Claimant voluntarily left work 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 nature of the work separation was a voluntary leaving that occurred on May 5, 2023. On that date, claimant voluntarily quit work as planned. Claimant believed if she did not resign, she would be fired. The record shows that, as of the date claimant announced her intention to quit, the superintendent had not made a final decision to discharge claimant, although discharging claimant was probable. Regardless, claimant announced her intention to resign effective May 5, 2023, and then did resign that day. Thus, the record shows that claimant severed the employment relationship and could have worked for the employer for additional period of time. The work separation therefore was a voluntary leaving.

Voluntary Leaving. A claimant who leaves work voluntarily is disqualified from the receipt of benefits unless they prove, by a preponderance of the evidence, that they had good cause for leaving work when they did. ORS 657.176(2)(c); *Young v. Employment Department*, 170 Or App 752, 13 P3d 1027 (2000). "Good cause . . . is such that a reasonable and prudent person of normal sensitivity, exercising ordinary

common sense, would leave work.” OAR 471-030-0038(4) (September 22, 2020). “[T]he reason must be of such gravity that the individual has no reasonable alternative but to leave work.” OAR 471-030-0038(4). The standard is objective. *McDowell v. Employment Department*, 348 Or 605, 612, 236 P3d 722 (2010). A claimant who quits work must show that no reasonable and prudent person would have continued to work for their employer for an additional period of time. Under OAR 471-030-0038(5)(b)(F), leaving work without good cause includes “resignation to avoid what would otherwise be a discharge for misconduct or potential discharge for misconduct.”

Claimant resigned to avoid what would otherwise have been a potential discharge. As discussed above, claimant resigned, and did so believing that if she did not resign, she would be discharged. At the time claimant announced her intent to resign, although the superintendent had not made a final decision, it was probable that the superintendent would discharge her. At hearing, the superintendent testified that as of May 1, 2023, he “didn’t think it was likely that [claimant would] continue as a bus driver.” Transcript at 9. The fact that the superintendent emailed claimant’s union representative on May 1, 2023 advising that claimant would be eligible for future employment as a classroom aide, further supports that the superintendent was contemplating discharging claimant. Moreover, because claimant’s pre-termination meeting had been canceled, the superintendent was not considering any perspective offered by claimant regarding whether she should be discharged, a circumstance that increased the likelihood of discharge had claimant not quit. The record evidence therefore supports that the superintendent probably would have discharged claimant. Accordingly, the record shows that claimant resigned to avoid what otherwise would have been a potential discharge.

The remaining element to consider is whether the potential discharge would have been for misconduct. “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). Isolated instances of poor judgment are not misconduct. OAR 471-030-0038(3)(b).

The record further shows that claimant quit in order to avoid a potential discharge that would have been for misconduct. The employer expected bus drivers to inspect their buses when they finish their route and when they return to the bus yard to ensure that all students are off the bus. Claimant knew and understood this expectation. Nevertheless, when claimant completed her preschool route, she did not walk to the back of the bus to ensure that all students were off the bus. When claimant returned the bus to the bus yard, she again did not walk to the back of the bus to ensure that all students were off the bus. On both occasions, claimant thought she would see or hear any students that remained without walking to the back because the preschool bus was small. Claimant failed to notice a four-year-old child that was left behind on the bus. The young child was later found wandering the bus yard, looking for help.

These violations of the employer’s expectations were wantonly negligent. Claimant was indifferent to the consequences of her actions because she relied merely on seeing or hearing the children instead of walking to the back of the bus to confirm all the children had exited the bus. Claimant was conscious of

her conduct because she did not walk to the back of the bus, fully conscious of her failure to do so, but believed that relying on seeing or hearing the children would be sufficient. Claimant should have known that her failure to walk to the back of the bus would probably result in a violation of the employer's expectations because she knew and understood the employer's policy.

Moreover, claimant's wantonly negligent violations were repeated acts and, therefore, not isolated instances of poor judgment. Under OAR 471-030-0038(3)(b)(A) for an incident to be an isolated instance of the poor judgment, "[t]he act must be isolated. The exercise of poor judgment must be a single or infrequent occurrence rather than a repeated act or pattern of other willful or wantonly negligent behavior." Here, claimant engaged in a repeated act by failing to inspect the bus to ensure that all student were off the bus when she completed her trip, and when she returned the bus to the bus yard. Thus, claimant's wantonly negligent violations were not isolated instances of poor judgment and therefore constituted misconduct.

For these reasons, the record shows that on May 5, 2023, claimant resigned to avoid what would otherwise have been a potential discharge for misconduct. Accordingly, under OAR 471-030-0038(5)(b)(F), claimant voluntarily left work without good cause. As a result, claimant is disqualified from receiving unemployment insurance benefits effective April 30, 2023.

DECISION: Order No. 23-UI-231256 is affirmed.

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

DATE of Service: September 21, 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.

Employment Appeals Board - 875 Union Street NE | Salem, OR 97311
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