

EMPLOYMENT APPEALS BOARD DECISION
2023-EAB-0898

Reversed
No Disqualification

PROCEDURAL HISTORY: On July 3, 2023, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant was discharged by the employer for misconduct and disqualified from receiving benefits effective May 7, 2023 (decision # 100738). Claimant filed a timely request for hearing. On July 31, 2023, ALJ Toth conducted a hearing, and on August 4, 2023 issued Order No. 23-UI-232450, affirming decision # 100738. On August 11, 2023, claimant filed an application for review with the Employment Appeals Board (EAB).

WRITTEN ARGUMENT: EAB considered claimant's written argument when reaching this decision.

FINDINGS OF FACT: (1) Oregon Home Care Services, Inc. employed claimant as the managing director of their Portland-area operations from January 1, 2012 until May 11, 2023. For most of this period, the employer did business under the assumed business name (ABN) Pegasus Social Services.

(2) The employer's business comprised three separate divisions: home care, care management, and support services. The support services division operated a small fleet of vehicles that were used to transport the employer's clients.

(3) Until June 1, 2022, claimant held an ownership interest in Oregon Home Care Services, Inc. On June 1, 2022, the company was purchased by Montlake Capital – Fedelta Home Care. At that time, claimant executed two agreements with the new owners of the company: a purchase agreement in which she agreed to sell her shares in the company, and an employment agreement in which she agreed to remain in her role as a managing director. The purchase agreement included a non-solicitation provision that forbade claimant, if she separated from employment, from "soliciting, for a period of five (5) years, any employees, clients, customers or referral partners of the Company or potential clients, customers or

referral partners of the Company for purposes of diverting their business or services from the Company.” Exhibit 1 at 20–21. The employment agreement included a non-compete provision.

(4) On or around February 23, 2023, the employer allowed the Pegasus Social Services ABN to lapse by failing to renew the ABN with the Oregon Secretary of State.

(5) On April 1, 2023, the employer rebranded itself as Oregon Home Care Services – Fedelta Home Care. The rebranding effort included “announcements... sent out to clients, a big open house... to announce the change to [the employer’s] professional clients,” and an update to the employer’s website announcing the name change and indicating that they were saying “farewell to the Pegasus brand.” Exhibit 1 at 2.

(6) In April 2023, the employer’s chief executive officer (CEO) told claimant that she intended to curtail or modify the operations of the company’s support services division. Claimant understood this to mean that the CEO intended to eliminate the support services division entirely. As such, claimant began devising a proposal to purchase the support services division from the employer, which she intended to present to the CEO.

(7) On April 21, 2023, while preparing her proposal, claimant decided to check the status of the ABN Pegasus Social Services, and discovered that the employer had allowed the registration with the Secretary of State to lapse. Given the employer’s recent rebranding efforts, claimant assumed that the employer had abandoned the ABN. Claimant therefore reregistered the ABN under her own name in order to protect it from any other persons who would seek to do business under the name. Claimant intended to include the purchase of the ABN from the employer as part of her proposal to purchase the support services division. At that time, claimant intended to meet with the CEO on the following Monday (April 24, 2023) to discuss the proposal.

(8) The CEO was unable to meet with claimant as planned on April 24, 2023. Claimant instead first discussed the proposal with the CEO on May 2, 2023. That discussion was somewhat brief, and the CEO told claimant that she would take the proposal to the company’s board of directors. On May 4, 2023, the CEO informed claimant that she and the board had decided that they did not want claimant to run a side business, but instead focus on her managerial duties for the employer. Claimant later countered by proposing to purchase the support services division as an absentee owner, leaving the management of the proposed new company to claimant’s son or son-in-law. The CEO considered claimant’s counteroffer but did not explicitly accept or reject it. During these negotiations, claimant did not inform the employer that she had already registered the lapsed ABN under her own name.

(9) At some point in late April or early May 2023, the employer, via their legal team, became aware that claimant had registered the ABN under her own name.

(10) On May 9, 2023, claimant and the CEO discussed claimant’s counteroffer, among other topics. At that point, the CEO told claimant that the employer “would not let go of the Pegasus name, but that she would call [claimant] the next day to discuss the issue further.” Exhibit 1 at 4. The CEO did not call claimant on May 10, 2023 as planned, and also cancelled her scheduled weekly meeting with claimant on May 11, 2023.

(11) Later on May 11, 2023, the CEO “approached [claimant] with a copy of the Secretary of State paperwork, accusing her of violating the conditions of the employment offer signed in 2022 that said she would not set up [a] competing business, and... terminating [claimant] ‘for cause.’” Exhibit 1 at 4. The employer discharged claimant because they believed that claimant’s registration of the ABN without notifying the employer was a violation of her June 2022 employment or purchase agreement, asserting that claimant’s conduct “constitute[d] ‘dishonesty, fraud, intentional misrepresentation, illegality [and/]or harassment’ that ‘materially adversely affect[s] the business or reputation of the Company[.]’” in contravention of one or both agreements. Exhibit 1 at 20.

(12) Other than registering the ABN under her own name and proposing the purchase to the CEO, claimant had taken no steps to form a business.

(13) On May 15, 2023, the employer re-registered the Pegasus Social Services under their own name.

CONCLUSIONS AND REASONS: Claimant was discharged, 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 due to her having registered the ABN Pegasus Social Services, which the employer had allowed to lapse around the time of their rebrand, under her own name without notifying the employer that she had done so. The employer believed that claimant’s conduct constituted a breach of one or both of the agreements that she had signed when the company was purchased in June 2022. The order under review concluded similarly, finding that “claimant’s conduct demonstrated knowing disregard of the non-solicitation language in the employee agreement” by engaging in “competing business activities.” Order No. 23-UI-232450 at 4, 1. However, the record does not support this conclusion.

As a preliminary matter, the record contains little evidence of the provisions contained within the June 2022 agreements that claimant executed when the new owners purchased the company. The only relevant language actually included in the record was the terms of the non-solicitation provision, which, in summary, forbade claimant from soliciting business from any of the employer’s clients or similar for five years. There is no indication in the record that claimant engaged in any such solicitation. Despite the finding in the order under review, above, the record does not explicitly show that claimant was prohibited by any provision of one or both of the agreements from engaging in “competing business activities.”

Regardless, even if claimant was so prohibited, the record simply does not show that claimant actually engaged in competing business activities. Many of the facts regarding the series of interactions between claimant and the CEO during April and May 2023, and to what extent the employer intended to divest itself of the support services division, are in dispute. Nevertheless, the uncontroverted evidence in the record shows that the only step claimant took towards operating a business of any sort was registering the lapsed ABN. It cannot be reasonably asserted that registering the ABN, without taking further steps (such as securing premises, hiring employees, soliciting business, or the like) constituted engaging in competing business activities. Thus, the employer has not met their burden to show that claimant violated any of the terms of her June 2022 agreements.

Further, the record suggests that the employer discharged claimant, at least in part, because they suspected that she *intended* to engage in competing business activities, even if she had not yet done so.¹ Had claimant intended to engage in competing business activities—i.e., by intending to start a competing business if the employer ultimately refused to sell the support services division to her—it is possible that such intent could constitute a willful or wantonly negligent disregard of the employer's interest. However, the employer offered no evidence to corroborate their suspicion that claimant intended to do so. Rather, the totality of the evidence in the record—such as claimant's continued efforts to negotiate with the employer and give ground after her offers were rejected, the fact that claimant took no steps to engage in business under the Pegasus Support Services name, and the apparent ease with which the ABN reverted to the employer after claimant's discharge²—supports the conclusion that, more likely than not, claimant did not intend to engage in any business activities without the employer's consent.

For the above reasons, the employer has failed to show that claimant's actions in registering the ABN under her own name without notifying the employer constituted misconduct. Claimant therefore is not disqualified from receiving benefits based on her work separation from the employer.

DECISION: Order No. 23-UI-232450 is set aside, as outlined above.

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

DATE of Service: September 27, 2023

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.

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

¹ *See* Transcript at 12.

² It is not clear from the record what role, if any, claimant played in the reversion of the ABN to the employer. Given how little time it took to revert the name to the employer, however (too short to for an adversary proceeding to take place, for instance), it can be reasonably presumed that claimant's assent was necessary for the ABN to revert to the employer.

‘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 الاستئناف 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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