EO: 200
BYE: 202440

State of Oregon
Employment Appeals Board
875 Union St. N.E.
Salem, OR 97311

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VQ 005.00

EMPLOYMENT APPEALS BOARD DECISION
2024-EAB-0184

Affirmed
Disqualification

PROCEDURAL HISTORY: On December 19, 2023, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant voluntarily quit work without good cause and therefore was disqualified from receiving unemployment insurance benefits effective October 8, 2023 (decision # 100343). Claimant filed a timely request for hearing. On January 30, 2024, ALJ Amesbury conducted a hearing, and on February 1, 2024, issued Order No. 24-UI-247056, affirming decision # 100343. On February 20, 2024, claimant filed an application for review with the Employment Appeals Board (EAB).

WRITTEN ARGUMENT: Claimant submitted written arguments on February 20, 2024, and March 7, 2024. Claimant did not declare that she provided a copy of her February 20, 2024, argument to the opposing party as required by OAR 471-041-0080(2)(a) (May 13, 2019). Additionally, both arguments contained information that was not part of the hearing record, and did not show that factors or circumstances beyond claimant's reasonable control prevented her from offering the information during the hearing as required by OAR 471-041-0090 (May 13, 2019). EAB considered only information received into evidence at the hearing when reaching this decision. *See* ORS 657.275(2). EAB considered claimant's March 7, 2024, written argument to the extent it was based on the record.

FINDINGS OF FACT: (1) Purelight Power employed claimant, most recently as an operational research worker, from July 13, 2020, until October 13, 2023. At the time of separation, the employer paid claimant $30 per hour, and claimant worked 40 hours per week.

(2) At the onset of claimant's employment, claimant worked in the employer's offices. In the summer of 2023, claimant gave birth to her son. Claimant initially took a leave of absence and claimed short-term disability benefits. During that time, the employer allowed claimant to work part-time from home while claiming those disability benefits. After claimant's leave of absence ended and her disability benefits expired, the employer temporarily permitted claimant to continue working from home. The work from home arrangement was to last approximately six months. The employer advised claimant that they would eventually require her to return to work in their office, to which claimant initially agreed.

Level 3 - Restricted

(3) On or around September 26, 2023, the employer notified claimant that they wanted her to return to work in the office by October 16, 2023. The employer intended claimant to initially return to the office three days per week, eventually transitioning her to the office full time. In order to prepare for this, claimant attempted to secure childcare for her son. Claimant obtained "about three or four" quotes for childcare options in her area, which ranged from approximately $200 to $277 per week.[1] Claimant determined that she could not afford to place her son in childcare. Claimant also looked into government programs to assist with childcare costs, but found that she did not qualify for them based on her income. Claimant did not continue to pursue obtaining childcare for her son because she believed she could perform her job without having to come into the office and did not want her child placed in childcare. Transcript at 11-12.

(4) Claimant and the employer continued to discuss claimant's working arrangement from late September through early October 2023. However, the employer continued to insist that claimant return to the office, while claimant resisted agreeing to return to the office and attempted to convince the employer to allow her to continue working from home. Eventually, the employer's human resources (HR) director "made it very clear" to claimant that if claimant did not agree to return to the office by October 16, 2023, they would consider her to have resigned effective October 13, 2023. Transcript at 20.

(5) Claimant did not agree to return to the office. On October 13, 2023, claimant sent an email to the employer which stated:

> Today is my final day with [the employer]. In this, I think it is important for me to stress that I am willing and able to fulfill my job responsibilities while working from home as I have for the past six months.
>
> I am aware of other employees who work remotely, I have not been given any reasons why my position cannot continue to be remote nor have I ever been provided with a job description stating otherwise.
>
> The truth is that I am not quitting my position, I am being forced out of it - terminated without cause.

Exhibit 1 at 8. Claimant did not return to work for the employer after that date.

CONCLUSIONS AND REASONS: Claimant was discharged 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).

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[1] Claimant testified that the most expensive childcare option she found was approximately $1,200 per month. Transcript at 7. When pro-rated on a weekly basis, this results in a weekly cost of approximately $277.

The parties disagreed as to the nature of the work separation. At hearing, claimant asserted that the employer discharged her because she refused to return to the office, while the employer's HR director testified that claimant "chose not to continue employment, so she ultimately quit." Transcript at 5–6, 20. The order under review agreed with the employer, concluding, "Claimant informed employer that she would not return to work, and employer accepted that refusal as a resignation," and explaining that "claimant could have continued working for [the] employer through the simple act of reporting to her designated worksite, but she elected not to." Order No. 24-UI-247056 at 3. The record does not support this conclusion.

The employer's characterization of the work separation as a "resignation" does not change the nature of the separation. While it is true that claimant could have continued working for the employer by agreeing to report to the office, the employer was unwilling to continue to allow claimant to work after October 13, 2023, when claimant refused to do so. A refusal to allow an employee to continue working due to their failure to comply with a policy or requirement is consistent with a finding that the employer discharged that employee. Similarly, while claimant stated in an email on October 13, 2023 that her last day of work would be that day, the record shows that the *employer* chose the date on which claimant's separation would occur, suggesting that claimant's statement in this email was mere acquiescence to the reality of her circumstances and acknowledgement that the employer was unwilling to continue to permit claimant to continue working for the employer after October 13, 2023 because claimant would not return to work at the employer's office. In light of these factors, the record supports the conclusion that the employer discharged claimant on October 13, 2023, because she refused to return to work at the office as the employer had required.

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).

Isolated instances of poor judgment are not misconduct. OAR 471-030-0038(3)(b). The following standards apply to determine whether an "isolated instance of poor judgment" occurred:

> (A) The 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.
>
> (B) The act must involve judgment. A judgment is an evaluation resulting from discernment and comparison. Every conscious decision to take an action (to act or not to act) in the context of an employment relationship is a judgment for purposes of OAR 471-030-0038(3).

> (C) The act must involve poor judgment. A decision to willfully violate an employer's reasonable standard of behavior is poor judgment. A conscious decision to take action that results in a wantonly negligent violation of an employer's reasonable standard of behavior is poor judgment. A conscious decision not to comply with an unreasonable employer policy is not misconduct.
>
> (D) Acts that violate the law, acts that are tantamount to unlawful conduct, acts that create irreparable breaches of trust in the employment relationship or otherwise make a continued employment relationship impossible exceed mere poor judgment and do not fall within the exculpatory provisions of OAR 471-030-0038(3).

OAR 471-030-0038(1)(d).

As noted above, the employer discharged claimant because she refused to return to work at the office as the employer had required. An employer generally has the right to expect that an employee report to work at a duty station of the employer's choosing. Furthermore, while claimant most recently worked from home as a temporary agreed upon accommodation for claimant after the birth of her child, claimant had previously worked from the employer's office before the temporary accommodation, and the record shows that claimant's only hindrance to returning to work there was her need for childcare. While claimant's testimony indicated that she believed she was unable to afford to pay for childcare, the record also shows that her salary was significantly higher than the cost of childcare itself, and it is not clear how claimant's complete loss of her salary would have left claimant in a more favorable financial position than paying a portion of her salary for childcare while returning to the office. Moreover, when claimant was asked whether the primary reason claimant did not return to work was because she could not afford childcare, or because she believed she could perform her job without having to come to the office, claimant admitted she had a different opinion from the employer about how important it was for her to be at the office for her work. Claimant simply did not believe it was necessary to work in the office. Transcript at 11-12. In light of this, claimant's suggestion that she could not afford to pay for childcare in order to return to the office does not show that the employer imposed a condition of employment that she could not meet. Therefore, the employer's requirement that claimant return to the office was reasonable.

Because the employer's requirement was reasonable, claimant's conscious refusal to comply with the requirement was an intentional violation of the employer's standards of behavior that they had a right to expect of employees. Further, the record suggests that claimant's refusal to return to the office was intended to continue indefinitely. Therefore, claimant's conduct was not isolated, but was instead a repeated act or pattern of willful or wantonly negligent behavior. Because claimant's conduct was not isolated, it cannot be excused as an isolated instance of poor judgment.

Because claimant's willful or wantonly negligent violation of the employer's standards of behavior was not an isolated instance of poor judgment, the employer discharged claimant for misconduct, and claimant is therefore disqualified from receiving unemployment insurance benefits effective October 8, 2023.

DECISION: Order No. 24-UI-247056 is affirmed.

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

DATE of Service: March 28, 2024

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.

Please help us improve our service by completing an online customer service survey. To complete the survey, please go to https://www.surveygizmo.com/s3/5552642/EAB-Customer-Service-Survey. You can access the survey using a computer, tablet, or smartphone. If you are unable to complete the survey online and need a paper copy of the survey, please contact our office.

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 – 本判决会影响您的失业救济金。 如果您不明白本判决， 请立即联系就业上诉委员会。 如果您不同意此判决，您可以按照该判决结尾所写的说明，向俄勒冈州上诉法院提出司法复审申请。

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 فورا، 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 دستورالعمل موجود در پایان آن، از دادگاه تجدید نظر اورگان درخواست تجدید نظر کنید.

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