

EMPLOYMENT APPEALS BOARD DECISION
2024-EAB-0299

Reversed
No Disqualification

PROCEDURAL HISTORY: On February 14, 2024, 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 November 26, 2023 (decision # 105435). Claimant filed a timely request for hearing. On March 8, 2024, ALJ Logan conducted a hearing, and on March 12, 2024 issued Order No. 24-UI-249928, modifying decision # 105435 by concluding that claimant was disqualified from receiving benefits effective December 3, 2023. On March 25, 2024, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Compass Group employed claimant as a cook from November 15, 2023 through approximately December 3, 2023. Claimant worked for one of the employer's subsidiaries that provided food service management for a school.

(2) The employer planned to suspend their operations for the week of Thanksgiving 2023 (November 19 through 25, 2023), and informed their employees that they would all be paid for the time off from work. The employer expected their employees to return to work on Sunday, November 26, 2023, as the school was reopening after the holiday on Monday, November 27, 2023. Nevertheless, claimant understood the employer to be offering employees two weeks off for the holiday, and that he was to return to work on December 3, 2023.

(3) On November 15, 2023, claimant worked for the employer for approximately 2 hours, completing the employer's onboarding process. On November 16, 2023, claimant worked a shift of approximately 7.5 hours. Claimant did not work on November 17 or 18, 2023.¹

¹ There is some conflict in the record about why claimant did not work on these dates. However, as the record shows that claimant's work separation did not occur as a result of his not having worked those two days, it is not necessary to resolve this conflict.

(4) Claimant did not report for work at all during the week of November 26 through December 2, 2023, as he believed that the employer was still closed during that time. Because claimant did not return to work during this time, the employer believed that claimant had quit by way of abandoning his job. The employer did not attempt to contact claimant during this week.

(5) On December 3, 2023, claimant returned to the employer's facility, intending to work. When he arrived, the sous chef informed claimant that his services were no longer required. Claimant, upset about the dismissal and believing that he would not be paid for the previous two weeks off from work, left.

CONCLUSIONS AND REASONS: Claimant was discharged, but not for misconduct.

Nature of the work separation. The parties disputed the 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).

At hearing, the employer's witness asserted that claimant quit without notice, by way of failing to return to work. Audio Record at 9:42. By contrast, claimant asserted that he believed that the employer had given him and the other employees two weeks off from work with pay, and that when he returned to work on December 3, 2023, he was told that the employer no longer needed him. Audio Record at 15:00; 18:47. Neither party's testimony indicated that they desired or intended to sever the employment relationship. However, based on these facts, the record shows that the employer discharged claimant, and not that claimant quit.

Claimant's failure to return to work was the result of his belief, as discussed further below, that he had been granted two, rather than one, paid weeks off of work. The employer, expecting claimant to be back to work by November 26, 2023, believed that claimant had decided to abandon his job. The fact that claimant returned to work on December 3, 2023 shows that claimant was willing to continue working for the employer for an additional period of time. By contrast, even if the employer would have allowed claimant to continue working for them if he had returned on November 26, 2023, the sous chef's decision to turn claimant away on December 3, 2023 shows that the employer had, on that or some prior date, decided that they were no longer willing to allow claimant to continue working for them. As such, the employer discharged claimant on or around December 3, 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). "[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). Good faith errors are not misconduct. OAR 471-030-0038(3)(b) (September 22, 2020).

The employer discharged claimant because he failed to return to work as expected on November 26, 2023 as a result of his belief that he was due back at work one week later. The order under review concluded that this constituted misconduct, because it was “unlikely that [the] employer was closed for two weeks and claimant was the individual responsible for checking his work schedule,” and claimant therefore “should have been aware that he was scheduled for work on November 26, 2023[.]” Order No. 24-UI-249928 at 3. The record does not support this conclusion.

As a preliminary matter, the parties’ testimony at hearing differed significantly on a number of material facts. Most significantly, the employer’s witness testified that the employer had planned to close only for the week of Thanksgiving, rather than that week and the following week, while claimant asserted that the employer’s witness, the sous chef, and another cook had all told claimant that they were to be off for two weeks. Audio Record at 11:02; 16:20. The record suggests that the employer did in fact operate during the week after Thanksgiving, and it appears unlikely that the employer would have announced to their employees that they would be closed for two weeks when in fact they only planned to close for one. The record therefore shows that the employer likely was closed for only the week of Thanksgiving, and the evidence as to whether claimant was separately told otherwise is equally balanced.

The employer’s witness also testified that despite several attempts to contact claimant, claimant “would not pick up the phone” when the employer called him to ask whether he was returning to work. Audio Record at 11:22. Claimant, however, testified that the employer never contacted him during that week. Audio Record at 17:34. The employer’s witness did not state or indicate that she personally attempted to contact claimant during that week, nor did she indicate when someone attempted to contact claimant. Therefore, because the employer’s witness did not offer personal testimony or any specific details on that point, claimant’s testimony is afforded equal weight, and the record fails to show that the employer attempted to contact claimant about his whereabouts during the week after Thanksgiving.

Because the record shows the employer expected claimant to return to work on November 26, 2023, and the evidence as to whether claimant was told otherwise is equally balanced, the record is unclear as to why claimant mistakenly believed he was not expected to return to work until December 3, 2023. However, the fact that claimant returned work that day supports his testimony that his belief was sincere. And because claimant’s belief was sincere, the record fails to show that he consciously neglected to check his work schedule to confirm that belief, that he knew neglecting to do so would probably result in his return to work a week later than expected, or that he was indifference to the consequences of his actions. The record therefore shows that claimant’s failure to return to work when expected was the result of a good faith error and, at worst, ordinary negligence. The record does not show that claimant’s conduct was willful, or that it rose to the level of wanton negligence as defined under OAR 471-030-0038(1)(c). Absent such a showing, the employer failed to establish misconduct.

For the above reasons, claimant was discharged, but not for misconduct, and is not disqualified from receiving benefits based on the work separation.

DECISION: Order No. 24-UI-249928 is set aside, as outlined above.

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

DATE of Service: May 9, 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.

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.

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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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