EO: Intrastate
BYE: 28-Jun-2025

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

679
DS 005.00

EMPLOYMENT APPEALS BOARD DECISION
2025-EAB-0168

Affirmed
No Disqualification

PROCEDURAL HISTORY: On July 31, 2024, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that the employer discharged claimant, but not for misconduct, and that claimant therefore was not disqualified from receiving unemployment insurance benefits based on the work separation (decision # L0005437753). The employer filed a timely request for hearing. On February 19, 2025, ALJ Parnell conducted a hearing, and on February 20, 2025, issued Order No. 25-UI-283623, affirming decision # L0005437753. On March 12, 2025, the employer filed an application for review with the Employment Appeals Board (EAB).

WRITTEN ARGUMENT: The employer did not state that they provided a copy of their argument to claimant as required by OAR 471-041-0080(2)(a) (May 13, 2019). The argument also contained information that was not part of the hearing record and did not show that factors or circumstances beyond the employer's reasonable control prevented them from offering the information during the hearing as required by OAR 471-041-0090 (May 13, 2019). EAB considered only the information received into evidence at the hearing. *See* ORS 657.275(2).

FINDINGS OF FACT: (1) Southern Oregon Burgers and Fries LLC employed claimant, most recently as a shift leader, at their Five Guys restaurant from September 12, 2022, until June 1, 2024.

(2) Prior to May 29, 2024, claimant had requested that day off work to attend a concert. The employer denied the time off request and scheduled claimant to work that day. On May 28, 2024, claimant was scheduled to work but called in sick and did not report to work. On May 29, 2024, claimant sent the employer a message advising that he was still sick and would not be coming to work that day. Claimant did not report to work on May 29, 2024.

(3) Because claimant had called out sick for May 29, 2024, but had previously requested that day off to attend a concert, the employer suspected that claimant had not actually been sick on May 29, 2024, and had abused the employer's attendance policy. The employer's suspicion was also driven by their belief that claimant had allegedly called out sick without being sick several times in the past, and had allegedly previously used bereavement leave when he was not bereaved.

(4) On May 30, 2024, the employer sent claimant an email advising that they required him to provide a doctor's note verifying that he was sick on May 29, 2024. Exhibit 1 at 7. The employer stated that claimant could not return to work without first providing a doctor's note verifying the reason for the absence. Exhibit 1 at 7.

(5) About an hour later, on May 30, 2024, claimant sent a reply email stating that he would not be able to provide a doctor's note "in time for work today." Exhibit 1 at 6. Claimant stated, "I will have to wait at urgent care or the emergency room which will take several hours and not give me enough time to get to work on time." Exhibit 1 at 6.

(6) Also on May 30, 2024, claimant's wife was hospitalized with Guillain-Barre syndrome, an autoimmune disorder. The condition caused claimant's wife to start to lose mental and physical functioning and ultimately resulted in claimant's wife being "in and out of the emergency room for almost two months." Transcript at 25. The condition caused claimant's wife to experience cognitive decline and lose her ability to walk and to manage bowel functions. Beginning May 30, 2024, claimant spent a substantial amount of time caring for his wife and helping her manage her hospitalizations and emergency room visits.

(7) On May 30, 2024, a few minutes after receiving claimant's email that he would not be able to provide a doctor's note that day, the employer emailed claimant that they will get his shift for that day covered. Exhibit 1 at 5. The employer further stated that if they did not receive a doctor's note by 4:00 p.m. that day, claimant would not be on the work schedule for the next day, May 31, 2024. Exhibit 1 at 5. The employer did not receive a doctor's note or a response to the email.

(8) On May 31, 2024, the employer emailed claimant that they did not hear back the day before by 4:00 p.m., as requested, and assumed that claimant was still sick. Exhibit 1 at 4. The employer stated that if they heard from claimant confirming that he had a doctor's note, they would put him back on the work schedule. Exhibit 1 at 4.

(9) On May 31, 2024, claimant texted the employer, stating, "I have a family crisis that requires my attention today." Exhibit 2 at 1. Although claimant did not include details regarding his wife's hospitalization because of her Guillain-Barre syndrome, claimant further stated, "I'll get back to you as soon [as] I can." Exhibit 2 at 1.

(10) Shortly thereafter, also on May 31, 2024, the employer responded, wishing claimant's family well and stating that they wanted claimant to "know where things stand with regards to getting back on the work schedule." Exhibit 2 at 1. The employer also asked, "Should we assume you are well and that you have a doctor's note and are wanting [to] go back to work? We really need to hear from you soon." Exhibit 2 at 1. Claimant did not immediately respond.

(11) At mid-morning the next day, June 1, 2024, the employer sent claimant an email stating they had asked for a doctor's note and noting that claimant had mentioned a family emergency but was failing to communicate. Exhibit 2 at 2. The employer concluded the email with, "Your failure to communicate with us with regards to your returning to work or to provide us with the requested doctor's note leaves us with no alternative than to view your actions as a voluntary quit." Exhibit 2 at 2.

(12) Claimant did not obtain a doctor's note or communicate further with the employer by the time of the employer's June 1, 2024, email because he was too busy caring for his wife. Claimant did not work on May 30, 31, or June 1, 2024, because he was caring for his wife and because he had been informed that he had been taken off the work schedule as to May 30 and 31, 2024, and, in the case of June 1, 2024, had been told he was considered to have voluntarily quit, which he viewed as the employer terminating his employment.

(13) On June 18, 2024, claimant responded to the employer's June 1, 2024, email, asserting that he did not voluntarily quit. Exhibit 2 at 3. Claimant stated that his "wife was in the ER and hospitalized for an extended period which required 24/7 care. She was released yesterday. But she is gravely ill and requires round the clock care and monitoring." Exhibit 2 at 3. Claimant referenced a desire to take a leave of absence due to his wife's condition and stated that he was "willing to come back to work after [his] leave[.]"

(14) The employer did not respond to claimant's June 18, 2024, email. They did not do so because upon sending claimant their June 1, 2024, email, they "felt that he was already quitting and he was . . . no longer employed" by the employer. Transcript at 8-9.

CONCLUSIONS AND REASONS: The employer discharged claimant, 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).

The work separation was a discharge that occurred on June 1, 2024. On that date, the employer told claimant by email that because of claimant's failure to communicate when he would return to work and failure to provide a doctor's note, the employer viewed claimant's "actions as a voluntary quit." Exhibit 2 at 2. At hearing, the employer's witness stated that upon sending the June 1, 2024, email, the employer felt claimant "was . . . no longer employed by us." Transcript at 8-9.

Claimant had maintained contact with the employer, emailing them on May 30, 2024, that he could not obtain a doctor's note in time for work that day, and texting on May 31, 2024 that he had a family crisis that required his attention. Exhibit 1 at 6; Exhibit 2 at 1. Though claimant did not work on May 30, 31, or June 1, 2024, that is not evidence of claimant having voluntarily quit. The employer had informed him he had been taken off the work schedule for those days due to not providing a doctor's note, and claimant therefore did not report to work on May 31 and June 1, 2024, because he was not scheduled to do so, as well as because he was busy caring for his wife. Though claimant did not communicate further with the employer between the time of his May 31, 2024, text and the employer's June 1, 2024 mid-morning email advising that claimant was viewed as having voluntarily quit, that also is not evidence of claimant having voluntarily quit. Claimant was busy caring for his wife at the time, stated in his text that, "I'll get back to you as soon [as] I can," and the period of time that elapsed between when claimant sent his text and when the employer advised that he was viewed as having voluntarily quit was too short to reasonably show that claimant was unwilling to continue to work. Exhibit 2 at 1. Furthermore,

claimant asserted in his June 18, 2024, email that he had *not* voluntarily quit, explained the circumstances of his wife's health condition, and expressed a willingness to come back to work after taking a leave of absence, which supports that claimant was willing to continue to work for the employer for an additional period of time.

Accordingly, the record shows that when the employer told claimant on June 1, 2024, that the employer viewed his "actions as a voluntary quit," the employer considered claimant to no longer be employed and thus not allowed to continue to work for the employer. Exhibit 2 at 2. Therefore, on that date, claimant was willing to continue to work for the employer for an additional period of time but was no longer allowed to do so by the employer. As such, the work separation was a discharge that occurred on June 1, 2024.

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).

The employer discharged claimant via their June 1, 2024, email. In it, the employer characterized the work separation as a voluntary leaving, but cited the reasons for the separation as being claimant's failure to provide a doctor's note verifying that he was sick on May 29, 2024, and failing to communicate with the employer regarding his return to work. *See* Exhibit 2 at 2 ("Your failure to communicate with us with regards to your returning to work or to provide us with the requested doctor's note leaves us with no alternative than to view your actions as a voluntary quit.").

The employer did not prove that claimant's failure to provide a doctor's note by the time of his June 1, 2024, discharge was misconduct. Beginning May 30, 2024, and repeated in several communications the next day, the employer conveyed to claimant an expectation that he provide a doctor's note verifying that he was sick on May 29, 2024. *See* Exhibit 1 at 7, 5, 4; Exhibit 2 at 1. This is sufficient to establish a general expectation that claimant provide the doctor's note. However, the record shows that on the day claimant was advised of the expectation, May 30, 2024, he notified the employer that he could not provide it in time for his work shift that day. Exhibit 1 at 6. Further, also on that day, claimant's wife was hospitalized due to Guillain-Barre syndrome, a serious autoimmune disorder, which caused claimant to become preoccupied with his wife's care. Claimant advised by text message on May 31, 2024, that he was having a "family crisis" and would get back to the employer "as soon [as he] could." Exhibit 2 at 1. Shortly thereafter, the next day at mid-morning, the employer sent their email discharging claimant. Claimant did not obtain a doctor's note by the time of the employer's June 1, 2024, email because he was too busy caring for his wife.
Thus, claimant did not willfully fail to provide the employer a doctor's note, as he could not do so by the time of his work shift on May 30, 2024, and, after his wife was hospitalized, was too busy with her care

to provide one before being discharged on June 1, 2024. Similarly, claimant did not fail to provide a doctor's note with wanton negligence. This is so because the record shows that his responsibilities to care for his wife made obtaining a note before his June 1, 2024, discharge impossible or prohibitively difficult. Furthermore, the record fails to show that claimant acted with indifference to his actions, a necessary element of wanton negligence, because he notified the employer on May 31, 2024, that he was having a "family crisis" and would get back to the employer "as soon [as he] could," thus providing some explanation for why a doctor's note had not been produced to that point. Exhibit 2 at 1.

The employer likewise did not establish that claimant's conduct amounted to misconduct based upon claimant having failed to communicate about his return to work. As mentioned above, claimant notified the employer on May 31, 2024, that he was having a "family crisis" and would get back to the employer "as soon [as he] could." Exhibit 2 at 1. That message logically called for the employer to standby a reasonable amount of time and await more information regarding claimant's return to work plans. However, the employer discharged claimant shortly thereafter, the next day, June 1, 2024, via an email sent at mid-morning. Exhibit 2 at 2. The employer did not establish that claimant violated a known workplace expectation by failing to inform the employer of his return-to-work plans by the time of the employer's June 1, 2024, email, particularly in light of the fact that claimant had stated just the day before that he was experiencing a family crisis and would get back to the employer soon.

For these reasons, the employer discharged claimant, but not for misconduct. Claimant is not disqualified from receiving unemployment insurance benefits based on the work separation.

DECISION: Order No. 25-UI-283623 is affirmed.

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

DATE of Service: April 10, 2025

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 stated above**. *See* ORS 657.282. For forms and information, visit https://www.courts.oregon.gov/courts/appellate/forms/Pages/appeal.aspx and choose the appropriate form under "File a Petition for Judicial Review." You may also contact the Court of Appeals by telephone at (503) 986-5555, by fax at (503) 986-5560, or by mail at 1163 State Street, Salem, Oregon 97301.

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. If you are unable to complete the survey online and wish to have 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 ໄດ້ ໂດຍປະຕິບັດຕາມຄຳແນະນຳທີ່ບອກໄວ້ຢູ່ຕອນທ້າຍຂອງຄຳຕັດສິນນີ້.

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.

Employment Appeals Board - 875 Union Street NE | Salem, OR 97311
Phone: (503) 378-2077 | 1-800-734-6949 | Fax: (503) 378-2129 | TDD: 711
Email: *appealsboard@employ.oregon.gov*
Website: *www.Oregon.gov/employ/pages/employment-appeals-board.aspx*