

EMPLOYMENT APPEALS BOARD DECISION
2018-EAB-0216

Affirmed
No Disqualification

PROCEDURAL HISTORY: On January 8, 2018, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 130529). Claimant filed a timely request for hearing. On February 7, 2018, ALJ Scott conducted a hearing, and on February 9, 2018 issued Hearing Decision 18-UI-102983, concluding claimant's discharge was not for misconduct. On February 27, 2018, the employer filed an application for review with the Employment Appeals Board (EAB).

The employer's argument contained information that was not part of the hearing record, and failed to show that factors or circumstances beyond its reasonable control prevented it from offering the information during the hearing. Under ORS 657.275(2) and OAR 471-041-0090 (October 29, 2006), we considered only information received into evidence at the hearing, and arguments based upon that evidence, when reaching this decision.

FINDINGS OF FACT: (1) Skyland Pub employed claimant as a server from December 6, 2017 to December 7, 2017.

(2) The employer notified claimant upon hire that she would not receive tips during her training shifts. Claimant understood that condition.

(3) On December 7, 2017, claimant reported to work for a training shift. Claimant's trainer was late, and claimant waited on some tables with no assistance from the trainer or another experienced employee, including one table that left a \$30 tip. Claimant became upset that the trainer intended to keep the \$30 tip when the trainer had not had any part in serving the table that left the tip.

(4) Claimant argued with the trainer and challenged her about keeping the tip. Claimant had a disagreement with the manager about the employer's tip policy and left work before her shift ended, believing the manager wanted her to leave. Claimant felt uncertain whether or not the manager had discharged her.

(5) On December 8, 2017, claimant called a coowner and left a message asking if she still had a job or not. When the coowner did not return her call, claimant sent a text message to a coowner asking if she still had a job. Claimant wrote in the message that if she did not hear from the coowner she would report to work as scheduled.

(6) The coowner replied to claimant's text stating that he did not know "how things went down" the night before "[b]ut, we are going to have to go another route" and he was "sorry to let you know that we can't have you be a part of the team any longer." Exhibit 2. Claimant replied that she "wont [*sic*] argue with your decision." *Id.* When claimant asked about her paycheck, the coowner replied, "I know that 24 hours is standard practice" and he would see if he could get her the paycheck that day. *Id.*

CONCLUSIONS AND REASONS: We agree with the ALJ that claimant's discharge was not for misconduct.

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) (August 3, 2011). 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 employer's witness considered claimant's work separation a voluntary leaving, alleging that claimant quit work by walking off the job before the end of her shift. Claimant considered the separation a discharge, alleging that the manager sent her home from work. On this record, it is more likely than not that the employer discharged claimant. The fact that claimant inquired with the employer about her next shift after leaving work early on December 7th, and specifically stated that she planned to report to work for her next shift as scheduled if she did not hear from the coowner, suggest that at all relevant times claimant wanted and intended to continue working for the employer. On the other hand, the employer responded to her text message that the employer could not have her be part of the team any longer, suggesting that it was the employer's choice not to allow her to continue working when claimant was willing to do so. Also notable is that the employer alluded to having 24 hours as "standard practice" to deliver claimant's final paycheck, given that Oregon law provides that a discharged employee's final paycheck is due by the end of the next business day, whereas if the employer considered claimant to have voluntarily left work without notice by walking off the job the employer had until the earlier of five days or the next regular payday to provide claimant with her paycheck. *Compare* ORS 652.140(1) and (2). Under the circumstances, it is more likely than not that the employer discharged claimant.

ORS 657.176(2)(a) requires a disqualification from unemployment insurance benefits if the employer discharged claimant for misconduct connected with work. OAR 471-030-0038(3)(a) defines misconduct, in relevant part, as a willful or wantonly negligent violation of the standards of behavior which an employer has the right to expect of an employee, or an act or series of actions that amount to a willful or wantonly negligent disregard of an employer's interest. OAR 471-030-0038(1)(c) defines wanton negligence, in relevant part, as 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.

The employer discharged claimant for her behavior in questioning the employer's tip policy, which she considered unfair under the circumstances. The manager working with claimant during the December 7th shift reported to the employer that claimant was upset that she "did all the work" and "deserved" tips, and that the manager felt claimant's "attitude about training was getting worse throughout her shift." Exhibit 1. The trainer reported claimant said "that's bullshit if you think you're keeping all of" a large tip, and later "started on again about the tips and was grilling" the trainer and manager about it, stating that customers left the large tip because of "how good" claimant was with the customers. *Id.* Neither of those written accounts of claimant's behavior on December 7th suggests that claimant's behavior was such that it amounted to a willful or wantonly negligent violation of the employer's reasonable expectations or the standards of behavior the employer had the right to expect of her. On this record, claimant's disagreement with the employer's tipping policy, and the manner in which she chose to voice her disagreement, did not amount to disqualifying misconduct. Claimant therefore is not disqualified from receiving unemployment insurance benefits because of her work separation.

DECISION: Hearing Decision 18-UI-102983 is affirmed.

J .S. Cromwell and S. Alba;
D. P. Hettle, not participating.

DATE of Service: March 27, 2018

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.surveymonkey.com/s/5WQXNJH>. If you are unable to complete the survey online and wish to have a paper copy of the survey, please contact our office.