

EMPLOYMENT APPEALS BOARD DECISION
2019-EAB-0321

Affirmed
No Disqualification

PROCEDURAL HISTORY: On March 5, 2019, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant, but not for misconduct (decision # 90043). The employer filed a timely request for hearing. On March 27, 2019, ALJ Janzen conducted a hearing, and on March 29, 2019 issued Order No. 19-UI-127287, affirming the Department's decision. On April 1, 2019, the employer filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Klamath County School District employed claimant as a teacher's aide from October 31, 2018 until February 6, 2019. After hire, claimant was on probationary status to enable the employer to decide if it wanted to keep claimant as an employee.

(2) As teacher's aide, claimant worked under the supervision of teachers. During claimant's employment various teachers told the special programs principal that claimant was using her cell phone at work when she was not on break, that claimant on occasion took fruit from the cafeteria without paying for it, that claimant was rude, and that claimant lacked initiative and motivation.

(3) Sometime before or around early January 2019, at least one teacher told claimant not to use her cell phone when she was supposed to be working and was not on break. After speaking with the teacher, claimant did not use her cell phone at work. Sometime around early January 2019, the principal told claimant that some of the teachers she worked with thought she was rude and did not have a good attitude. Claimant did not think she had been rude and did not understand why the teachers viewed her that way.

(4) On January 9, 2019, the principal conducted a staff meeting that claimant attended. At that meeting, the principal advised staff that they should not use cell phones at work unless they were on break, and that they were not allowed to take fruit from the cafeteria without paying for it. After the meeting, the principal did not receive reports that claimant continued to remove fruit without paying for it. However,

after the meeting, it was reported to the principal that claimant had used her cell phone at work. However, claimant had not used her cell phone.

(5) As of early February 2019, the end of claimant's probationary period was approaching. Around that time, the special programs principal decided that claimant was not a "good fit" for a teacher's aide and was not a "good team member." Transcript at 6, 7. On February 6, 2019, the principal met with claimant and told her that the employer was not going to continue her employment. However, the principal gave claimant the opportunity to resign in lieu of termination if she wanted to do so. That day, claimant resigned. Had claimant not resigned, the employer would have discharged her.

CONCLUSIONS AND REASONS: The employer discharged claimant but not for misconduct.

Because claimant resigned in lieu of discharge, the first issue this case presents is whether the work separation should be considered a voluntary quit or a discharge. OAR 471-030-0038(2) (December 23, 2018) sets out the standard for properly characterizing 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). 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 at hearing testified that had claimant not agreed to resign when she did, the employer would have discharged her. Transcript at 15. Claimant did not dispute that involuntary circumstances caused her to agree to resign. Because the employer did not allow claimant to continue working, and claimant could not have done so, the separation was a discharge, and not a voluntary leaving.

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 carries the burden to show claimant's misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

At hearing, the employer's witness testified that claimant was discharged because she was not a "good fit," lacked "motivation" and "initiative," and no final violation of the employer's standards caused claimant's discharge. Transcript at 6, 7. As a basis for discharge, the employer's alleged grounds for discharge do not appear to embody objectively ascertainable, unambiguous standards of work performance to which claimant reasonably could have been expected to conform her behavior. Claimant likely was neither consciously aware, nor reasonably should have been aware, that she was violating the employer's expectations in the manner that the employer alleged, or that her behavior would probably

result in a violation of the employer's standards. As such, the reasons that the employer discharged claimant likely did not constitute misconduct.

The employer also pointed out at hearing that claimant had allegedly violated the employer's standards on occasion when she supposedly used her cell phone at work, was rude, and removed fruit from the cafeteria without paying for it. The employer agreed, however, that claimant did not take fruit without paying for it after she was informed at the January 9 staff meeting that she should not do so, and might have thought before the meeting that she could take fruit without paying for it. Transcript at 15, 16, 24. While the employer's witness testified that she received hearsay reports from teachers that claimant continued using her cell phone at work after being advised that such use was prohibited, claimant contended that she had not. Transcript at 8, 25. Claimant's first hand evidence on this issue, her denial, is entitled to more weight than the employer's hearsay evidence. Finally, claimant denied the employer's contention that she had been rude to other staff, and the employer's witness testified that when she brought up this matter with claimant, claimant seemed confused and not to comprehend how her behavior could have been perceived as rude. Transcript at 8, 25. On this record, assuming that these allegations led the employer to discharge claimant, the employer did not demonstrate, more likely than not, that claimant violated standards of which she was aware with a willful or wantonly negligent state of mind.

The employer did not meet its burden to show that it discharged claimant for misconduct. Claimant is not disqualified from receiving unemployment insurance benefits based on her work separation from the employer.

DECISION: Order No. 19-UI-127287 is affirmed.

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

DATE of Service: May 1, 2019

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.



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 desisyong ito.

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 Asuntos Laborales. Si no está de acuerdo con esta decisión, puede presentar una Petición 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 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.

Employment Appeals Board - 875 Union Street NE | Salem, OR 97311
 Phone: (503) 378-2077 | 1-800-734-6949 | Fax: (503) 378-2129 | TDD: 711
www.Oregon.gov/Employ/eab

The Oregon Employment Department is an equal opportunity employer/program. Auxiliary aids and services are available upon request to individuals with disabilities. Language assistance is available to persons with limited English proficiency at no cost.

El Departamento de Empleo de Oregon es un programa que respeta la igualdad de oportunidades. Disponemos de servicios o ayudas auxiliares, formatos alternos y asistencia de idiomas para personas con discapacidades o conocimiento limitado del inglés, a pedido y sin costo.