

EMPLOYMENT APPEALS BOARD DECISION
2019-EAB-0331

Reversed
No Disqualification

PROCEDURAL HISTORY: On February 15, 2019, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant voluntarily left work without good cause (decision # 92834). Claimant filed a timely request for hearing. On March 14, 2019, ALJ Murdock conducted a hearing, and on March 19, 2019, issued Hearing Decision 19-UI-126655, affirming the Department's decision. On April 1, 2019, claimant filed an application for review with the Employment Appeals Board (EAB).

With her application for review, claimant submitted written argument. Claimant's argument contained information that was not part of the hearing record, and failed to show that factors or circumstances beyond claimant's reasonable control prevented claimant 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 claimant's argument, to the extent it was based on the hearing record, when reaching this decision.

FINDINGS OF FACT: (1) Café Sintra Sunriver Inc. employed claimant as its general manager from July 2006 to January 19, 2019.

(2) In October 2018, claimant learned that the kitchen manager was earning considerably more money than she was even though claimant had worked for the employer for over 12 years, which was considerably longer than the kitchen manager had worked for the employer. Claimant spoke to the owner about it and the owner agreed to increase her hourly wage by \$1.00 and revisit the issue in three months to determine if she would receive an additional wage increase. At that time, the owner also asked claimant to "work more on [the employer's] Facebook posts," which claimant agreed to do on "her part" to merit an increased wage. Transcript at 27.

(3) On January 14, 2019, claimant sent an email to the owner that it was time for further discussions about the pay raise issue. The owner did not reply. Over the next few days at work, claimant did not ask the owner about it when she saw her and became frustrated and angry that the owner appeared to ignore her.

(4) On Friday, January 18, 2019, as claimant was completing her catering work at the end of her shift, claimant said to the owner, "I'm finishing this up and I am going to leave. I [feel] like [you] shit down my throat . . . because [you are] paying somebody else more . . ." Transcript at 20. The owner offered to talk to claimant about it, but claimant declined because she was angry, stating, "I'm going right now." Transcript at 20. When claimant left work on January 18, she did not turn in her keys or take home her personal belongings. The owner did not ask claimant if she was quitting. Claimant did not state that she was quitting, but the owner "just assumed that she wasn't coming back." Transcript at 25. As she was driving home from work, claimant discovered that she had been deleted as the administrator of employer's Facebook page. Claimant was next scheduled to work on Wednesday, January 23, 2019.

(5) Over the weekend, claimant sent text messages to the owner's personal phone, requesting to discuss the matter further "to clear the air." Transcript at 29. However, although claimant had communicated with the owner in that manner for thirteen years, the owner did not see the messages because she had blocked claimant from her phone. Claimant also called the restaurant, but was told the owner was not available. Unbeknownst to claimant, on January 19, 2019, the owner prepared claimant's final paycheck though it was not a regular payday. Early the next week, the owner had claimant's final paycheck and personal belongings hand-delivered to her.

(6) The employer discharged claimant on January 19, 2019.

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

Work Separation. At hearing, claimant asserted that she was discharged, and the owner asserted that claimant quit. Transcript at 4, 24. 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) (December 23, 2018). 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). "Work" means "the continuing relationship between an employer and an employee." OAR 471-030-0038(1)(a). An individual is separated from work when the employer-employee relationship is severed. *Id.*

Order No. 19-UI-126655 concluded that "claimant voluntarily left work" based upon the following reasoning:

The record is persuasive that claimant expressed to the owner her intent to quit work when she became upset wither on January 18, 2019, at the end of the day, and told her that she was leaving. Claimant testified that she told her that she was leaving "for the day", but her testimony is implausible. Had she made it clear that she was leaving "for the day," it is illogical that she would then feel so compelled to try to reach the owner over the weekend to talk before returning to work or that the owner would feel compelled to immediately prepare her final paycheck. The record is persuasive that, more likely than not, claimant became very emotional and rashly decided to quit work, but then thought better of it later and attempted to negotiate a rescission of her resignation...Claimant voluntarily left work.

Order No. 19-UI-126655 at 3. However, the owner admitted that she did not ask, and claimant did not state, that she was quitting and the record shows that when claimant left the workplace on January 18, it

was after she had completed her catering work, and claimant did not take her personal belongings with her or turn in her keys. Transcript at 7, 21. Claimant also explained that she attempted to reach the owner after leaving on the January 18 because “I did tell my boss that she shit on me,...not a very nice thing to do,” and she wanted to “clear the air” and address it outside of the restaurant, as they had in the past when they had differences. Transcript at 6, 28. Under those circumstances, viewed objectively, it is not “implausible” that claimant would attempt to contact the owner, even if she had not quit. Moreover, the record is clear that by blocking claimant from her phone, removing her as administrator of the employer’s Facebook page, and issuing her final paycheck on January 19, the owner was not allowing claimant to return to work. Under OAR 471-030-0038(2)(b), because claimant was willing to continue to work for the employer for an additional period of time but was not allowed to do so, the work separation was a discharge which occurred on January 19, 2019.

Discharge. 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. In a discharge case, the employer has the burden to establish claimant’s misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

Rather than assert or even imply at hearing that she prepared claimant’s final paycheck on January 19, 2019 because claimant had violated a reasonable employer expectation, the owner explained that she did so because she “just assumed that [claimant] wasn’t coming back” after she left the workplace on January 18. Although claimant could, and perhaps should, have been clearer with respect to communicating with the owner on that occasion, the owner did not attempt to clarify claimant’s intent in stating, “I’m going right now,” when claimant left that day, and purposely blocked her calls to avoid communicating with her during the weekend. The employer described claimant as a “good employee,” and did not dispute claimant’s assertion that she had never been disciplined during the 13 years that she worked for the employer. Transcript at 17, 27. Accordingly, the employer failed to show that it discharged claimant because she willfully or with wanton negligence violated a reasonable employer expectation.

The employer discharged claimant, but not for misconduct under ORS 657.176(2)(a). Claimant is not disqualified from receiving unemployment insurance benefits on the basis of her work separation.

DECISION: Order No. 19-UI-126655 is set aside, as outlined above.¹

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

DATE of Service: May 2, 2019

¹ This decision reverses an order that denied benefits. Please note that payment of benefits, if any are owed, may take approximately one week for the Department to complete.

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.

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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 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 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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