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

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VQ 005.00
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EMPLOYMENT APPEALS BOARD DECISION
2019-EAB-0632

Reversed
No Disqualification

PROCEDURAL HISTORY: On May 30, 2019, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant voluntarily left work without good cause on May 9, 2019 (decision # 71312). Claimant filed a timely request for hearing. On June 25, 2019, ALJ Scott conducted a hearing, and on June 28, 2019 issued Order No. 19-UI-132496, affirming the Department's decision. On July 8, 2019, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) ME_AL, LLC employed claimant as Massage Envy general manager from March 21, 2017 to May 9, 2019. Claimant had worked in the same position for the franchise's former owner since 2008 or 2009.

(2) In 2017 and 2018, claimant became angry and told the owner she quit. She later apologized, and retracted both resignations. The owner accepted claimant's retractions and allowed her to continue working.

(3) Claimant had a history of communicating casually and freely with the owner. On March 5, 2019, claimant sent a text message to the owner in which she made statements including "I 100% hate this fucking job right now," "All I want to do is spew hate at everyone," "What the fuck is wrong woth [*sic*] them," and that she was too upset to speak with the owner at that time. Exhibit 1.

(4) The owner viewed discord or discourse with claimant as "pretty healthy . . . tension." Transcript at 15. The owner did not enforce any policies with respect to claimant's demeanor or behavior at work, but observed that he did not think his coaching was working. He felt she was not energetic enough about being at work, he did not "want to continuously go back to the person in charge of the whole thing and talk them into staying," and he "wasn't feeling that energy anymore." Transcript at 20-21.

(5) On May 9, 2019, claimant and the owner met to discuss the business. Another employee, intended to work as claimant's second-in-command, also attended. The conversation became heated, and the owner stood up and said he was leaving. Claimant asked the second-in-command to leave the meeting so she

and the owner could speak privately. The owner began to leave. Claimant asked if he was going to come back, and he said no. Claimant responded that she guessed she would not come back, either.

(6) After the owner walked away, claimant met the second-in-command again and they drove back together. Claimant continued to work. During the drive, claimant took a call from a client and told the client she would follow up with them the next day. Claimant and the second-in-command agreed to have a meeting the next day. Claimant also sent and received some emails about supplies.

(7) Claimant then received a text message from the owner that stated,

> [Claimant], thanks so much for the 2+ years you gave [the employer]. While the outcome today wasn't what I wanted, I do accept your verbal resignation as final. I've reached out . . . to issue a final check. * * * Wishing you the very best moving forward. Please do not access any computer system, etc moving forward.

Exhibit 1. Claimant received the owner's text message and, since she had not said she quit her job that day, concluded that the owner had fired her. Claimant sent a message to the owner that stated, "Via text: Classy." *Id*. Within five minutes, claimant began receiving calls from her location managers saying that the owner told them she had quit, and that she had done so while the second-in-command was present. One manager asked claimant what was going on, and claimant responded, "Nothing, I'm just working." Transcript at 38. The manager asked why people were saying she had quit, and she responded that she did not know what was going on "but I never quit." Transcript at 39.

(8) Claimant did not return to work after the May 9th text message from the owner, although she continued to pass on messages she received from clients who contacted her for information so he could follow up with the clients.

CONCLUSIONS AND REASONS: Claimant did not voluntarily leave work. The employer discharged claimant on May 9, 2019, and the discharge was not for misconduct.

Nature of the 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) (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).

Decision # 71312 concluded that claimant "quit work because you were upset at your employer." The order under review concluded that claimant quit work because after receiving the owner's text message she responded only "Classy," and that "[a] reasonable and prudent person of normal sensitivity, exercising ordinary common sense, who had not intended to quit her job and wanted to continue the employment relationship would have, in some form or fashion, protested [the owner's] pronouncement that she had quit her job." Order No. 19-UI-132496 at 3. The record does not support the conclusion that claimant quit work.

First, claimant did not respond, "Classy." She responded, "Via text: Classy." The addition of the phrase "Via text" changes the context and meaning of claimant's response. Second, the standard that applies to

a nature of the work separation determination is not that of "a reasonable and prudent person of normal sensitivity, exercising ordinary common sense." That is the standard that applies to whether or not an individual quitting work has good cause for leaving. The standard that applies to determining the nature of the work separation is, more generally, whether any reasonable person would believe that continuing work was available. *See accord Roadhouse v. Employment Department*, 283 Or. App. 859, 391 P.3d 887 (2017) (analyzing cases in which the question of whether an individual quit or was discharged is not answered by application of OAR 471-030-0038(2)(a)); *see also Van Rijn v. Employment Department*, 237 Or. App. 39, 43, 238 P.3d 419 (2010) (illustrating circumstances under which an employer can communicate that an employee will not be allowed to return to work without using explicit words to indicate a discharge, when the supervisor told claimant to "fucking leave" and nothing in that comment "would support a finding that claimant was welcome to remain at or return to work").

In this case, the owner alleged that claimant said "Fuck no, I quit" during the May 9th meeting, and that he sent the text message to claimant in response to that statement. Transcript at 6, 11. The owner also alleged, however, that claimant "got up and quit" before he "got up and left," while his later testimony suggested that the owner stood up first, not claimant. *Compare* Transcript at 6, 11. Two witnesses at the hearing, including the second-in-command, suggested that the owner told managers on May 9th that claimant's second-in-command was present when claimant quit; however, the second-in-command was not actually present. Given the inconsistencies in the owner's testimony, and the lack of corroboration for his allegation that claimant said she quit, the record does not prove it is more likely than not that claimant said "Fuck no, I quit" during the May 9th meeting.

The preponderance of the evidence is that the owner stood up during the meeting, and told claimant he was leaving and was not going to return, after which time claimant said she was leaving too. There is nothing in the record suggesting that either the owner or claimant intended to quit work by doing so, much less that claimant quit, or indicated that she was quitting. In fact, after the meeting during which claimant allegedly quit, she continued working by carpooling with her second-in-command, taking a client call, scheduling a meeting with her second-in-command for the following day, and sending and receiving emails about supplies. All of claimant's activities between the time she left the May 9th meeting and the time she received the owner's May 9th text indicates that claimant was continuing to work. The record strongly suggests that claimant was at all relevant times willing to continue working for the employer for an additional period, and that she did so.

Claimant did not stop working until after she received a text message from the owner purporting to accept her resignation, telling her that her final check had been issued and not to access the employer's computer system anymore, and then received calls from all of her managers telling her that the owner said she had quit. No reasonable person, having received the text message from the owner about the termination of the employment relationship and issuance of her final check, and having learned from her subordinate managers that she was no longer employed, would conclude they were welcome to remain at or return to work, regardless whether or not they protested the owner's pronouncement.

Claimant was willing to continue working for the employer during and after the May 9th meeting. The employer, at the point in time when the owner sent the May 9th text message, was no longer willing to allow her to do so. The work separation was, therefore, a discharge.

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).

The owner had concerns about claimant's demeanor and professionalism, but continued to coach her and viewed some of the dissention between them was "pretty healthy . . . tension." As such, the owner did not enforce the employer's policies against claimant and, beyond coaching, it does not appear on this record that the owner told claimant that her behavior was unacceptable. Ultimately, the owner testified that the thing that changed on May 9th was that claimant was no longer energetic about being at work and he no longer wanted to feel like he had to talk her into staying. The owner's perception about claimant's energy toward her job is not attributable to claimant, however. Absent evidence of willful or wantonly negligent conduct attributable to claimant as misconduct, the record does not support a disqualification from benefits.

On this record, the employer discharged claimant, but not for misconduct. Claimant is not disqualified from receiving unemployment insurance benefits because of this work separation.

DECISION: Order No. 19-UI-132496 is set aside, as outlined above.

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

DATE of Service: August 13, 2019

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.

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.

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