

EMPLOYMENT APPEALS BOARD DECISION
2019-EAB-0686

Affirmed
No Disqualification

PROCEDURAL HISTORY: On June 18, 2019, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant voluntarily left work without good cause (decision # 74412). Claimant filed a timely request for hearing. On July 12, 2019, ALJ Wyatt conducted a hearing, and on July 19, 2019, issued Hearing Decision 19-UI-133693, concluding the employer discharged claimant, not for misconduct. On July 24, 2019, the employer filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Bi Mart Corporation employed claimant as a cashier and receptionist from May 22, 2014 to May 24, 2019.

(2) On May 14, 2019, the store where claimant worked was exceptionally busy during claimant's shift, with long lines of customers at the checkout area. There was an insufficient number of cashiers on duty, and at least one of the cashiers was a new hire and inexperienced. As the senior cashier on duty, claimant attempted to keep the lines moving because customers appeared agitated, which caused her stress. At one point, a supervisor who typically sat at a workstation above the floor approached claimant and said to her, "[T]ake a deep breath." Transcript at 24. Claimant responded, "[T]hat's easy for you to say take a deep breath. You don't see what I see. You sit up there . . . You don't see the lines. I try to keep the store running smooth." Transcript at 24-25. The supervisor was offended by claimant's response, although claimant did not intend to insult her. The supervisor reported the incident to the store manager, who called claimant into the office. The supervisor criticized claimant for her "smart comment," and told her he intended to speak to the district manager about it. Transcript at 24. Claimant became upset and was given permission to go home early.

(3) On May 21, 2019, during claimant's shift, claimant was called back into the office and given a formal disciplinary warning for her comment on May 14, 2019. Claimant became "upset," an "emotional wreck," and "started shaking" and "crying" after being given the warning. Transcript at 7. She told the store manager that it would be difficult for her to finish her shift, greeting and working with customers, given her condition. After attempting to continue working without success, she summoned another receptionist to take her place and left work. She went home and immediately contacted the

office of the store's district manager to complain about being disciplined twice for the same conduct, to explain why she had left the workplace, and to discuss the appropriate next steps to take to complain about the store manager's conduct. Transcript at 9-10. Her district manager was out, so claimant spoke to another district manager, and explained what had happened. That district manager told claimant she would inform claimant's district manager and store manager about their conversation. Transcript at 9-10.

(4) On May 22, 2019, claimant was scheduled to work but had a migraine headache that had not responded to medication. She called the employer and notified an assistant manager that she would not be at work that day.

(5) On May 23, 2019, claimant was not scheduled to work.

(6) On May 24, 2019, claimant was scheduled to work the evening shift. It was claimant's regular payday. Before her shift started, claimant went to the employer's office to pick up her paycheck. When she arrived, the store manager gave claimant her paycheck but told her that her employment had been terminated. When claimant asked when and why the termination had occurred, the manager responded that he did not know when or for what reason the employer had terminated her employment. Transcript at 11.

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

As a preliminary matter, the employer provided only hearsay evidence regarding claimant's conduct and statements. Absent a basis for concluding that claimant was not a credible witness, her firsthand testimony, under oath, was given more weight than the employer's hearsay evidence, and facts found in accordance with her testimony on matters in dispute.

Work Separation. At hearing, claimant asserted that she was discharged on May 24, and the employer's witness asserted that claimant quit on May 21. Transcript at 5, 29. 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).

The employer presented hearsay evidence that claimant told a coworker on May 20 that she "couldn't take it anymore" and was "putting in [her] two weeks," but admitted that claimant never gave the employer a two-week notice of an intent to quit. Transcript at 14-15. The employer also presented hearsay evidence that claimant told the store manager on May 22 that she had left the store on May 21 without talking to a member of management because she was "frustrated and had enough." Transcript at 16. Claimant denied telling anyone she intended to give the employer two weeks' notice of her intent to quit, and asserted that she had only explained to the store manager on May 22 that she "couldn't finish [her] shift that day [May 21]" after telling him while in the office on May 21 that it was going to be difficult for her to do so given her emotional condition. Transcript at 20, 30. The employer did not dispute that claimant notified the employer on May 22 that she would not be at work that day, and that she was ready to work on May 24, the day she was told her employment had been terminated. The preponderance of the evidence shows that claimant was willing to continue to work for the employer on

and after May 24, but was told on May 24 that she would not be allowed to do so. Accordingly, the work separation is a discharge that occurred on May 24, 2019.

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) (December 23, 2018). “[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).

Although the employer asserted that its position on claimant’s work separation was that she voluntarily quit work without good cause, it also asserted that she had been “termed” for “job abandonment” because she left work on May 21 without notifying the store’s management. Transcript at 17, 29. To the extent that the employer discharged claimant for that reason, it failed to show that it did so for misconduct. There was no dispute that after claimant was given the disciplinary warning on May 21, she became “upset,” an “emotional wreck,” and “started shaking” and “crying,” and left work only after attempting to continue to work in that condition and summoning another receptionist to take her place. There also was no dispute that during the May 21 meeting she told the store manager that she did not believe she could work in her condition and that, after leaving, she immediately contacted the employer’s district management office to discuss what had occurred. Given her emotional condition, her actions in arranging for another receptionist to take her place, and her almost immediate contact of the employer’s district management office to discuss what had just occurred, the record fails to show that claimant was consciously indifferent to the consequences of her actions or the interests of the employer when she left work on May 21, 2019. Absent such a showing, the record fails to establish that leaving work on May 21 was misconduct.

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-133693 is affirmed.

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

DATE of Service: August 29, 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.

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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 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

ទោរទៅ – តើមានអ្វីដែលរារាំងការងាររបស់លោកអ្នក? បើបញ្ហាទាំងនេះរារាំងការងាររបស់លោកអ្នក រដ្ឋអាចផ្តល់ការប្រឹក្សាដល់លោកអ្នកបាន។ បើលោកអ្នកមិនយល់ស្របចំពោះសេចក្តីសម្រេចនេះទេ លោកអ្នកអាចដាក់ពាក្យប្តឹងសុំឲ្យមានការពិនិត្យរឿងក្តីឡើងវិញជាមួយតុលាការឧទ្ធរណ៍រដ្ឋ Oregon ដោយអនុវត្តតាមសេចក្តីណែនាំដែលសរសេរនៅខាងចុងបញ្ចប់នៃសេចក្តីសម្រេចនេះ។

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 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، می توانید با استفاده از دستور العمل موجود در پایان آن، از دادگاه تجدید نظر اورگان درخواست تجدید نظر کنید.

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