

EMPLOYMENT APPEALS BOARD DECISION
2019-EAB-0871

Reversed
No Disqualification

PROCEDURAL HISTORY: On July 8, 2019, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant voluntarily left work without good cause, and was disqualified from receiving unemployment insurance benefits (decision # 91706). Claimant filed a timely request for hearing. On August 14, 2019, ALJ Seideman conducted a hearing, and on August 22, 2019 issued Order No. 19-UI-135426, affirming the Department's decision. On September 9, 2019, claimant filed an application for review with the Employment Appeals Board (EAB).

EAB did not consider claimant's written argument when reaching this decision because they did not include a statement declaring that they provided a copy of their argument to the opposing party or parties as required by OAR 471-041-0080(2)(a) (May 13, 2019).

FINDINGS OF FACT: (1) Big Sky Hospitality, Inc. employed claimant as a bartender from October 16, 2014 to May 17, 2019.

(2) In early 2019, claimant requested time off for a vacation from May 24, 2019 to June 3, 2019. On February 15, 2019, the employer granted the request.

(3) On April 23, 2019, claimant requested time off for a second vacation from July 10, 2019 to July 15, 2019. On May 6, 2019, the person in charge told claimant that the employer could not accommodate both of her vacation requests and would not authorize her July vacation. Claimant said she was going to start looking for another job if the employer did not accommodate both vacation requests.

(4) On May 6, 2019, the person in charge spoke with the employer's owner and general manager. They discussed claimant's request, their business needs, and other employees' time off requests, decided that they could not accommodate claimant's July vacation request without hiring a new employee, and denied the request.

(5) On May 7, 2019, the person in charge spoke with claimant and confirmed that her July vacation request was being denied. Claimant said if that was the case, she guessed she would be looking for another job.

(6) The person in charge, owner, and general manager construed claimant's statements as claimant's two weeks' notice, given effective May 6, 2019. The person in charge continued to schedule claimant through May 17th, then removed claimant from the work schedule.

(7) Despite intending to look for a new job, claimant was willing to continue working for the employer through the beginning of her May 24th vacation, and was willing to continue working for the employer after returning from that vacation. Claimant always looked for a new job while continuing to work for her existing employer.

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

Nature of 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) (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 order under review concluded that claimant voluntarily left work without good cause. Order No. 19-UI-135426 at 2. The order was based upon the finding that claimant told the employer's person in charge that she "was giving a two-week notice to quit and looking for other work." *Id.* Although claimant denied in the hearing that she gave two weeks' notice, the ALJ wrote, "I find the testimony of the employer witnesses more persuasive on that issue. It is appropriate to also note that employer deemed claimant to be a very fine employee." *Id.* However, the order under review did not explain why the employer's witnesses were more persuasive or claimant less, and ultimately the record does not support the finding that claimant gave two weeks' notice, or that she quit her job.

The employer's owner and person in charge both alleged at the hearing that claimant gave two weeks' notice of her intent to quit her job and was going to look for work. Audio recording at 16:00-16:15; 25:00-25:10; 30:15-30:20. The owner was not present at the time claimant allegedly made the statement, however, and learned of claimant's alleged statement through the person in charge. The employer's only evidence about what claimant allegedly said therefore came through a single individual, the person in charge.

Claimant denied having said she was giving "two weeks' notice" of her intent to quit her job. Audio recording at 10:15-10:45. The evidence about whether or not claimant gave "two weeks' notice" consists only of the equally balanced testimony of claimant and the person in charge, both of whom were credible eyewitnesses. Absent a basis for disbelieving either witness, the record does not establish that claimant said she was giving two weeks' notice.

Claimant admitted that she told the person in charge that she would look for a different job if the employer did not accommodate both of her vacation requests. The preponderance of the evidence therefore establishes that claimant said she was looking for a new job. Claimant's statement to the

employer that she was going to look for another job does not suggest that she was not willing to work for the employer at a time when continuing work remained available to her. At best, it was an ambiguous statement that she did not want to work for the employer indefinitely. It is therefore more likely than not that claimant was, between May 6th and May 17th, and likely after May 17th, willing to continue working for the employer.

The employer was the party that ended the employment relationship in this case by removing claimant from the work schedule based upon her ambiguous statements about ending the employment relationship over her rejected vacation request at a time when claimant was willing to continue working. In so doing, the employer discharged claimant. Additionally, when claimant learned she had been removed from the work schedule she asked the employer why that had occurred, further suggesting that she had not intended to quit her job and had not given two weeks' notice.

Even if claimant had made the statement alleged about giving two weeks' notice, the separation would remain a discharge. The person in charge testified that claimant stated, conditionally, that if the employer did not allow her to take time off work, she "*will be*" or "*would be*" turning in her two weeks' notice and "guesses that she would start" looking for another job. Audio recording at 25:00-25:10; 30:15-30:20. "Will be" and "would be" and "guesses" are all statements or conditional statements of future intent. Objectively considered, none of the statements attributed to claimant at the hearing suggest that she was at that moment on May 6th giving two weeks' notice that she was in fact quitting work at that time. Nor did claimant specify what date she wanted to designate as her last day. Therefore, even if claimant made the "two weeks'" statements attributed to her on May 6th, the record would not support a finding that claimant had in fact given notice of her present intent to quit her job. It is more likely than not that any such statements were no more than an indication that she would in the future, likely start looking for another job and give two weeks' notice.

For either or both of those reasons, the record shows it is more likely than not that the employer ended the employment relationship by removing claimant from the schedule at a time when she was still willing to continue working. 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). "[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).

The employer discharged claimant effective May 17th because she stated on May 6th and May 7th, after her request for vacation time in July 2019 was denied, that she guessed she would start looking for a new job and intended to still take the time off work in July. While it might be the case that an individual who actually takes unauthorized time off work has committed misconduct, that had not yet occurred in this case at the time of claimant's discharge. At the time of discharge, claimant had not yet engaged in a

willful or wantonly negligent violation of the employer's expectations. Claimant's discharge was not for misconduct. Claimant is not disqualified from receiving unemployment insurance benefits because of her work separation.

DECISION: Order No. 19-UI-135426 is set aside, as outlined above.

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

DATE of Service: October 14, 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.

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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

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 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 دستور العمل موجود در پایان آن، از دادگاه تجدید نظر اورگان درخواست تجدید نظر کنید.

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