

EMPLOYMENT APPEALS BOARD DECISION
2019-EAB-0981

Reversed
No Disqualification

PROCEDURAL HISTORY: On August 19, 2019, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant quit work without good cause (decision # 95835). Claimant filed a timely request for hearing. On September 30, 2019, ALJ Seideman conducted a hearing, and on October 3, 2019 issued Order No. 19-UI-137509, affirming the Department's decision. On October 15, 2019, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant did not declare 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). The argument also contained information that was not part of the hearing record, and did not show that factors or circumstances beyond claimant's reasonable control prevented them from offering the information during the hearing as required by OAR 471-041-0090 (May 13, 2019). EAB considered only information received into evidence at the hearing when reaching this decision. *See* ORS 657.275(2).

FINDINGS OF FACT: (1) JT Restaurant Group LLC employed claimant as a shift leader at its Kentucky Fried Chicken restaurant in Astoria, Oregon from December 2018 to July 11, 2019.

(2) In early 2019, the employer participated in a fundraiser for the Muscular Dystrophy Association (MDA). Employees at claimant's restaurant were told that if they donated their tips or otherwise contributed to the fundraiser they would receive a \$300 gift card from MDA. The employees did so contribute but never received their gift cards. Claimant asked the Astoria general manager of the Astoria restaurant (AGM) about the gift cards and was told MDA never sent them.

(3) In April 2019, the employer's Director of Operations (DOO) visited the Astoria restaurant and claimant mentioned to her that the employees there had not received the promised gift cards. Afterwards, the DOO spoke with MDA and learned that the cards had been sent to the restaurant and that the AGM had signed for them. After the AGM admitted that she had received the cards and had used them, she was directed to reimburse the employees.

(4) Shortly thereafter, the Vancouver restaurant general manager (VGM), who had advocated for the AGM to receive her job and later became the “area coach” for claimant’s restaurant, began making “snide remarks” to claimant whenever she visited the Astoria restaurant. Transcript at 8. The “snide remarks” included telling claimant that she would have “fired [her] already.” Transcript at 8. Claimant believed her criticisms were unjustified and were made because she had been the “whistleblower” regarding the gift cards and the AGM. Transcript at 5.

(5) On or around July 10, 2019, when claimant was assigned to work the drive-through, an assistant manager showed claimant how to enter a refund into the cash register system using the front register. The assistant manager in question instructed claimant that if an order item was cancelled at the front register, a refund could not be issued using the same register. Therefore, the assistant manager and claimant went to the drive-through register and began the process of issuing a refund. However, it was very busy at the time and the assistant manager told claimant to just refund the money to the customer and perform the refund entry later when it was not busy. Claimant gave the customer the appropriate refund and a receipt. Later that day, before claimant closed, she entered the refund into the drive-through register, put the receipt in the register, and left.

(6) On July 11, 2019, the VGM and a different assistant manager began questioning claimant about the refund, implying that she had taken the money for herself. Claimant explained what had occurred with the other assistant manager and suggested that they view the cameras or wait until the other assistant manager arrived, because he could corroborate claimant’s explanation. However, they continued to ask claimant about when the refund occurred, and claimant could not remember. She was then told she would not be allowed to perform her job until she remembered, and the situation “started to escalate from there.” Transcript at 14. After another assistant manager began yelling at claimant, she walked off the job, but did not tell anyone that she quit. After claimant left, she sent a text message to the AGM, explained what had occurred, told her she felt “harassed” and “stressed,” but added, “I need this job.” Transcript at 14.

(7) The next day, July 12, 2019, was claimant’s day off work. That morning, the VGM called claimant, instructed her to bring in her keys, and discharged her.

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

Work Separation. At hearing, claimant asserted that she did not quit and “wanted to keep working there,” but the employer’s witness asserted that claimant abandoned her job. Transcript at 15-17, 26. 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).

Order No. 19-UI-137509, without any analysis, found that “[c]laimant voluntarily quit work on July 11, 2019.”¹ However, there was no dispute that claimant never told anyone at work that she was quitting, and did not leave her keys when she left work. It is also uncontested that immediately after she left the restaurant, claimant sent a text message to the AGM, explained what occurred on July 10 and 11, told

¹ Order No. 19-UI-137509 at 1.

the AGM she felt harassed and stressed, but added, “I need this job.” Moreover, the record fails to show that there was any discussion before the VGM directed claimant on July 12, 2019 to turn in her keys. 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 that occurred on July 12, 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).

The employer’s witness at hearing asserted that claimant was guilty of “job abandonment” on July 11, explaining “all we have is that, you know, she did not like being questioned and walked off her shift.” Transcript at 26. However, claimant explained that after she continually told the VGM and assistant manager that day that she could not remember the time the refund incident occurred, she was told she would not be allowed to perform her job until she remembered, and the situation “started to escalate from there.” After another assistant manager began yelling at claimant, she walked off the job. Claimant could have been, and perhaps should have been, clearer in communicating with the VGM and assistant manager before she left work on July 11. However, immediately after leaving, she sent a text message to the AGM to clarify what had occurred, and explained that she felt “harassed” by the questioning that took place and the directive that she would not be allowed to work unless she remembered the time of the refund incident. She also asserted that she left because she became extremely “stressed” after “things just started to escalate.” Transcript at 14. Viewing the record as a whole, the employer failed to meet its burden to show that claimant consciously, i.e. willfully or with wanton negligence, violated a known employer expectation at the time she walked off the job, particularly after she was told she would not be allowed to continue to work until she remembered something she could not remember.

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-137509 is set aside, as outlined above.²

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

DATE of Service: November 20, 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

² 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.

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 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 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 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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