

EMPLOYMENT APPEALS BOARD DECISION
2019-EAB-1092

Affirmed
No Disqualification

PROCEDURAL HISTORY: On October 8, 2019, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant quit work without good cause (decision # 144635). Claimant filed a timely request for hearing. On November 4, 2019, ALJ Murray-Roberts conducted a hearing, and on November 12, 2019 issued Order No. 19-UI-139547, setting aside the administrative decision and concluding that claimant was discharged, but not for misconduct. On November 18, 2019, the employer filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Chewy's Pub and Grub, Inc. Inc. employed claimant as a bartender from January 19, 2019 until June 3, 2019.

(2) Claimant lived approximately twenty-five miles from her work site and did not have driving privileges due to a revoked driver's license. Therefore, claimant's boyfriend provided her transportation to and from work.

(3) Upon hire, claimant's work schedule began at 1 p.m. The employer trained claimant during the day shift so that she would know what to do on the night shift. During May 2019, the employer scheduled the claimant to work some night shifts, which began at 7 p.m.

(4) In May 2019, the employer initiated a work policy that prohibited claimant's boyfriend from being in the bar during claimant's work shift. Claimant's boyfriend stopped coming into the bar while claimant worked, and would wait for claimant in the employer's parking lot until her shift ended.

(5) On June 2, 2019, at approximately 1:00 a.m., claimant took bar food to the back door to give to her boyfriend as thanks for the work rides and waiting for her. The employer took notice of this incident and informed claimant her that he was coming down to cover the rest of her shift so claimant could go eat with her boyfriend. The employer had never covered the rest of claimant's shift in the past. When the employer showed up claimant handed the employer her work key and stated, "I'm not quitting on you," before leaving the workplace. Transcript at 7.

(6) On June 3, 2019, the employer asked claimant to work the day shift, which started at 1 p.m. Claimant declined because the request was on short notice, she had worked the night shift the day before, and the employer had already scheduled her to work the night shift that day, which started at 7 p.m. The employer told claimant that she was not needed on the night shift and would consider her absence during the day shift as a “no call/no show.” Transcript at 17.

(7) On June 3, 2019, at approximately 6:30 p.m., claimant called the employer to inquire whether she was to come in and work her scheduled night shift. The employer told the claimant that she did not need to come in because her shift was covered.

(8) The employer discharged claimant on June 3, 2019.

(9) On June 4, 2019, claimant called the employer and the employer stated that she no longer had a job there. On June 6, 2019, the employer told claimant her check was in the mail and that she should receive it the next day.

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

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 asserted that claimant’s work separation was a voluntarily quit and not a discharge. One fact that supports the employer’s assertion is that claimant turned in her work key to the employer when the employer covered the rest of her June 2, 2019, work shift. However, the notion that claimant voluntarily quit her job is dispelled because claimant stated she was not quitting, intended to work the night shift the next day, and was asked by the employer to work the day shift later the same day. Although the employer never stated that claimant was fired, the record suggests she was. Claimant had two conversations with the employer after June 3, 2019. During both conversations, the employer told her that she no longer had a job and that her check was in the mail. These statements when combined with the employer’s statement that he would consider claimant to be a “no call/no show if she did not work the day shift on June 3, 2019 suggest it is more likely than not that claimant was willing to work for the employer for an additional time but was not allowed to do so. The work separation therefore was a 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 had a policy that prohibited claimant's boyfriend from being inside the business during claimant's work shift. The employer reasonably expected claimant to comply with this policy. On May 6, 2019 claimant had to "86," or remove, her ex-boyfriend from the premises at the employer's request. Transcript at 48. The record does not show that claimant violated the employer's policy thereafter. To the extent the employer discharged claimant by allowing her boyfriend inside the business during her shift, the discharge was not for misconduct.

The employer also testified that claimant was always late to work. Transcript at 30. Although consistent tardiness at the workplace could be viewed as a willful or wantonly negligent violation of the standards of behavior which an employer has the right to expect of an employee, the employer never admonished claimant for her tardiness, but instead addressed the tardiness by not paying claimant for the time she was absent from her shift. *See* Transcript at 54. To the extent the employer might have discharged claimant because of her attendance, the discharge therefore was not for misconduct.

In a discharge case, the employer has the burden to establish misconduct by a preponderance of evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976). For the reasons explained, the employer has not met his burden. The employer discharged claimant, but not for misconduct. Claimant is not disqualified from receiving unemployment insurance benefits because of her work separation.

DECISION: Order No. 19-UI-139547 is affirmed.

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

DATE of Service: December 19, 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

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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