

EMPLOYMENT APPEALS BOARD DECISION
2019-EAB-1113

Reversed
No Disqualification

PROCEDURAL HISTORY: On September 27, 2019, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant voluntarily left work without good cause (decision # 73006). Claimant filed a timely request for hearing. On October 29, 2019, ALJ Frank conducted a hearing, and on November 6, 2019, issued Order No. 19-UI-139294, affirming the Department's decision. On November 22, 2019, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Howiees On Front, Inc., a restaurant and bar, employed claimant from April 2017 until June 30, 2019 as a security manager.

(2) The employer's general manager hired claimant. The general manager was the only person who directed claimant's work. The general manager had worked for the employer for 12 years. Claimant rarely saw the employer's owner.

(3) On June 24, 2019, the owner told the general manager that he was laying him off work. The general manager responded that he was quitting and taking the "whole crew" with him. Audio Record at 16:58. The owner allowed the general manager to remain at the restaurant until the end of the month to collect his belongings.

(4) On approximately June 25, 2019, the general manager told claimant that the owner was laying him and claimant off work. The general manager asked claimant to continue working until the general manager's last day. Claimant did not discuss his impending employment separation with the owner. Neither the owner nor the general manager told claimant that anyone else would assume the general manager's duties before the end of the month. Claimant saw a new employee at the restaurant, but she did not introduce herself to claimant. Claimant assumed she was replacing the general manager, but did not know when she was going to begin work.

(5) The evening of June 29, 2019, the owner was at the restaurant. Claimant did not speak with the owner. All but two of the employer's employees were at the restaurant that night for a farewell gathering for the general manager, including employees who were not on duty.

(6) On June 29, 2019 at midnight, claimant and approximately 20 other employees gave a toast the general manager. Just after midnight and after the toast, in the early morning hours of June 30, 2019, claimant and all the other employees left the restaurant, quitting work. There were still customers in the restaurant, which was open after midnight. Customers left with items from the restaurant and without paying their bills. The owner had to close the restaurant early that night.

(7) On June 30, 2019, claimant quit work to show support for the general manager who had been laid off work.

CONCLUSIONS AND REASONS: Claimant quit work without good cause within fifteen days prior to an impending discharge not for misconduct. Because claimant quit during the same week as his impending discharge was to occur, claimant is not disqualified from receiving benefits.

Nature of the Work Separation. The order under review concluded that claimant voluntarily left work without good cause. Order No. 19-UI-139294 at 3. However, claimant contended that the general manager laid him off work. The first issue is therefore the 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 was not discharged, but that more likely than not, claimant chose to quit during the general manager's farewell gathering, "at the urging of the employer's former general manager . . . [or] other staff." Order No. 19-UI-139294 at 2-3. However, claimant testified that the general manager told him he was laid off, and asked him to work until the end of the month. Audio Record at 7:35 to 7:41, 8:00 to 8:06. Although the owner testified that he did not discharge claimant and that the employer had continuing work available for claimant after June 30 (Audio Record at 20:01 to 20:30), claimant's testimony that the general manager told him he was laid off was uncontested during the hearing. The record also shows that even if the owner did not tell the general manager to discharge claimant, the general manager had apparent authority to discharge claimant. The general manager had hired claimant, and normally gave claimant all his directions. Claimant rarely saw the owner at the restaurant. The owner allowed the general manager to remain in the restaurant until June 30, and did not give claimant any notice that he was limiting the general manager's authority after the general manager quit on June 24, 2019. Claimant testified that when the general manager told claimant he was laid off, claimant understood his statement as "the way it's gonna be." Audio Record at 8:44. Based upon the general manager's statements that continuing work would not be available to claimant after June 30th, no reasonable person would conclude that they were welcome to continue working after that date. Thus, because the general manager told claimant that he would be laid off after his June 30 shift, claimant's impending work separation on June 30 was a discharge.

The record also shows that claimant ended his employment after toasting the general manager, but *before* the end of his shift on June 30, 2019, when he walked out of work in apparent solidarity with the general manager even though the restaurant was still open and had customers. Claimant's explanation for why he left work early, that he had no security staff to manage after everyone quit work, was not plausible. Audio Record 12:30 to 12:37. It is implausible that claimant actually thought that everyone else leaving an unattended bar full of customers relieved him of his duties. More likely than not, claimant knew he could have finished his shift, and left early in solidarity with the general manager. Because claimant could have continued to work until the end of his shift, his leaving work early was a quit on June 30, 2019.

However, because the quit occurred within fifteen days of claimant's impending discharge, it is necessary to determine if the work separation should be adjudicated under ORS 657.176(7). ORS 657.176(7) states, "For purposes of applying subsection (2) of this section, when an employer has notified an individual that the individual will be discharged on a specific date and it is determined that: (a) The discharge would not be for reasons that constitute misconduct connected with the work; (b) The individual voluntarily left work without good cause prior to the date of the impending discharge; and (c) The voluntary leaving of work occurred no more than 15 days prior to the date of the impending discharge, then the separation from work shall be adjudicated as if the voluntary leaving had not occurred and the discharge had occurred. However, the individual shall be ineligible for benefits for the period including the week in which the voluntary leaving occurred through the week prior to the week in which the individual would have been discharged."

Discharge. The employer discharged claimant effective June 30. The next issue is therefore whether the discharge was for misconduct. 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 general manager presumably discharged claimant because he wanted to take the "whole crew," including claimant, with him when his own employment ended. The reason the employer planned to discharge claimant is not attributable to claimant as misconduct. The employer therefore discharged claimant, not for misconduct, effective June 30.

Voluntary Leaving. Claimant left work just after the toast to the general manager, which was more likely than not in the first minutes of June 30. The next question therefore is whether claimant had good cause for the voluntary leaving. A claimant who leaves work voluntarily is disqualified from the receipt of benefits unless they prove, by a preponderance of the evidence, that they had good cause for leaving work when they did. ORS 657.176(2)(c); *Young v. Employment Department*, 170 Or App 752, 13 P3d 1027 (2000). "Good cause . . . is such that a reasonable and prudent person of normal sensitivity, exercising ordinary common sense, would leave work." OAR 471-030-0038(4). "[T]he reason must be of such gravity that the individual has no reasonable alternative but to leave work." OAR 471-030-0038(4). The standard is objective. *McDowell v. Employment Department*, 348 Or 605, 612, 236 P3d 722 (2010). A claimant who quits work must show that no reasonable and prudent person would have continued to work for their employer for an additional period of time.

Where 21 employees quit together on June 30 in an apparent show of support for the general manager, it is reasonable to presume that claimant also quit work before the end of his shift to show support for the general manager. The record does not show that the general manager's circumstances created a grave situation for claimant, or that continuing to work for the employer for an additional few hours would have otherwise created a grave situation for claimant. Claimant therefore did not quit work for good cause. In sum, claimant quit work on June 30, not for good cause, less than 15 days before his impending discharge not for misconduct.

Conclusion and Disqualification Period. Because claimant quit within 15 days of a planned discharge not for misconduct, the work separation must be adjudicated as a discharge under ORS 657.176(7). Because the impending discharge and actual quit occurred on the same day (June 30, 2019), however, claimant is not ineligible for benefits during the week he quit. Nor is claimant disqualified from receiving unemployment insurance benefits beginning with the week of the impending discharge.

DECISION: Order No. 19-UI-139294 is set aside, as outlined above.

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

DATE of Service: December 30, 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 ໂດຍປະຕິບັດຕາມຄໍາແນະນໍາທີ່ບອກໄວ້ຢູ່ຕອນຫ້າຍຂອງຄໍາຕັດສິນນີ້.

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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