

**OREGON EMPLOYMENT
DEPARTMENT 875 UNION ST NE
SALEM, OR 97311**

**EMPLOYMENT APPEALS BOARD DECISION
2020-EAB-0187**

*Modified
No Disqualification*

PROCEDURAL HISTORY: On December 26, 2019, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant voluntarily quit working for the employer without good cause and was disqualified from receiving benefits beginning November 3, 2019 (decision # 85308). Claimant filed a timely request for hearing. On February 7, 2020, ALJ Meerdink conducted a hearing, and on February 11, 2020, issued Order No. 20-UI-144307, modifying decision #85308 by concluding that the employer discharged claimant, not for misconduct, within 15 days of a planned voluntary leaving without good cause. On February 14, 2020, issued amended Order No. 20-UI-144518, again modifying decision #85308 by concluding that the employer discharged claimant, not for misconduct, within 15 days of a planned voluntary leaving without good cause. On March 2, 2020, the Department filed an application for review with the Employment Appeals Board (EAB).

EAB considered the Department's written arguments when reaching this decision.

FINDINGS OF FACT: (1) Wilder Bar employed claimant as a kitchen manager and chef from October 8, 2019 to November 9, 2019. Claimant had previously worked for the employer during the summer of 2019, and had placed other jobs on hold to return to the employer in October 2019. Claimant worked 30 hours a week, and the only day he did not work was on Sundays.

(2) Claimant began experiencing difficulties with the employer's lead bartender shortly after beginning his employment. At the time of these difficulties, claimant believed that the lead bartender was also the owner because that is what the lead bartender had told the claimant. During claimant's first week of employment, the lead bartender began keeping claimant's tips and did not "tip out," which claimant

viewed as stealing his money. Audio Record at 18:00. The lead bartender continued this behavior until claimant's work separation.

(3) The lead bartender also failed to pay claimant on time. The employer delivered claimant's first bi-weekly paycheck 12 days late, and delivered his second bi-weekly paycheck 5 or 6 days late.

(4) Claimant became concerned about the safety of the employer's work environment. The restaurant had plumbing issues which included two faulty sinks that the health inspector had cordoned off, and a third sink that had a broken pipe causing water to leak on the floor. Claimant would repeatedly have to mop up the water to prevent himself and other coworkers from slipping. The restaurant had poor and misplaced lighting that made it difficult to see and difficult to cook during nighttime hours. The restaurant had poor air circulation in the kitchen, which created a "toxic" environment during those times when claimant had to cook 50-60 hamburgers on a flat top, while simultaneously using a deep fryer. Audio Record at 22:10. Claimant brought each of the concerns to the lead bartender's attention and the lead bartender indicated he would fix them, but never did.

(5) Claimant viewed the lead bartender to be "stonewalling me, gaslighting me, and avoiding me at every cause," causing claimant to be "stressed out." Audio Record at 9:55; 15:43. Claimant's stress caused him to have trouble sleeping and to deviate from the positive person he normally was.

(6) On November 3, 2019, claimant arranged a meeting with the lead bartender to address claimant's concerns about the lead bartender's management approach and the work environment. Instead, the lead bartender questioned claimant about whether claimant was actually working a full 30-hour work week, whether claimant was adequately keeping product in stock, and whether claimant was creating conflict with other employees. The lead bartender referenced a particular employee who had claimed that claimant had alienated them. Claimant proposed that he, the lead bartender, and the alienated employee have a conversation to talk about what was bothering the co-worker. The lead bartender declined, stating that a conversation of more than two people always turns into a "bitch session." Audio record at 14:08. Claimant viewed the lead bartender's refusal to have the meeting as consistent with the lead bartender's overall approach to avoid conflict resolution. Claimant viewed his meeting with the lead bartender as unsuccessful. Had it been successful, claimant would have remained on the job.

(7) On November 3, 2019 (after his meeting with the lead bartender), claimant submitted a resignation letter to the employer stating that his last day on the job would be November 16, 2019. Claimant offered in the letter to assist with training any replacement employee during this two-week window.

(8) The employer did not place claimant on the work schedule for the week of November 10, 2019, through November 16, 2019, so claimant's last day on the job was November 9, 2019.

(9) After claimant's work separation, claimant had a telephone conversation with one of the owners of the restaurant and learned that the lead bartender was not an owner of the employer's restaurant.

CONCLUSIONS AND REASONS: We agree with Order No. 20-UI-144518 that claimant's discharge was not for misconduct; however, since we find that claimant's planned voluntary leaving would have been for good cause, the work separation must be adjudicated as a discharge, and claimant is not subject to disqualification from benefits.

ORS 657.176(2)(a) and (c) require a disqualification from unemployment insurance benefits for individuals discharged for misconduct or who quit work without good cause. ORS 657.176(8) provides that when an individual has notified an employer that he will leave work on a specific date, and the departure is not for good cause, but the employer discharges him within 15 days of the planned voluntary leaving, but not for misconduct, the separation is adjudicated as though the planned voluntary leaving had occurred, although the individual remains eligible for benefits through the week prior to the week of the planned voluntary leaving.

Claimant's employment ended on November 9, 2019, when the employer left claimant off the weekly work schedule, effectively discharging claimant. However, Order No. 20-UI-144518 determined that ORS 657.176(8) applied to this case because claimant had, at the time of his discharge, planned to quit his job on November 16, 2019, and claimant's planned quit was not for good cause. In so concluding, Order No. 20-UI-144518 found that although claimant felt uncomfortable by the way the lead bartender had been stonewalling, gas lighting, and avoiding claimant, "the circumstances claimant described did not reflect the level of abuse or toxicity of a grave situation" such that claimant had demonstrated good cause to leave work. Order No. 20-UI-144518 at 2. The record does not support that conclusion.

A claimant who leaves work voluntarily is disqualified from the receipt of benefits unless he proves, by a preponderance of the evidence, that he had good cause for leaving work when he did. ORS 657.176(2)(c); *Young v. Employment Department*, 170 Or App 752, 13 P3d 1027 (2000). "Good cause" is defined, in relevant part, as a reason of such gravity that a reasonable and prudent person of normal sensitivity, exercising ordinary common sense, would have no reasonable alternative but to leave work. OAR 471-030-0038(4) (December 23, 2018). 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 his employer for an additional time.

Claimant's unrefuted testimony established that he worked in a toxic and unhealthy environment from the start of his employment due to the negative behavior and inaction of his coworker, the lead bartender. This negative behavior included the lead bartender's failure to properly distribute earned tips to claimant and to properly ensure the timely distribution of claimant's paychecks. The lead bartender's inaction included his unwillingness to properly address health and safety issues brought to his attention by claimant and his unwillingness to engage in any form of conflict resolution with claimant. The record demonstrates that claimant made many attempts to try to bring his many concerns to the lead bartender; however, the lead bartender met these attempts with stonewalling and avoidance. As a result of his employment environment, claimant became stressed out and was unable to sleep at night. Under these circumstances, no reasonable and prudent person would have felt as though they had any reasonable alternative but to leave work.

Because claimant's planned voluntary leaving was for good cause, ORS 657.176(8) does not apply, and claimant's planned voluntary leaving is immaterial to whether or not he should be disqualified from receiving unemployment benefits. Claimant's work separation therefore must be adjudicated as a discharge, based upon the employer's November 9, 2019 decision to end claimant's employment by leaving him off the work schedule.

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 willfully or wantonly negligent disregard of an employer's interest.

The employer did not attend the hearing in this matter and therefore did not offer any evidence suggesting a reason why the employer chose to end claimant's employment on November 9, 2019. In a discharge case the employer has the burden to prove misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976). In the absence of evidence suggesting misconduct, the employer has not met its evidentiary burden.

Claimant's discharge was not for misconduct. Claimant is therefore not disqualified from receiving unemployment insurance benefits because of his work separation in this matter.¹

DECISION: Order No. 20-UI-144518 is modified, as outlined above.

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

DATE of Service: April 3, 2020

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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¹ This decision modifies a hearing decision that denied benefits. Please note that payment of any benefits owed may take from several days to two weeks for the Department to complete.



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 الاستئناف 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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