EO: 200
BYE: 202107

State of Oregon
Employment Appeals Board
875 Union St. N.E.
Salem, OR 97311

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VQ 005.00

EMPLOYMENT APPEALS BOARD DECISION
2020-EAB-0348

Reversed
No Disqualification

PROCEDURAL HISTORY: On March 24, 2020, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant left work without good cause and was disqualified from receiving benefits effective February 16, 2020 (decision # 114449). On March 28, 2020, claimant filed a timely request for hearing. On April 24, 2020, ALJ Monroe conducted a hearing, and on April 28, 2020 issued Order No. 20-UI-148836, affirming the Department's decision. On May 6, 2020, claimant filed an application for review with the Employment Appeals Board (EAB).

EAB considered both claimant's May 17, 2020 written argument and the employer's written argument when reaching this decision. Claimant did not declare that they provided a copy of their May 6, 2020 argument to the opposing party or parties as required by OAR 471-041-0080(2)(a) (May 13, 2019). The May 6, 2020 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, along with claimant's May 17, 2020 written argument and the employer's written argument, when reaching this decision. *See* ORS 657.275(2).

FINDINGS OF FACT: (1) Rogue Valley Family YMCA employed claimant first as a site aid and later as a site lead for its after-school program at Central Point Elementary (CPE) School from August 2019 until February 24, 2020.

(2) On January 24, 2020, the CPE office manager emailed the employer's after-school director regarding an interaction the office manager had with claimant where claimant was "rude". Transcript at 30. The after-school director spoke with other staff members at the CPE site and received feedback that claimant was "not very approachable." Transcript at 30. The after-school director spoke with claimant about the matter, and claimant later addressed the office staff to remediate the issue. The after-school director viewed the January 2, 2020 incident as the catalyst to her later decision to remove claimant as site lead at CPE.

(3) Between February 3, 2020 and February 7, 2020, the employer instructed claimant to train the individual who would be claimant's eventual replacement as CPE site lead. At the time of this training, the individual knew she would be replacing claimant, but the employer instructed the individual not to tell claimant this information. The after-school director also told claimant's significant other, who also was an employee of the employer, that claimant was going to be removed as site lead, and asked the significant other not to share this information with claimant. Claimant's significant other was "extremely upset" upon receiving this news and informed claimant of the information. Transcript at 19.

(4) On February 13, 2020, the after-school director informed claimant of her decision to remove claimant as site-lead and place her in a substitute aid position. Claimant was "upset" but "accepted the decision." Transcript at 8. The after-school director instructed claimant to come to her office on a later date where the two of them would discuss claimant's substitute hours. Claimant informed the kids in the after-school program that she would no longer be the CPE site lead. The children were upset and some of them blamed the CPE office manager for claimant's removal as site-lead. Claimant tried to "diffuse" the situation by telling them that the decision was made by the employer's after-school director, but the CPE office manager believed that claimant to told the kids that the CPE office manager "doesn't like" claimant. Exhibit 1, February 14, 2020 email.

(5) On February 14, 2020, the CPE office manager emailed the after-school director to complain about claimant's "unprofessional" behavior the day before. Exhibit 1, February 14, 2020 email. The after-school director decided that she was not going to give claimant substitute hours until she first spoke to claimant "about the way [claimant] handled her leaving her site on … February 13th." Exhibit 1, April 14, 2020 email (1:15 p.m.).

(6) On February 19, 2020, claimant met with the after-school director with the intention of confronting her about her decision to remove claimant as CPE site lead. The two discussed this issue, as well as the circumstances surrounding claimant's February 13, 2020 departure from the CPE site. The after-school director informed claimant that she had "nothing for [claimant]" and claimant became "frustrated" and told the after-school director, "I'm gonna have to walk away right now. I can't deal with this." Transcript at 10-11. Claimant left the meeting and never said the words, "I quit, or anything like that," and she did not intend for "it [to] go that way." Transcript at 11, 14. The after-school director perceived claimant's words as an indication that she was quitting. The employer prepared claimant's "termination" paperwork after the February 19, 2020 meeting, but the employer did not finalize the paperwork that day. Transcript at 26.

(7) On February 21, 2020, claimant emailed the employers executive director and associate executive director about her concerns related to the after-school director. A meeting between claimant, the associate executive director, and another manager was arranged for February 24, 2020. The employer's intentions for the February 24, 2020 meeting included determining whether claimant was quitting and, if so, providing claimant her final check.

(8) On February 24, 2020, claimant met with the associate executive director and another manager. The parties discussed claimant's February 21st emails, and then the employer told claimant that "it's our understanding that you walked out" of the February 19, 2020 meeting and, as a result, the after-school director "already filed the paperwork and said you quit." Transcript at 10, 35. Claimant explained "why [she] left in such frustration," and the employer stated that "[t]hey were apologetic [and] said that

[claimant] would be able to be hired back [by the employer], [and] that they would be investigating [the after-school director]." Transcript at 10. Claimant did not perceive from the conversation that the employer was offering her the ability to remain on the job. The employer perceived that claimant had confirmed her prior February 19, 2020 decision to quit, despite the fact that substitute work remained available. At the conclusion of the conversation, claimant determined that she could no longer work with the after-school director, or the employer, because of her view that the associate director had acted inappropriately towards claimant. The employer provided Claimant her final check.

CONCLUSIONS AND REASONS: Claimant was discharged, but not for misconduct.

Nature of the work separation. The first issue this case presents is the nature of the work separation. The standard for determining how to characterize the nature of the work separation is set out in OAR 471-030-0038(2) (December 23, 2018). 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). 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 answer to the threshold question of whether an employee has 'voluntary left work' or been discharged is a legal conclusion that is based on factual findings." *Roadhouse v. Employment Dept.*, 283 Or App 859, 863, 391 P3d 887 (2017).

Order No. 20-UI-148836 concluded that claimant quit work because, despite claimant's belief that she was "discharged" when the after-school director removed her from the position of site lead, the evidence demonstrated that claimant could have continued working for the employer for an additional period of time. Order No. 20-UI-148836 at 2. The preponderance of the evidence in the record does not support this conclusion.

Order No. 20-UI-148836 is correct that claimant used the word "discharge"[1] when discussing the employer's decision to remove her as site lead. However, the record also reflects that, in context, claimant used the term "discharge" to refer *only* to the employer's decision to remove her from the site lead position, and not as a means of conveying that the employer was not willing to allow claimant to perform further work. The preponderance of the evidence demonstrates that after claimant was removed as site lead on February 13, 2020, all parties understood that the employer's intent was that claimant would continue her employment as a substitute aid. This fact, however, does not end the work separation inquiry.

Despite the employer's initial intent that claimant continue working as a substitute aid, and claimant's understanding of her ability to continue her employment, confusion occurred as a result of the contentious February 19, 2020 meeting between claimant and the after-school director. Claimant ended the meeting by telling the after-school director that she was "gonna have to walk away right now. I can't deal with this" and then walking out of the meeting. Claimant did not mean to convey that she was quitting her job, but that is how the after-school director interpreted her words and actions and she proceeded to prepare work separation paperwork.

[1] Transcript at 9.

The record demonstrates that due to "miscommunication"[2] at the February 24, 2020 meeting that followed, the employer failed to meet its objective of clarifying whether it was claimant's desire to quit her employment. Instead, the preponderance of the evidence demonstrates that the employer informed claimant that they were aware that claimant had told the after-school director she had quit and then later filed the separation paperwork. Rather than directly asking claimant if it was indeed her intent to quit, the employer implicitly acquiesced to the after-school director's earlier conclusion, apologized to claimant for the after-school director's conduct, and told claimant that she was eligible to be "hired back." In light of these circumstances, the preponderance of the evidence supports the conclusion that it was the employer who prevented claimant from working for an additional period of time and, as such, the proper characterization of the work separation in this case is a discharge. The fact that claimant later determined that she could no longer work for the employer is of no moment given that claimant's realization in this regard only occurred after the employer had already made their discharge decision.

Discharge. The remaining issue in this case is whether the employer discharged claimant 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). "'[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). 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).

Claimant was discharged, but not for misconduct. While the events surrounding claimant's January 24, 2020 "rude" interaction with the CPE office manager provide some arguable support for the employer's decision to remove claimant from her position as CPE site aid, the preponderance of the evidence demonstrates that this incident was not viewed by the employer to be of such magnitude that the employer felt the need to discharge claimant. To the contrary, claimant's attempt to remediate the matter by speaking with the CPE office manager after the incident reflects a conscientious regard for employer's interest. Likewise, claimant's first-hand testimony that she did not tell the CPE children that her removal as site lead was due to the CPE office manager not liking her, and that she tried to diffuse the situation, is entitled to greater weight that the employer's hearsay testimony stating differently. The preponderance of the evidence, thus demonstrates that claimant's discharge was not the result of misconduct. Claimant is not disqualified from receiving unemployment insurance benefits.

DECISION: Order No. 20-UI-148836 is set aside, as outlined above.

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

[2] Both claimant and the employer have referred to the "miscommunication" that occurred at the February 24, 2020 meeting. Transcript at 34; Employer's written argument at 1.

DATE of Service: June 4, 2020

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.

Please help us improve our service by completing an online customer service survey. To complete the survey, please go to https://www.surveygizmo.com/s3/5552642/EAB-Customer-Service-Survey. You can access the survey using a computer, tablet, or smartphone. If you are unable to complete the survey online and need a paper copy of the survey, please contact our office.

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 – 本判决会影响您的失业救济金。 如果您不明白本判决， 请立即联系就业上诉委员会。 如果您不同意此判决，您可以按照该判决结尾所写的说明，向俄勒冈州上诉法院提出司法复审申请。

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 فورا، 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 دستورالعمل موجود در پایان آن، از دادگاه تجدید نظر اورگان درخواست تجدید نظر کنید.

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