EO: 200
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State of Oregon
Employment Appeals Board
875 Union St. N.E.
Salem, OR 97311

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DS 005.00

EMPLOYMENT APPEALS BOARD DECISION
2020-EAB-0578

Reversed
No Disqualification

PROCEDURAL HISTORY: On March 30, 2020, the Oregon Employment Department (the Department) issued an administrative decision concluding that claimant voluntarily left work without good cause, and was disqualified from receiving benefits effective February 9, 2020 (decision # 144517). Claimant filed a timely request for hearing. On May 11, 2020, ALJ Wymer conducted a hearing, and on May 15, 2020 issued Order No. 20-UI-149859, affirming decision # 144517 on different grounds.[1] On May 23, 2020, claimant filed a timely application for review with the Employment Appeals Board (EAB). On August 14, 2020, EAB received claimant's application for review.

FINDINGS OF FACT: (1) Chicos FAS, Inc. employed claimant as a sales associate from September 16, 2019 to February 13, 2020.

(2) The employer had a policy that prohibited employees from reporting to work while intoxicated. The employer published the policy in its handbook, which it usually provided to employees during the onboarding process. The policy did not require employees to pay for drug or alcohol testing.

(3) On February 12, 2020, claimant felt ill, had a fever, and felt dizzy. She used Nyquil at approximately 4:00 a.m. She subsequently used hand sanitizer and mouthwash.

(4) At approximately 4:00 p.m. on February 12, 2020, claimant reported to work for a scheduled shift. The store manager noticed that claimant's demeanor was abnormal, and observed claimant slurring words, having trouble focusing, and swaying. The store manager also thought she smelled alcohol on claimant.

[1] Decision # 144517 and Order No. 20-UI-149859 found that claimant quit work for different reasons that fell under different provisions of the Oregon Administrative Rules; however, since both decisions found claimant disqualified from benefits effective the same date, Order No. 20-UI-149859 actually affirmed decision # 144517, but on different grounds.

(5) The store manager confronted claimant and offered to provide claimant with a ride home from work. Claimant declined, and asked if she was being let go. The manager said that claimant was a valued employee but could not be in the store in her condition. Claimant left as instructed.

(6) On February 13, 2020, the store manager and regional human resources manager spoke. The store manager reported that claimant had reported to work intoxicated and had admitted being intoxicated at work. The regional human resources manager, in accordance with the employer's usual practice, instructed the store manager to offer claimant the opportunity to resign, and to tell claimant that if she did not resign that human resources would conduct an investigation into the matter.

(7) The store manager then spoke to claimant and told her that if claimant did not quit the manager would bring in human resources. Claimant understood the store manager's statement as an ultimatum, and that she would be discharged unless she quit her job. On February 13, 2020, claimant resigned. Had claimant not received what she perceived as an ultimatum, she would not have resigned.

(8) At all relevant times, the employer's store managers did not have the authority to fire employees. The regional human resources manager was aware that employees often considered being offered the choice to resign or be investigated as an ultimatum, and perceived that they would be fired if they did not resign. The employer usually discharged employees who admitted intoxication, as the regional human resources manager believed claimant had.

CONCLUSIONS AND REASONS: The employer discharged claimant, but not for a disqualifying act.

Nature of the work separation. The order under review found as fact that claimant voluntarily left her job after receiving an ultimatum of "quitting work or being discharged," and concluded that she left work without good cause.[2] The record does not support that conclusion.

OAR 471-030-0038(2) (December 23, 2018) provides that 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; 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.

In this case the record lacks evidence establishing that claimant could likely have continued to work for the employer had she not resigned when she did. Although the employer did not intend to give claimant an ultimatum, the employer was aware that giving employees the option to resign or be investigated was normally construed as an ultimatum. No reasonable employee, upon being given such an ultimatum, would believe they would be welcome to continue working for the employer for an additional time.

Additionally, the store manager told the regional human resources manager that claimant admitted being intoxicated at work. Since the employer also typically discharged employees who admitted intoxication but did not quit, the preponderance of the evidence in this record also fails to show that, objectively, any amount of continuing work was actually available to claimant at the time she resigned.

[2] Order No. 20-UI-149859 at 2.

Because claimant resigned her job at a time when no reasonable employee would believe continuing work was available, and when the employer normally discharged similarly situated employees, the record fails to show that claimant "could have continued to work for . . . an additional period of time." Even though claimant and the employer called the work separation a quit or resignation, it is more likely than not that, although claimant was willing to continue working for the employer for an additional period of time, she would not have been allowed to do so. The record therefore shows that claimant's work separation was a discharge.

Discharge. ORS 657.176(2)(h) requires a disqualification from unemployment insurance benefits if the employer discharged claimant for committing a disqualifying act. ORS 657.176(9)(a) defines a "disqualifying act" to include, among other things, failing to comply with an employer's reasonable written policy that governs the effects of alcohol in the workplace. "Disqualifying acts" are further defined to include an employee's admission that they violated a reasonable written employer policy governing, among other things, the effect of alcohol in the workplace, or, in the absence of a test, "there is clear observable evidence that the employee is under the influence of alcohol in the workplace." OAR 471-030-0125(9)(a)-(b) (January 11, 2018).

The order under review concluded that claimant quit her job due to a disqualifying act.[3] The primary basis for reaching that conclusion was that claimants have the burden of proof in a quit case; the order reasoned that because claimant had the burden of proof, and claimant's and the employer's witnesses' testimony were "equally balanced" with respect to whether claimant was intoxicated at work or admitted intoxication, the matter had to be resolved against claimant.[4] The record does not support the order's conclusion, however, because claimant was discharged, and in a discharge case it is the employer that bears the burden to establish that claimant should be disqualified from benefits. *See e.g. Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

The employer discharged claimant after concluding she had reported to work while intoxicated, and admitted to the store manager that she was intoxicated. Such conduct, if proved, would likely constitute a disqualifying act, and disqualify claimant from receiving unemployment insurance benefits. The first element is whether or not the employer's policy prohibiting the effects of alcohol in the workplace was "reasonable." An employer's written policy is considered "reasonable" if, among other things, the policy prohibits the effects of alcohol in the workplace, does not require the employee to pay for any drug or alcohol testing, and is published and communicated to the individual or provided to the individual in writing. OAR 471-030-0125(3)(a)-(c).

In this case, the employer's policy was written in its handbook, it prohibited the effects of alcohol in the workplace, and this record lacks evidence suggesting that the policy required claimant to pay for any portion of a test for drugs or alcohol. However, while the record establishes that the employer published its policy in its handbook, the record is not clear as to whether or when the employer communicated the policy to claimant or provided it to her in writing. Specifically, while the store manager testified that she presented the policy to claimant after confronting her about her demeanor at work, and the regional

[3] Order No. 20-UI-149859 at 3.

[4] Order No. 20-UI-149859 at 3.

human resource manager testified that employees usually receive the policy during onboarding, claimant also provided firsthand evidence that she was not given the policy. The firsthand evidence of whether or not claimant was provided the policy is equally balanced between claimant and the employer. Since the employer has the burden of proof in this case, the question must be resolved against the employer. The record therefore does not establish that the employer discharged claimant under a "reasonable" written policy.

Even if the employer had met its burden of proving that its policy satisfied the definition of "reasonable" set forth in OAR 471-030-0125(3), the outcome of this case would likely remain the same for two additional reasons, whether considered together or separately. The applicable rule for when an employee is discharged due to allegedly admitted alcohol intoxication, and was not tested for intoxication, is OAR 471-030-0125(9), which provides:

> The employee is discharged or suspended for committing a disqualifying act if:
>
> (a) The employee violates or admits a violation of a reasonable written employer policy governing the use, sale, possession or effects of drugs, cannabis, or alcohol in the workplace; unless in the case of drugs the employee can show that the violation did not result from unlawful drug use.
>
> (b) In the absence of a test, there is clear observable evidence that the employee is under the influence of alcohol in the workplace.

Claimant would not be disqualified under that rule for two reasons. First, the record does not establish that claimant committed a disqualifying act under OAR 471-030-0125(9)(a) by admitting that she was intoxicated at work. The employer alleged claimant admitted intoxication, but claimant refuted the allegation by testifying that she did not make any such admission. Because the employer has the burden of proof in this case, the equally balanced firsthand evidence is resolved against the employer.[5]

Second, the record does not establish the presence of "clear observable evidence" that claimant was intoxicated at work under OAR 471-030-0125(9)(b). The store manager testified that claimant was slurring words, having trouble focusing, swayed, and had an odor of alcohol. While those behaviors might under some circumstances be considered evidence of intoxication, it is just as likely as not that claimant's speech, focus, and equilibrium were affected by her illness and use of a sedating cold medicine the morning before she reported to work. Likewise, the odor of alcohol the store manager observed might just as likely have been the result of either alcohol consumption or claimant's recent use of mouthwash and hand sanitizer. Because the physical signs of intoxication the store manager reported might just as likely have been the result of illness or use of non-intoxicating substances like mouthwash and hand sanitizer, the record does not establish that there was "clear" evidence of claimant's

[5] Notably, even if we had determined that claimant admitted intoxication to the store manager on February 12th, claimant also would not be disqualified unless she had also admitted *violation* of the employer's policy. Put another way, it is not enough under OAR 471-030-0125(9)(a) for claimant to have admitted she engaged in particular conduct, she must have admitted to a violation of the policy before the admission would be disqualifying.

intoxication.[6] Without "clear" evidence, the record does not support a finding that claimant's discharge was for a disqualifying act.

Because the record does not show that claimant more likely than not violated a "reasonable" employer policy, admitted intoxication, or showed "clear" evidence of intoxication, claimant did not commit a disqualifying act. Claimant therefore is not disqualified from receiving unemployment insurance benefits because of this work separation.

DECISION: Order No. 20-UI-149859 is set aside, as outlined above.

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

DATE of Service: August 19, 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.

[6] The Department did not define the term "clear" as used in OAR 471-030-0125(9)(b). Relevant definitions of the word "clear" include "free from doubt" and "unqualified, absolute." *See* https://www.merriam-webster.com/dictionary/clear.

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.

Employment Appeals Board - 875 Union Street NE | Salem, OR 97311
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