

EMPLOYMENT APPEALS BOARD DECISION
2020-EAB-0585

Affirmed
No Disqualification

PROCEDURAL HISTORY: On June 30, 2020, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant quit work without good cause and was disqualified from receiving unemployment insurance benefits effective March 8, 2020 (decision # 161804). Claimant filed a timely request for hearing. On July 28, 2020, ALJ S. Roberts conducted a hearing, and on July 30, 2020, issued Order No. 20-UI-152702, concluding the employer discharged claimant not for misconduct, and claimant was not disqualified from receiving benefits. On August 18, 2020, the employer filed an application for review with the Employment Appeals Board (EAB).

The employer and claimant each submitted a written argument to EAB. Each party's argument contained information that was not part of the hearing record, and did not show that factors or circumstances beyond that party's reasonable control prevented them from offering the information during the hearing. Under ORS 657.275(2) and OAR 471-041-0090 (May 13, 2019), EAB considered only information received into evidence at the hearing when reaching this decision.

FINDINGS OF FACT: (1) The Grove Healing & Wellness Center employed claimant as a part-time massage therapist from February 27, 2020 to March 10, 2020. The employer paid claimant on a commission-only basis.

(2) At hire, claimant and the employer's owner agreed that claimant would work full days on Sundays and half days on Mondays and Fridays, but claimant told the owner that she could not work split shifts or be on-call for single sessions because of the distance between the workplace and claimant's home. The owner did not schedule claimant for many appointments during her first ten days of employment. To supplement her income, claimant began to see massage clients unrelated to the employer in claimant's home. The contract between claimant and the employer permitted claimant to see her own clients in her home. Exhibit 2. Claimant also decided to seek an additional job to work Tuesdays through Thursdays to supplement her income so she could pay her mortgage and meet her other expenses. (3) On March 9, 2020, claimant observed that the owner had scheduled her to work a split shift on Tuesdays, Wednesdays, and Thursdays over the subsequent few weeks, working one hour in the

morning and one hour in the evening. Claimant sent a text message to the owner informing her that she could not work split shifts on those days because she could not afford to drive the long distance to work twice per day for one non-guaranteed hour of work in both the morning and evening. The owner and claimant then agreed that claimant would perform only one session on those days.

(4) During the morning of March 10, 2020, claimant texted the owner and told her that she could not work on Tuesdays, Wednesdays, or Thursdays because she needed to earn income elsewhere on those days, and working one session on each of those days would interfere with that. Claimant told the owner she could work all other days. The owner agreed to remove claimant from the schedule on Tuesdays through Thursdays, but requested a meeting with claimant after claimant's scheduled massage session that evening to "discuss moving forward." Exhibit 1 (March 10, 2020 text message). The owner intended to discuss claimant's refusal to work the massage sessions the owner had scheduled for her, the owner's perceived lack of respect and professionalism toward the owner by claimant, and claimant's apparent lack of commitment to the employer. Exhibit 1 (March 10, 2020 owner notes).

(5) On March 10, 2020, after claimant's evening massage session, the owner and claimant met for approximately 45 minutes. During the meeting, they both became upset and raised their voices, but did not use foul language, derogatory terms, or threats. They discussed claimant's refusal to accept split shifts or single massage sessions on Tuesdays through Thursdays. The owner believed claimant agreed at hire to accept such sessions, but claimant disagreed. They discussed claimant's need for a second job on Tuesdays through Thursdays. They discussed their communication with each other regarding those issues and claimant's perception that the owner refused to be flexible with claimant's schedule, which claimant believed the owner had agreed to do at hire. They also discussed the owner's stated belief that claimant had demonstrated that she was "not invested in the company" by not accepting the scheduled massage sessions on Tuesday through Thursday, not agreeing to work at corporate events without guaranteed sessions, and not incorporating stretching techniques claimant had not been adequately trained on into her massage sessions. Transcript at 66, 79. After about 45 minutes, claimant said to the owner, "I feel like you're firing me," to which the owner again replied, "You're not invested in my company." Transcript at 79. Claimant then stated that she did not believe "everything was going to get resolved that night," and "they could talk about it the next day." Transcript at 10, 41. As claimant began to walk out the door, the owner requested claimant's keys to the business. Claimant gave her keys to the owner and left.

(6) On March 10, 2020, the owner discharged claimant because the owner believed claimant was "not invested in [the owner's] company."

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

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).

Claimant asserted that the owner discharged her at the end of their March 10 meeting by requesting her keys, and the owner asserted claimant quit. Transcript at 16-17, 41. However, claimant stated that at the

conclusion of the March 10 meeting, she was willing to continue to work for the employer because she “needed to have a job,” and both parties agreed that claimant never stated that she was quitting. Transcript at 17-18, 41. When asked by the ALJ whether claimant had stated to her that they were not going to get things resolved “that night,” the owner said claimant had, but also stated, “It wasn’t an option to continue the conversation. At that point that was at the end.” Transcript at 39, 41. When asked by the ALJ whether she asked claimant for the keys to the business as claimant began to walk out the door, the owner did not deny that she had, and stated, “I might have.” Transcript at 40. More likely than not, at the conclusion of the March 10 meeting, claimant was willing to continue to work for the employer, but by requesting and then accepting claimant’s keys to the business and considering that “at the end,” the record shows it is more likely than not that the owner would not allow claimant to continue working. Accordingly, the work separation was a discharge that occurred on March 10, 2020.

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). 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).

The employer failed to meet its burden to establish it discharged claimant for misconduct. Viewing the record as a whole, the employer’s owner discharged claimant because she believed that claimant was “not invested in [the owner’s] company.” The owner explained at hearing that her “focus” for the meeting was to “figure this out,” and “make sure they were on the same page” to avoid “future issues as [the owner] integrated [claimant] more and more into the schedule,” which was her plan. Transcript at 41. The owner’s meeting agenda notes showed that the owner intended to discuss claimant’s “commitment to the Grove” because by refusing to work “certain days,” the owner did not believe claimant was “even half willing to reciprocate.” Exhibit 1 (March 10, 2020 owner notes). By the end of the March 10th meeting, claimant had not agreed to work non-guaranteed single sessions or on Tuesdays through Thursdays going forward, and the owner concluded that “[i]t wasn’t an option to continue the conversation” and discharged claimant by requesting her keys to the business. Discharging claimant because claimant did not show that she was “invested in [the owner’s] company” did not constitute a discharge for consciously violating a reasonable employer expectation, and was not misconduct.

The record also fails to show that the owner discharged claimant because claimant willfully or with wanton negligence otherwise violated a reasonable employer expectation. The owner did not assert or show that she had discharged claimant for such a reason, and although claimant refused to work split shifts or one-hour sessions the owner had scheduled for her on Tuesdays through Thursdays after March 10, 2020, the owner did not dispute that Tuesdays through Thursdays were claimant’s scheduled days off and claimant had discussed her inability to work one-hour sessions at hire due to the expense of driving over 40 miles round-trip for each session for which she was not guaranteed payment. For that reason, the record fails to show that the owner discharged claimant for willfully violating a reasonable

employer expectation or for demonstrating indifference to the employer's interests because the record also fails to show that claimant knew or should have known that she was violating a reasonable employer expectation by refusing to make herself available to work the sessions in question.

The employer discharged claimant, but not for misconduct under ORS 657.176(2)(a). Claimant is not disqualified from receiving unemployment insurance benefits based on her work separation.

DECISION: Order No. 20-UI-152702 is affirmed.

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

DATE of Service: September 18, 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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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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