

EMPLOYMENT APPEALS BOARD DECISION
2020-EAB-0691

Affirmed
Disqualification

PROCEDURAL HISTORY: On September 21, 2020, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant voluntarily left work without good cause and was disqualified from receiving unemployment insurance benefits effective June 28, 2020 (decision # 71041). Claimant filed a timely request for hearing. On October 15, 2020, ALJ Snyder conducted a hearing, and on October 22, 2020 issued Order No. 20-UI-155605, affirming the Department's decision. On October 31, 2020, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Casa Bella employed claimant as a server from June 16, 2020 until July 2, 2020.

(2) At the time the employer hired claimant, claimant was experiencing financial distress and requested that the employer pay her tips in cash on a nightly basis. The employer's owner told claimant the employer would pay claimant her tips as quickly as possible, but did not commit to paying claimant's tips in cash on a nightly basis. The employer did not always pay claimant her tips on a nightly basis, but paid the tips as quickly as the employer was able to pay the tips, and not later than claimant's regular pay day.

(3) During the time claimant worked for the employer, the employer had a mask-wearing policy in place. Under the employer's mask-wearing policy, every worker was required to wear a mask. The employer expected each worker to wear their mask in such a way that the nose and mouth was covered. The employer's mask-wearing policy was consistent with county government regulations imposed due to the COVID-19 pandemic.

(4) On July 2, 2020, claimant sent the owner a communication listing several of the employer's practices to which claimant objected. Claimant's complaints involved how claimant's tips were paid, the reassignment of claimant's tables to other workers, and the employer's mask-wearing policy. Claimant believed the employer's workplace practices put her health in danger and resulted in her earning less

income. In order to continue working for the employer, claimant wanted the employer to address her complaints.

(5) On July 2, 2020, the owner responded to claimant's list of complaints by text and informed claimant that the employer would not alter any of the policies or practices to which claimant objected. A text exchange ensued. In the text exchange, the owner told claimant "good luck," which claimant took to mean she was fired. After sending the text that said "good luck," the owner texted claimant that she was not fired and was on the schedule and expected to work the next day. Claimant made clear to the owner that she would not work her scheduled shift because the employer had not addressed her objections. Claimant never returned to work.

(6) On July 2, 2020, the employer paid claimant all of her earnings due on July 2, 2020. The employer initially planned to pay claimant her earnings due within 72 hours of July 2, 2020. Because claimant's texts to the owner had an "aggressive[]" tone, however, the employer changed its plan and paid claimant on July 2, 2020. Transcript at 32.

CONCLUSIONS AND REASONS: Claimant voluntarily left work without good cause.

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) (September 22, 2020). 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 parties disagreed as to whether claimant's work separation was a voluntary quit or a discharge. Claimant testified that her last day of work was June 30, 2020, and that on or around that date, she gave the employer a letter detailing her concerns regarding some of the employer's workplace practices. Transcript at 5-6. Claimant stated that she believed some of the workplace practices put her in danger, and she "needed a – a whole different situation to happen before, you know, [she] could continue working there." Transcript at 12. Claimant stated that after she conveyed the letter, possibly on June 30 but claimant was unsure of the date, the owner sent claimant a text response wherein the owner wrote, "Good luck finding a job anywhere in Ventura," which claimant took to mean she was fired. Transcript at 10, 14. Claimant stated that the employer paid her the same day, which claimant also took to mean she had been discharged. Transcript at 29-30. However, claimant also testified that in her text exchange with the owner, the owner specifically informed her, "You're not fired, you still have a job." Transcript at 14.

In contrast to claimant's testimony, the owner testified that the last day claimant worked was July 1, 2020, and that on July 2, 2020, claimant sent the owner's daughter a text listing claimant's workplace concerns. Transcript at 18. The owner stated that in response to the text to her daughter, the owner sent claimant a text on July 2 informing claimant that the employer would not change any of its policies. Transcript at 18, 22, 23. The owner testified that during the text exchange, she told claimant "good luck." Transcript at 22. The owner stated that when she texted "good luck" she meant that given claimant's tone, which the owner thought was rude and demanding, claimant would need good luck to have her objections addressed. Transcript at 22. The owner testified that she stated in the text exchange that she understood claimant to be resigning but that she told claimant she was on the work schedule and if she did not appear for her shift, it would be a no show. Transcript at 22-23. The owner stated that

claimant made clear in the text exchange that she was quitting, and that because claimant's texts took a threatening tone, the employer paid her in full the same day. Transcript at 24-25, 32. The owner testified that she initially told claimant during the text exchange that the employer would pay her in 72 hours, rather than the same day, but the owner decided to pay claimant the same day because of the "aggressiveness of [claimant's] texts." Transcript at 32.

While a great deal of the evidence in the record is in conflict, it is more probable than not that claimant could have continued working at the time of her work separation, and therefore the work separation in this case was a voluntary quit. Although the owner's "good luck" comment caused claimant to believe she was fired, the parties agreed that during the text exchange (and after the owner sent the "good luck" comment), the owner told claimant that she was not fired and was on the schedule for the next day. Transcript at 14, 22. It is also undisputed that the owner informed claimant that the employer would not change any of its policies. This supports the conclusion that the text exchange culminated in claimant voluntarily leaving work given claimant's testimony that she believed the employer's policies put her in danger and she "needed a – a whole different situation to happen before, you know, [she] could continue working there." Transcript at 12. Further, on these facts, the employer's decision to pay claimant on the same day as the work separation does not suggest that claimant was discharged. The employer's decision to pay claimant the same day as the work separation is consistent with claimant having voluntarily quit given the owner's un rebutted testimony that she decided to pay claimant the same day because of the "aggressiveness" of claimant's texts. Transcript at 32. Finally, given that claimant was unsure when the text exchange occurred, it is more probable than not that it occurred on July 2, 2020, as testified to by the owner. Accordingly, Claimant voluntarily left work on July 2, 2020 because, at the time of her work separation that day, the preponderance of evidence shows she could have continued working for the employer for an additional period of time but did not do so.

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.

Claimant voluntarily quit working for the employer because the employer failed to alter certain workplace policies to which claimant objected. Claimant failed to prove by a preponderance of evidence that the employer's failure to change its workplace policies presented so grave a situation that claimant had no reasonable alternative but to leave work.

Claimant's objections to the employer's workplace policies involved how claimant's tips were paid, the reassignment of claimant's tables to other workers, and the employer's mask-wearing policy. With respect to tips, claimant testified that she objected to how the employer distributed her tips because she believed the employer used an "illegal tip book" and at the time she was hired, the employer promised to pay claimant her tips in cash on a nightly basis, but never did. Transcript at 6. However, claimant produced no evidence that the manner in which the employer paid claimant her tips was illegal. Nor was

it unreasonable for the employer to fail to pay claimant her tips each night in cash given the evidence in the record that customers usually tipped servers by credit card. Transcript at 19. Moreover, the owner disputed claimant's testimony that the employer promised to pay claimant her tips on a nightly basis. According to the owner, the employer committed to paying claimant her tips as quickly as possible, and the record does not show that the employer failed to pay the tips in a timely manner. Transcript at 19. Claimant failed to establish that the manner in which the employer distributed her tips presented her with a situation so grave that claimant had no reasonable alternative but to quit.

Next, claimant stated that she objected to the employer "stealing money" from her by giving away tables that were in claimant's section to other workers. Transcript at 9, 11-12. The owner, however, testified that "nobody was taking any tables from [claimant] of any sort." Transcript at 20. In the owner's telling, claimant, like all of the servers, might be sent home from time to time if the restaurant was slow, but the employer would only send claimant home after she worked a full five or six hour shift. Transcript at 20. Furthermore, the record contained un rebutted evidence that during the time claimant believed tables were unfairly taken from her, she worked a substantial number of hours, including overtime, and earned a significant income in tips alone, not including her hourly pay. Transcript at 20-21. Claimant failed to carry her burden to show by a preponderance of evidence that she faced a grave situation relating to the employer's practices in assigning claimant tables or sending her home when the restaurant was slow.

Finally, claimant objected to what she described as the employer's failure to enforce an appropriate mask-wearing policy. Transcript at 9, 12. Claimant testified that the owner wore a mask that was improperly "cut up", that the kitchen workers failed to wear masks, and that servers wore masks without the masks properly covering their noses. Transcript at 12. The owner disputed claimant's testimony regarding masks. The owner stated that all of the employer's workers wore masks pursuant to a five-point COVID-19 training regimen and "strict" protocols imposed by county government. Transcript at 27. Claimant failed to show by a preponderance of evidence that the employer's mask-wearing policy subjected her to a grave situation. Viewed objectively, the evidence is no more than equally balanced regarding whether the employer failed to enforce an appropriate mask-wearing policy. Where the evidence is no more than equally balanced, the party with the burden of persuasion, here claimant – has failed to satisfy its evidentiary burden.

Claimant voluntarily left work without good cause. Claimant is disqualified from receiving unemployment insurance benefits based upon this work separation.

DECISION: Order No. 20-UI-155605 is affirmed.

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

DATE of Service: December 8, 2020

NOTE: This decision denies payment of your Unemployment Insurance (UI) benefits.

However, you may be eligible for Pandemic Unemployment Assistance (PUA) benefits for the period you are not eligible for other benefits as long as you are unable to work, unavailable for work, or unemployed due to the COVID-19 public health emergency. PUA is a new unemployment benefits

program available through the Oregon Employment Department in response to the COVID-19 pandemic.

Visit <https://unemployment.oregon.gov> for more information, to apply for PUA, or to contact the Oregon Employment Department using the “Contact Us” form. You can also apply for PUA by calling 1-833-410-1004, but please be aware that the PUA staff cannot answer questions about this decision that denies payment of regular Unemployment Insurance (UI) benefits.

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 desisyong ito.

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 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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