

EMPLOYMENT APPEALS BOARD DECISION
2020-EAB-0733

Reversed
No Disqualification

PROCEDURAL HISTORY: On July 31, 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 April 12, 2020 (decision # 60128). Claimant filed a timely request for hearing. On October 23, 2020, ALJ Frank conducted a hearing, and on October 30, 2020 issued Order No. 20-UI-155950, affirming the Department's decision. On November 13, 2020, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) The employer employed claimant as a cook from July 2014 until April 15, 2020.

(2) Near the end of claimant's shift on April 15, 2020, the employer's owner gave claimant an order ticket that mistakenly included two orders of bread sticks instead of one. When claimant saw that the owner had listed bread sticks on the ticket twice, she asked the owner in an "abrasive" tone, "Is this one order of bread sticks or two orders of bread sticks?" Audio Record at 16:33; 8:15 to 8:35. The owner responded that it was one order of bread sticks, and then told claimant, "I'm your boss, you can't talk to me like that; that's not acceptable." Audio Record at 17:04 to 17:12. A moment later, the owner told claimant to go home for the rest of the shift and that the owner would complete claimant's duties at the restaurant that night. After the owner told claimant to go home for the rest of claimant's shift, claimant and the owner had a conversation.

(3) Claimant left the restaurant per the owner's instructions. Claimant returned briefly after the restaurant closed to get her tips. After claimant got her tips and left again, the owner realized she still owed claimant \$11 in tips. The owner sent claimant a text message that night, April 15, 2020, that explained that she owed claimant \$11 in tips, and stated, "I will mail that to you with your final paycheck." Audio Record at 26:42 to 26:55.

(4) On April 16, 2020, the owner sent claimant another text referring to her paycheck as "final." Audio Recording at 18:27 to 18:40. The owner and claimant exchanged texts and arranged for claimant to pick

up the paycheck that day at the restaurant at 2:15 p.m. April 16 was also claimant's normal payday and based on claimant's regular work schedule she would have worked on April 16. But due to the owner's texts referring to claimant's paycheck as final, claimant believed the owner "[did not] want [claimant] working there anymore." Audio Record at 14:03 to 14:44.

(5) Claimant went to the restaurant at 2:15 p.m. and picked up her paycheck. The owner was present when the claimant got her paycheck, but claimant and the owner did not speak to each other. Claimant did not work her shift on April 16 and did not work for the employer again after April 15.

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

Nature of the 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).

Order No. 20-UI-155950 found that "[c]laimant voluntarily quit work because she objected to working conditions." Order No. 20-UI-155950 at 1. The order acknowledged that the parties presented conflicting evidence about what the parties said to one another at the restaurant on April 15, 2020 after the employer told claimant to go home for the night. Order No. 20-UI-155950 at 2-3. However, the order found that the employer's account was more likely, and on that basis, concluded that claimant voluntarily quit. Order No. 20-UI-155950 at 4.

The record does not support the order's finding that claimant voluntarily quit work. The parties presented conflicting testimony about what was stated during the conversation between claimant and the owner after the owner told claimant to go home on April 15. However, the record does not show that either account of what the parties said to one another was more likely than the other. Claimant testified that after the owner told her to go home, claimant asked when her paycheck would be ready the next day (which was a payday), to which the owner responded that claimant had quit so the employer would not have to pay claimant for two weeks. Audio Record at 9:40 to 10:15. Claimant stated that she told the owner that she had not quit and would be present for her scheduled shift the next day, but that the owner did not respond to her comment. Audio Record at 10:16 to 10:34. The owner testified that claimant told her that if the owner was sending her home, she was not coming back. Audio Record at 17:30 to 17:42. The owner stated she took claimant's comment to mean she was quitting and when the owner asked claimant if the comment was claimant's resignation, claimant did not deny she was quitting. Audio Record at 17:42 to 17:57.

Because the evidence is equally balanced as to what the parties said to one another after the owner told claimant to go home for the night on April 15, the record does not support the conclusion of Order No. 20-UI-155950 that the owner's testimony was the more likely account of what occurred on April 15, or therefore that claimant voluntarily quit. Here, the first clear evidence of an act to end the employment relationship was the owner's undisputed testimony that she sent claimant a text on the night of April 15 informing claimant that she would include claimant's tips with her "final paycheck." Audio Recording at 26:42 to 26:55. The owner also testified that she sent claimant another message on April 16 in which she again referred to claimant's paycheck as "final." Audio Recording at 18:27 to 18:40. This

undisputed evidence is sufficient to show that continuing work was not available to claimant when the owner sent the text messages, meaning that at that point in time, the employer discharged claimant.

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 has not carried their burden to show by a preponderance of evidence that claimant was discharged for misconduct. The record shows that the employer discharged claimant based on her conduct on April 15 and does not show that any other conduct may have resulted in the employer discharging claimant. The record fails to show that claimant consciously engaged in conduct on April 15 that she knew or should have known probably violated the standards of behavior which an employer has the right to expect of an employee. The record therefore fails to establish that claimant willfully or with wanton negligence violated the employer’s reasonable expectations or disregarded its interests.

For these reasons, claimant’s discharge was not for misconduct. Claimant is not disqualified from receiving unemployment insurance benefits based on this work separation.

DECISION: Order No. 20-UI-155950 is set aside, as outlined above.

D. P. Hettle and S. Alba.

DATE of Service: December 18, 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.

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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 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 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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