

EMPLOYMENT APPEALS BOARD DECISION
2021-EAB-0269

Reversed
No Disqualification

PROCEDURAL HISTORY: On March 1, 2021, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant voluntarily quit without good cause and was disqualified from receiving unemployment insurance benefits effective March 22, 2020 (decision # 83619). Claimant filed a timely request for hearing. On April 1, 2021, ALJ Frank conducted a hearing, and on April 2, 2021 issued Order No. 21-UI-163998, affirming decision # 83619. On April 12, 2021, claimant filed an application for review with the Employment Appeals Board (EAB).

WRITTEN ARGUMENT: EAB considered claimant's written argument when reaching this decision.

FINDINGS OF FACT: (1) Texas Roadhouse Management Corp employed claimant as a hostess from November 2019 until approximately late March 2020.

(2) In mid-March 2020, the employer temporarily scaled back operations due to restrictions related to the COVID-19 pandemic. At that time, the employer offered claimant and other staff the option to either accept a temporary layoff until the restaurant could fully reopen, or continue working on a sporadic, part-time basis. The employer promised claimant that she would "still [be] 100 percent a Texas Roadhouse employee" if she chose the former option. Transcript at 4. Claimant chose the latter option, and was eventually scheduled to work on March 24, 2020.

(3) After claimant arrived at work on March 24, 2020, she observed another employee removing an armadillo costume that he had been wearing outside. The employer thereafter informed claimant and the other employees that they would be required to take shifts standing outside and holding a sign to promote the restaurant. Claimant understood this to mean that she would also be required to wear the

armadillo costume, and was concerned about the safety of doing so, as the other employee had breathed inside of it while he wore it. Claimant refused to wear the costume. After taking a break, claimant asked the employer if they had other work she could perform instead, but the employer did not have other work for her at the time. Claimant then asked the employer if she could elect to take a temporary layoff, as had been offered to her earlier that month. The employer permitted her to do so, and claimant left.

(4) After March 24, 2020, claimant did not return to work. Based on the employer's earlier statement, claimant continued to believe herself to be employed by the employer through May 2020. Around that time, claimant contacted the employer in an attempt to return to work, but did not receive a response.

CONCLUSIONS AND REASONS: Claimant was discharged, 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). In relevant part, the date an individual is separated from work is the date the employer-employee relationship is severed. OAR 471-030-0038(1)(a).

The order under review concluded that "claimant had discontinued working on March 24 and left the job in lieu of completing the day's shift," and therefore voluntarily quit per OAR 471-030-0038(2)(a). Order No. 21-UI-163998 at 3. The record does not support this conclusion. While the record does show that, as of March 24, 2020, claimant could have continued working for the employer for an additional period of time, the record does not show that the employer-employee relationship was severed on March 24, 2020. Both parties testified that the employer had previously offered claimant the option of taking a temporary layoff and then returning to work once the restaurant fully reopened. Transcript at 4, 17. Claimant further testified that the employer told her that if she chose to be temporarily laid off, she would still be considered an employee, and that after she elected to do so, she expected to eventually be called back to work. Transcript at 4, 9.

Based on these facts, claimant did not voluntarily quit when she left work on March 24, 2020. The record does not conclusively show when the employer-employee relationship was severed. However, because claimant continued to believe herself to be employed and attempted to return to work based on the expectations the employer gave her, and because the employer never responded to her attempts to return to work, the record shows that, more likely than not, the employer chose to sever the employer-employee relationship at some point on or after March 24, 2020. Because claimant was willing to continue working for the employer for an additional period of time but the employer did not allow her to do so, the employer therefore discharged claimant.

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) (September 22, 2020). "[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).

Although the employer did not offer evidence that claimant explicitly resigned, both of their witnesses at hearing testified that claimant walked off of the job following being told on March 24, 2020 that she was required to hold a sign outside the restaurant. Transcript at 14, 21. The record does not contain an account of any person either having decided to discharge claimant, or else telling claimant that she had been discharged. The facts on the record therefore show that, more likely than not, the employer discharged claimant in a mistaken belief that claimant had quit. Because the decision to discharge claimant was not the result of her willful or wantonly negligent disregard for the employer’s standards of behavior, the employer discharged claimant, but not for misconduct, and claimant is therefore not disqualified from receiving benefits based on this work separation.

DECISION: Order No. 21-UI-163998 is set aside, as outlined above.

S. Alba and D. Hettle;
Angela Steger-Bentz, not participating.

DATE of Service: May 19, 2021

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.

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.

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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 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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