EO: 200
BYE: 202211

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

003
VQ 005.00

EMPLOYMENT APPEALS BOARD DECISION
2021-EAB-0575

Reversed
No Disqualification

PROCEDURAL HISTORY: On May 13, 2021, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant voluntarily quit work without good cause and was disqualified from receiving unemployment insurance benefits effective September 27, 2020 (decision # 131641). Claimant filed a timely request for hearing. On July 2, 2021, ALJ Scott conducted a hearing, and on July 7, 2021 issued Order No. 21-UI-169946, modifying[1] decision # 131641 by concluding that claimant voluntarily quit work without good cause and was disqualified from receiving unemployment insurance benefits effective September 20, 2020. On July 15, 2021, claimant filed an application for review with the Employment Appeals Board (EAB).

WRITTEN ARGUMENT: EAB did not consider claimant's July 16, 2021 written argument when reaching this decision because she did not include a statement declaring that she provided a copy of her argument to the opposing party or parties as required by OAR 471-041-0080(2)(a) (May 13, 2019). Claimant's August 3, 2021 argument contained information that was not part of the hearing record, and did not show that factors or circumstances beyond claimant's reasonable control prevented her from offering the information during the hearing. Under ORS 657.275(2) and OAR 471-041-0090, EAB considered only information received into evidence at the hearing when reaching this decision. EAB considered claimant's August 3, 2021 argument to the extent it was based on the record.

FINDINGS OF FACT: (1) Do You, Inc. employed claimant, most recently as a hair stylist, from 2015 until September 25, 2020. The employer operated franchised hair salons in Albany, Oregon and Salem, Oregon. Claimant lived two blocks away from the employer's Albany salon.

(2) Due to the COVID-19 pandemic, the employer had a difficult time retaining stylists, and as of May 2020, claimant was the only full-time stylist who worked at the employer's Albany salon. Claimant typically worked shifts from 10:00 a.m. to 6:00 p.m., Monday through Friday. The salon closed at 6:00 p.m. on days when it was open. Due to the staff shortage, the employer significantly curtailed the

[1] The order under review stated that decision # 131641 was "affirmed." Order No. 21-UI-169946 at 6. However, as the order under review found a different disqualification date than decision # 131641, it actually modified the administrative decision.

Albany salon's operating hours and days. Because of the staffing shortage, the general manager and the owner regularly discussed the possibility of closing the salon, sometimes within earshot of salon employees and customers.

(3) On September 24, 2020, claimant worked her last shift for the employer. On September 25, 2020 at 8:18 a.m., claimant notified the general manager via text message that she was ill, and requested to use her remaining sick leave to cover the absence. The general manager subsequently went to the salon to cover claimant's shift. When the general manager arrived that morning, she noticed that claimant's cosmetology license was no longer on display at her workstation and that claimant had removed her supplies from the workstation. The salon's receptionist also presented to the general manager a key to the salon that she had found in a drawer at claimant's workstation, which the general manager believed belonged to claimant. Thereafter, the general manager sent a text message to claimant asking her if she had quit, as claimant's belongings had been removed from the workstation. Exhibit 1 at 2. Prior to closing the store at 6:00 p.m. that evening, the owner hung a sign on the salon's door indicating that the salon would be closed permanently or for the foreseeable future.

(4) While claimant was ill on September 25, 2020, both the salon's receptionist and another stylist contacted her multiple times to inform her that the general manager had been telling customers that the salon would be closing. Claimant did not confirm that the salon would be closing with either the general manager or the owner.

(5) Claimant did not respond to the general manager's text until after 7:06 pm on the evening of September 25, 2020, at which point she explained that she had slept "most of the day" because she was sick, that she did not quit, that she had taken most of her belongings because she was uncertain of the salon's future, and that the key the manager found had belonged to someone else. Exhibit 1 at 3; Transcript at 18. At 7:17 p.m., in the same text message exchange, claimant stated that she "was told the shop was closed and we are all out of a job. I'll go slide my key under the back door." Exhibit 1 at 4.

(6) After September 25, 2020, the employer closed the salon and laid off their remaining employees, then reopened a few months later with a new staff.

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).

The order under review concluded that claimant voluntarily quit working for the employer because of claimant's unverified belief that the employer intended to close the salon; and that as a result of claimant's having voluntarily quit, the employer closed the salon because it was insufficiently staffed to remain open. Order No. 21-UI-169946 at 3–5. The record contains conflicting evidence regarding when the employer decided to close the salon. As such, the order under review based its conclusion that claimant quit on the determination that claimant's testimony—that she had seen the "closed" sign at the salon before notifying the employer that she was going to return their key—was "inaccurate" because

"the only conclusion that makes sense is that [the salon owner] did not decide to close the salon until after the 7:17 p.m. text message from claimant expressing her lack of intention to return to work." Order No. 21-UI-169946 at 4. The record does not support these conclusions.

In cases such as this one where the parties are not in agreement as to the nature of the work separation and offer conflicting evidence, whether the claimant voluntary quit or was discharged turns on which party made the first unequivocal act evincing an intent to sever the employment relationship. No one party bears the burden of persuasion to characterize the work separation. The record does not show either that claimant explicitly stated that she was quitting or that the employer explicitly told claimant that they were discharging her due to the closure of the salon. While claimant's 7:17 p.m. text message stating that she would slide her key under the back door might reasonably be construed as her informing the employer that she had quit, such a construction would necessarily require that an employment relationship still existed between the two parties—in other words, that the employer had not already discharged her. Had the employer already made the decision to close the store before claimant sent the text message, the employer would have severed the employment relationship by way of laying off claimant (and the rest of the staff), and claimant's message about returning her key would therefore have had no effect on the employment relationship.

At hearing, the salon owner testified that once the general manager formed the belief that claimant had quit, the two discussed the possibility of closing the salon, and the owner told the manager that he would not do so until they knew whether or not claimant had actually quit. Transcript at 8. Further, the owner testified that he personally hung the "closed" sign on the salon's door after 8:30 p.m., well after claimant sent the text message about returning the key. Transcript at 41. By contrast, claimant's witness—the stylist who had notified her on September 25, 2020 that the general manager was talking about closing the salon—testified that she personally watched the manager hang the "closed" sign on the salon door prior to 6:00 p.m. that evening. Transcript at 33. Additionally, claimant—who lived two blocks away from the salon—testified that she had traveled to the salon and personally observed that the sign had already been hung on the door by the time that she sent the text message at 7:17 p.m. Transcript at 23.

Despite the corroborating testimony from claimant's witness, the order under review reasoned that claimant's testimony was not credible because it would have been irrational for claimant to text the manager that she had been told that the salon was closed, rather than stating that she had seen the sign on the door, if she had actually seen the sign; because if claimant was asleep most of the day and unable to respond to the manager's text until 7:06 p.m., "it was never made clear how [claimant] managed to go to the salon prior to 7:17 p.m.;" and because the owner's testimony was "persuasive that it would have been a bad business decision for [the employer] to close the salon if that salon still had appropriate staffing levels." Order No. 21-UI-169946 at 4. In so reasoning, the order under review draws several unsupported inferences from the record. For instance, the record does not show that claimant was *unable* to respond to the manager's text message prior to 7:06 p.m.—only that she did not—and the record does not otherwise clearly demonstrate any reason why claimant would have been unable to travel two blocks to view the sign on the salon door prior to texting the manager at 7:17 p.m. Similarly, the suggestion that claimant's failure to mention the door sign in the 7:17 p.m. text was "irrational" lacks support.

Finally, in finding that the employer's version of events is "the only conclusion that makes any sense" because claimant's version of events would indicate that the employer had made a "bad business decision," the order under review tacitly suggested that the owner was incapable of or otherwise unlikely

to make bad or irrational business decisions, where claimant, by contrast, was inclined to do so. Such a finding, without the support of evidence to show more broadly either that the employer tended to make rational, well-informed decisions or that claimant tended to do the opposite, is mere conjecture, and ignores the fact that business owners are as capable as anyone else of making irrational or hasty decisions. In fact, the employer's general manager demonstrated that ability earlier on September 25, 2020, when she misread the state of claimant's workstation to mean that claimant had quit. Overall, the evidence in the record is sufficient to find that either party's version of events was plausible. Because claimant's evidence was corroborated by another firsthand witness to those events, however, the evidence weighs more strongly in claimant's favor that the employer made the first unequivocal act evidencing a desire to discontinue the employment relationship by hanging a "closed" sign on the salon door, prior to claimant's text notifying the employer she intended to return her key. Accordingly, the employer discharged claimant on September 25, 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) (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).

Based on the unsubstantiated belief that claimant had quit, the employer decided to close the salon entirely and reopen at a later date with new employees. Nothing in the record indicates that the employer's decision to discharge claimant was the result of claimant's willful or wantonly negligent violation of the employer's standards of behavior. Therefore, the employer has not met its burden to show that they discharged claimant for misconduct.

For the above reasons, claimant was discharged, but not for misconduct, and is not disqualified from receiving unemployment insurance benefits based on this work separation.

DECISION: Order No. 21-UI-169946 is set aside, as outlined above.

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

DATE of Service: <u>August 20, 2021</u>

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.

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.

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