

EMPLOYMENT APPEALS BOARD DECISION
2021-EAB-0810

Modified
Eligible Week 13-21
Disqualification

PROCEDURAL HISTORY: On May 5, 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 March 28, 2021 (decision # 133753). Claimant filed a timely request for hearing. On September 24, 2021, ALJ Wardlow conducted a hearing, and on September 28, 2021 issued Order No. 21-UI-175808, affirming decision # 133753. On October 5, 2021, claimant filed an application for review with the Employment Appeals Board (EAB).

WRITTEN ARGUMENT: Claimant did not declare 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). The argument also 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 as required by OAR 471-041-0090 (May 13, 2019). EAB considered only information received into evidence at the hearing when reaching this decision. *See* ORS 657.275(2).

FINDINGS OF FACT: (1) Bi-Mart employed claimant as a cashier from September 10, 2018 until March 31, 2021.

(2) On March 29, 2021, claimant was at work closing down her register. A customer in line for a different register noticed that the light of claimant's register was still on and began "ranting" at claimant about the fact that the light was on while the register was closed. Transcript at 6. The customer, who was physically large, made "intense eye contact" with claimant, pointed at her, and made comments like "[t]he light was on, nobody's home[.]" Transcript at 7. The customer completed his transaction and exited the store, but then returned and "started in on" claimant again. Transcript at 8. One of claimant's coworkers took the customer aside and calmed him down. As the customer departed the store, he turned to claimant and stated, "This isn't over yet. I'll be back." Transcript at 9. The encounter with the customer made claimant feel threatened and go into "a panic state of mind," and claimant decided to quit working for the employer. Transcript at 11.

(3) On March 30, 2021, claimant gave her manager a resignation letter notifying of her intent to quit working for the employer effective April 6, 2021. The resignation letter also requested that the employer key in eight hours of claimant's accrued paid time off ("PTO") for her upcoming April 2, 2021 shift, in lieu of her working that shift.

(4) Based on the letter's request to use PTO for claimant's April 2, 2021 shift, claimant's manager believed that claimant intended to use her accrued PTO for all her remaining shifts through April 6, 2021, rather than work them. Under the employer's PTO policy, PTO accumulations are paid out upon an employee's separation from work and may not be assigned to scheduled shifts during an employee's quit notice period.

(5) Claimant's manager consulted with the district manager about claimant's resignation letter and conveyed his view that claimant intended to use her accrued PTO for all her remaining shifts through April 6, 2021, rather than work them. On March 31, 2021, the district manager confirmed to claimant's manager that, because claimant intended to use PTO for her remaining shifts and PTO may not be assigned to scheduled shifts during an employee's quit notice period, the employer considered claimant to have quit and processed claimant's termination from employment effective March 31, 2021.

(6) On April 2, 2021, claimant called her manager intending to call in an absence for her shift that day. When she reached the manager and explained her intent to call in, he informed her that the employer had already terminated her employment because the employer considered her to have quit.

(7) Prior to tendering her resignation letter, claimant did not ask the employer to ban the customer from the store or request that the employer transfer her to a different store. Claimant did not ask for the customer to be banned because she thought it would be futile to do so. She did not request to be transferred to another store because she did not want to transfer to a different store. However, had claimant brought her encounter with the customer to the attention of her manager or district manager, the employer may have banned the customer from the store. There was also an open cashier position at another store operated by the employer and transferring to that position would have been possible had claimant requested a transfer.

CONCLUSIONS AND REASONS: The employer discharged claimant, not for misconduct, within 15 days of claimant's planned voluntary leaving without good cause.

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).

On March 30, 2021, claimant tendered notice of her intent to quit work effective April 6, 2021. However, based on claimant's request in her resignation letter to use PTO for her April 2, 2021 shift, claimant's managers believed that claimant intended to use PTO for all her remaining shifts rather than work them. Because, under the employer's policy, PTO may not be assigned to scheduled

shifts during an employee's quit notice period, the employer considered claimant to have quit and processed claimant's termination from employment effective March 31, 2021. The record shows that claimant was willing to maintain the employment relationship during her notice period because on April 2, 2021, after the employer had processed claimant's termination from employment, claimant called her manager and attempted to call in an absence for the shift she had been scheduled to work that day. Because claimant was willing to continue working but was not allowed to do so by the employer because they considered her to have resigned and processed her termination effective March 31, 2021, the work separation was a discharge that occurred on March 31, 2021.

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).

The employer discharged claimant on March 31, 2021 because claimant's managers believed claimant intended to use PTO for all her remaining shifts rather than work them, and for that reason the employer considered claimant to have quit and processed claimant's termination from employment effective March 31, 2021. Because the record shows that the employer discharged claimant on March 31, 2021 because they viewed claimant's resignation as being effective on that date, rather than because they considered her to have breached an employer expectation willfully or with wanton negligence, the employer did not discharge claimant for misconduct.

ORS 657.176(8). While the record shows that claimant was not discharged for misconduct, it is necessary to determine whether ORS 657.176(8) applies to this case. ORS 657.176(8) states, "For purposes of applying subsection (2) of this section, when an individual has notified an employer that the individual will leave work on a specific date and it is determined that: (a) The voluntary leaving would be for reasons that do not constitute good cause; (b) The employer discharged the individual, but not for misconduct connected with work, prior to the date of the planned voluntary leaving; and (c) The actual discharge occurred no more than 15 days prior to the planned voluntary leaving, then the separation from work shall be adjudicated as if the discharge had not occurred and the planned voluntary leaving had occurred. However, the individual shall be eligible for benefits for the period including the week in which the actual discharge occurred through the week prior to the week of the planned voluntary leaving date."

The employer discharged claimant not for misconduct on March 31, 2021, which was within 15 days of claimant's planned quit on April 6, 2021. Therefore, the applicability of ORS 657.176(8) turns on whether claimant's planned quit was without good cause. "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’s planned quit was without good cause. Claimant faced a grave situation during the encounter with the customer on March 29, 2021. The record shows that the customer was physically large, made “intense eye contact” with claimant, pointed at her, and made rude comments. The record further shows that the customer left the store briefly, but then returned, continued berating claimant, and threatened her by stating “This isn’t over yet. I’ll be back.” Transcript at 9.

However, although the customer’s behavior presented claimant with a grave situation, claimant failed to establish good cause because she did not pursue reasonable alternatives prior to quitting. Before she tendered her resignation letter, claimant did not raise the customer’s behavior with her manager or district manager. Nor did claimant request a transfer to one of the employer’s other stores. The record indicates that had claimant brought her encounter with the customer to the attention of her manager or district manager, the employer may have banned the customer from the store. The record further shows that at the time claimant tendered her resignation letter, there was an open cashier position at a different store and transferring to that position would have been possible had claimant requested a transfer.

Thus, because the employer discharged claimant, but not for misconduct, within 15 days prior to the date she planned to voluntarily leave work without good cause, ORS 657.176(8) applies to this case. Accordingly, ORS 657.176(8) requires that claimant be disqualified from receiving unemployment insurance benefits effective April 4, 2021. Claimant is not ineligible to receive benefits for the week in which her discharge occurred, the week of March 28, 2021 through April 3, 2021 (week 13-21).

DECISION: Order No. 21-UI-175808 is modified, as outlined above.

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

DATE of Service: November 9, 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.

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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.

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.

Employment Appeals Board - 875 Union Street NE | Salem, OR 97311
 Phone: (503) 378-2077 | 1-800-734-6949 | Fax: (503) 378-2129 | TDD: 711
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