

EMPLOYMENT APPEALS BOARD DECISION
2022-EAB-0530

Affirmed
No Disqualification

PROCEDURAL HISTORY: On March 11, 2022, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that the employer discharged claimant for misconduct, disqualifying claimant from receiving benefits effective February 13, 2022 (decision # 82354). Claimant filed a timely request for hearing. On April 27, 2022, ALJ Kaneshiro conducted a hearing and issued Order No. 22-UI-192359 reversing decision # 82354 by concluding that claimant was discharged, but not for misconduct, and was not disqualified from receiving benefits based on the work separation. On May 2, 2022, the employer filed an application for review with the Employment Appeals Board (EAB).

WRITTEN ARGUMENT: The employer submitted two written arguments, one on May 2, 2022, and the other on May 13, 2022. EAB did not consider the employer's May 2, 2022 argument because the employer did not declare that they provided a copy of their May 2, 2022 argument to the opposing party or parties as required by OAR 471-041-0080(2)(a) (May 13, 2019). The May 13, 2022 argument contained information that was not part of the hearing record, and did not show that factors or circumstances beyond the employer's reasonable control prevented them 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). EAB considered the employer's May 13, 2022 argument to the extent it was based on the record.

FINDINGS OF FACT: (1) Beach Wok employed claimant as a server at their restaurant from October 12, 2021 until February 15, 2022.

(2) The employer expected claimant to work a full time schedule that included working on weekends unless the employer granted claimant a weekend day off. Claimant understood that expectation.

(3) In November and December 2021, claimant requested days off, mostly on weekend days, in order to finish moving into her home and to spend time with her husband. The employer granted those requests. In January 2022, claimant occasionally requested days off, including some weekend days. The employer's owner became concerned that claimant's requests for weekend days off would burden the

employer's business. Thereafter, the owner granted some, but not all, of the weekend days off claimant requested. Claimant worked every shift she was scheduled to work and only failed to work a weekend day if the employer granted her the day off.

(4) In early to mid-February 2022, claimant met with the owner and informed her that she intended to apply for a local government job and, if she was offered the job, would resign from her server job, but otherwise intended to continue working for the employer. Claimant did not state that resigning from her server job was certain to occur, or that she was unwilling to work weekends. Based on the conversation, however, the owner believed claimant would work for the employer only until she found another job but was unwilling to work weekends in the meantime.

(5) On February 15, 2022, the owner "realized that [she] didn't need [claimant]" and took her off the restaurant's work schedule. Transcript at 31. The owner took claimant off the work schedule because the owner decided she "couldn't just sit there and let [claimant] decide . . . when she was gonna leave," and believed that she "ha[d] to move" and find a new worker to fill claimant's position. Transcript at 31, 12.

(6) On February 18 or 19, 2022, the owner texted claimant and stated that the employer did not need claimant to work the weekend shifts of February 19 and 20, 2022. The owner's text surprised claimant because she was willing to work February 19 and 20, 2022, and had expected to do so. Claimant texted and attempted to call the owner to learn why she was not scheduled to work that weekend. On February 20, 2022, the employer sent claimant an email. The email expressed disappointment that claimant had applied for the local government job and stated that claimant need not provide a two-week notice. After receiving the email, claimant discovered she was denied access to the employer's online work schedule. Claimant concluded that her employment had been terminated and ceased asking the employer about the work schedule.

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). "Work" means "the continuing relationship between an employer and an employee." OAR 471-030-0038(1)(a). The date an individual is separated from work is the date the employer-employee relationship is severed. OAR 471-030-0038(1)(a).

The work separation was a discharge that occurred on February 15, 2022. In their May 13, 2022 written argument, the employer stated that they viewed claimant's separation from work as a quit. May 16, 2022 Written Argument at 3. Although that may have been the employer's view, the standard set forth by OAR 471-030-0038(2)(a) determines the nature of a work separation, not the manner in which the separation is viewed by the parties.

The record shows that on February 15, 2022, the employer's owner "realized that [she] didn't need [claimant]" and took her off the restaurant's work schedule. Transcript at 31. The owner took claimant off the work schedule because the owner decided she "couldn't just sit there and let [claimant] decide . . . when she was gonna leave," and believed that she "ha[d] to move" and find a new worker to fill

claimant's position. Transcript at 31, 12. The record further shows that the owner's text stating that claimant need not work the February 19 and 20, 2022 shifts surprised claimant because she had expected to work those days, and texted and attempted to call the owner seeking an explanation for why she was not allowed to work those days. Only after receiving the employer's February 20, 2022 email and being denied access to the online work schedule did claimant cease asking the employer about the work schedule. The record therefore establishes that as of February 15, 2022, claimant was willing to continue to work for the employer for an additional period of time but was not allowed to do so by the employer. The employer therefore discharged claimant on February 15, 2022.

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).

At hearing, the owner testified that the "one and only reason [claimant] doesn't work for me anymore is because she changed her availability. . . she no longer was going to be available weekends." Transcript at 13. However, the testimony of the owner and claimant differed substantially regarding whether claimant was willing to work weekends. At hearing, the owner testified that on February 12, 2022, claimant told her that she was applying for a local government job, would eventually resign from her server job, and was not willing to work weekends going forward. Transcript at 10-12, 15, 30-31. The owner further testified that during that conversation, she advised claimant, "I can't employ you if you don't have the full availability." Transcript at 15.

In contrast, claimant testified that on February 8, 2022, she told the owner that she intended to apply for a job with the local government and, if she was offered the job, would resign from her server job, but otherwise intended to continue working for the employer. Transcript at 22. Claimant further testified that she was available to work weekends, worked every weekend day she was scheduled, never told the owner that she was unwilling to work weekends, and that the owner never had a conversation with her in which the owner informed claimant she could not employ her anymore. Transcript at 19, 23, 24-25. Viewed objectively, the evidence on those issues was no more than equally balanced. Where the evidence is no more than equally balanced, the party with the burden of persuasion – here, the employer – has failed to satisfy their evidentiary burden. Consequently, on those disputed matters, EAB based its findings on claimant's evidence.

Accordingly, the record shows that claimant was discharged for being unwilling to work weekends, when, in fact, she remained willing to work weekends. Although there were occasions when claimant took weekend days off in November and December 2021, and January 2022, the record shows that the employer granted claimant's request to take those days off and as of the time she was discharged claimant was available and willing to work weekends. Because claimant remained willing to work

weekends, the employer did not show that they discharged claimant because she had engaged in a willful or wantonly negligent violation of the standards of behavior the employer had the right to expect or disregarded the employer's interests. Therefore, the employer did not discharge claimant for misconduct under ORS 657.176(2)(a).

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

DECISION: Order No. 22-UI-192359 is affirmed.

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

DATE of Service: July 21, 2022

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 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 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 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 دستور العمل موجود در پایان آن، از دادگاه تجدید نظر اورگان درخواست تجدید نظر کنید.

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