

EMPLOYMENT APPEALS BOARD DECISION
2022-EAB-0600

Affirmed
No Disqualification

PROCEDURAL HISTORY: On March 10, 2022, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant quit working for the employer without good cause and was disqualified from receiving unemployment insurance benefits effective February 13, 2022 (decision # 123432). Claimant filed a timely request for hearing. On April 20 and 29, 2022, ALJ Mott conducted a hearing, and on May 2, 2022 issued Order No. 22-UI-192611, reversing decision # 123432 by concluding that claimant was discharged, but not for misconduct, and was not disqualified from receiving benefits based on the work separation. On May 23, 2022, the employer filed an application for review with the Employment Appeals Board (EAB).

WRITTEN ARGUMENT: Both the employer's and claimant's arguments contained information that was not part of the hearing record, and did not show that factors or circumstances beyond either party's reasonable control prevented them from offering the information during the hearing. Under ORS 657.275(2) and OAR 471-041-0090 (May 13, 2019), EAB considered only information received into evidence at the hearing when reaching this decision. EAB considered both the employer's and claimant's arguments to the extent they were based on the record.

FINDINGS OF FACT: (1) Bud Junction LLC employed claimant as a bud tender and manager for the employer's marijuana dispensary from November 18, 2018 until February 14, 2022. The employer was licensed by the Oregon Liquor and Cannabis Commission (OLCC) to sell marijuana products. Claimant also was licensed by the OLCC to work within the employer's dispensary. Claimant's regular work hours were Monday through Thursday, 10:00 a.m. to 4:30 p.m., but she also would occasionally work half days on Fridays, Saturdays, and Sundays.

(2) In addition to owning the dispensary, the employer's owner also owned an adjacent appliance store. Because the employer's dispensary did not have a bathroom, their dispensary employees used the bathroom at the adjacent appliance store when needed. The dispensary also had a security system that required each dispensary employee to be issued and maintain a code that they were required to input into the security system upon opening the dispensary each day. As a manager, claimant could access and view the security system's video cameras remotely from her phone in real time when needed.

(3) In early January 2022, the owner told claimant that he was thinking of selling the dispensary. The owner asked claimant to help him find a buyer for the dispensary. Prior to February 10, 2022, claimant believed she had lined up a potential buyer for the dispensary, and the owner was aware of this potential buyer.

(4) On February 10, 2022, the adjacent appliance store was closed due to a COVID-19 situation. That evening, an incident occurred outside of the dispensary that required claimant to call the police. While that incident was being addressed by law enforcement, a dog bit and injured claimant's hand. Claimant texted the owner and told him that she had been injured.

(5) On February 11, 2022, claimant planned to use her day off to seek medical attention for her hand injury. However, claimant received a call from a coworker, A.V., who was scheduled to open the dispensary that morning. A.V. had a lung condition, was concerned about exposure to COVID-19 while using the appliance store bathroom, and wanted to know if the bathroom at the appliance store had been cleaned. Claimant asked the owner by text whether the appliance store bathroom had been cleaned, and the owner responded by directing claimant to tell A.V. to clean the bathroom. When claimant responded that A.V. was not comfortable cleaning the bathroom due to her lung condition and the COVID-19 situation that existed at the appliance store, the owner responded with a text that stated, among other words, "shut that business down and have the bud Kinder (sic) go clean the bathroom. That is definitely an order." Exhibit 1 at 8, 14. Claimant was unsure whether the owner's text message meant that she should temporarily close the dispensary so that the appliance store bathroom could be cleaned, or whether she should close the dispensary down permanently given the owner's recent indication that he planned to sell the business, and because a buyer had already been lined up for this purpose.

(6) Later, claimant went to the dispensary and decided that the owner's intent was that the dispensary should be closed down temporarily so that the appliance store bathroom could be cleaned. However, because of her continuing uncertainty regarding the owner's intent, claimant decided to close the dispensary down as if it would be a permanent closure with the intent of seeking clarification from the owner on this issue once she got medical treatment for her hand. In the meantime, claimant, A.V., and another coworker spent three to four hours "lock[ing] . . . up" the business, while recording the actions they took in doing so. April 20, 2022 Transcript at 38. During this process, claimant removed four "dab rigs" from the business that belonged to claimant and her coworkers. April 29, 2022 Transcript at 46.¹ Claimant and her coworkers had been awarded the dab rigs as part of the employer's loyalty rewards program after they had each, as customers, bought \$5,000 worth of merchandise from the dispensary. Claimant removed the dab rigs from the point-of-sale system and issued them to herself and the

¹ Claimant testified that a "dab rig" is a "glass or silicone piece that you can smoke marijuana concentrates out of. . . legally." April 29, 2022 Transcript at 47.

coworkers through the loyalty program. After they finished closing the business, claimant, A.V., and the coworker went out to dinner and posted a photo of their dinner experience on Facebook. The Facebook photo included the statement, “All this hard work for nothing. But Fuck it.. here’s to margaritas instead.” Exhibit 2 at 1. At that point, claimant had planned to return for her next regularly scheduled shift on February 14, 2022.

(7) On February 12, 2022, the owner went to the dispensary after seeing claimant’s Facebook post. The owner was concerned that the Facebook post might be indicative of a decision by claimant to quit, and then subsequently discovered that the store had not been opened that day. A.V. had been scheduled to open the dispensary that day, but called claimant because she was unclear if the store was to be opened given the closure that occurred the day before, and she was also concerned about whether the adjacent appliance store bathroom had been cleaned, among other things. Claimant decided to conference call the owner, with A.V. and the dispensary’s other employees participating in the call, so that everyone could “get on the same page.” April 20, 2022 Transcript at 7. During the conversation, A.V. expressed that she, claimant, and the other employees, would like to return to work, but had concerns. The owner felt like A.V. kept talking over him when he tried to respond, and warned A.V. that if she did not stop doing so, he would hang up the phone. The owner felt like A.V. continued to talk over him, despite his warning, so he hung up the phone.

(8) At that point, the owner “kinda . . . [thought] that well, I guess everybody quit” and was “ready to shut the business down.” April 29, 2022 Transcript at 14-15.² The owner believed he could no longer trust his dispensary employees and was concerned that he might be penalized by the OLCC if any products were stolen from the dispensary. On February 12, 2022, the owner therefore changed the locks on the dispensary doors and removed all of the dispensary employee’s codes from the security system. As the owner was removing claimant from the security system, claimant received an alert on her phone and logged in to view the security cameras in real time. Claimant observed the owner in the dispensary and then “[her] screen went blank.” April 20, 2022 Transcript at 16. Claimant understood this to mean she had been removed from the security system and, as a result, could no longer physically access the dispensary. Because the owner believed at that point he was “gonna close [the dispensary] down for good,” he then posted on Facebook that he had closed down the dispensary. April 29, 2022 Transcript at 39. Claimant later saw the owner’s Facebook post.

(9) Thereafter, on February 12, 2022, claimant texted the owner that “it’s clear you fired us” based on the owner’s decision to remove claimant and the other employees from the security system. April 20, 2022 Transcript at 17. The owner responded that he had not fired claimant, but that instead she “didn’t show up for work today [and] I already have proof that you quit.” April 20, 2022 Transcript at 18. The proof the owner pointed to was claimant’s decision to close the dispensary on February 11, 2022 and the fact that no employees showed up to open the dispensary on February 12, 2022. Based on this, the owner stated, “it’s pretty obvious you guys quit” and that he would be contacting his attorney for advice and would be “taking every kind of legal action that . . . I can.” April 20, 2022 Transcript at 19, 21. Claimant responded that she did not show up for work that day because it was her day off, and that she had closed the dispensary the day before because the owner had given her a “definite order” to do so because the appliance store bathroom had not been cleaned. April 20, 2022 Transcript at 20. Despite the

² See also April 29, 2022 Transcript at 30. (“[After A.V.] called and said that, ‘We’ll come back to work for you,’ that’s kinda telling me they had already quit, and that conversation didn’t last very long, because . . . she kept talking over me . . .”).

owner's misgivings that claimant may have quit her employment, and his direct words to claimant to that effect, the owner nevertheless expected that claimant would report to work for her next regularly scheduled shift on February 14, 2022.

(10) On February 14, 2022, claimant, believing she had been fired, did not report for her regularly scheduled work because of the text messages she had received from the owner and because her removal from the security system meant she had no way to get into the dispensary. Meanwhile, the owner reviewed, for the first time, security video footage of claimant shutting down the dispensary on February 11, 2022. The owner believed that the video depicted claimant "ransack[ing]" the dispensary and improperly taking the dab rigs. April 29, 2022 Transcript at 8. It was only after the claimant did not show up for work on February 14, 2022, in conjunction with his belief that claimant had stolen from the employer and ransacked the dispensary, that the owner definitively concluded that claimant had quit her job.

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 order under review concluded that the employer discharged claimant on February 12, 2022 when the owner removed claimant's physical access to the dispensary by removing her security code from the dispensary's security system because "[the owner had] made up his mind that claimant had [already] quit." Order No. 22-UI-192611 at 3. Based on the owner's actions in denying her access to the dispensary, and his later text to claimant regarding contact with his attorney, the order reasoned that claimant "reasonably understood" that she was no longer allowed to work for the employer, and the nature of the work separation therefore was a discharge. Order No. 22-UI-192611 at 3. The record does not support the conclusion that claimant was discharged.

Claimant voluntarily quit work on February 14, 2022, when she failed to show up for her regular work shift on that day. The record shows that on that day, the owner still expected claimant to show up for work, and that he only concluded that she had quit her job after she failed to come to work and then subsequently reviewed security video that he believed showed claimant "ransacking," and stealing from, the dispensary on February 11, 2022.³ Thus, for purposes of OAR 471-030-0038(2)(a), the record shows that as far as the employer was concerned, claimant could have continued to work for the employer as of February 14, 2022, had she shown up for her regularly scheduled shift that day, and despite the events that had occurred on February 12, 2022. To be sure, the record also shows that claimant reasonably

³ While it is true the record shows that the owner removed claimant from the security system and changed the dispensary locks on February 12, 2022, and that these actions would have prevented claimant from physically accessing the dispensary, the owner also testified that he still expected claimant to report for her regularly scheduled shift on February 14, 2022, and that, had claimant contacted him upon her arrival to work that day, she "could be put back in [the security system] just as fast as she was taken out," and he would have provided her a new key. April 29, 2022 Transcript at 17-18.

believed that she had been discharged on February 12, 2022 based on the totality of the events that occurred that day, in particular, her knowledge that the employer had removed her from the security system, thereby depriving her of any ability to physically access the dispensary. However, despite the reasonableness of her beliefs, for purposes of OAR 471-030-0038(2)(b), the record shows that the employer was willing to allow claimant to continue working for an additional period of time after February 12, 2022, and that claimant failed to show up for work on February 14, 2022 because she was no longer willing to do so. The work separation in this case therefore was a voluntary leaving that occurred on February 14, 2022.

Voluntary leaving. A claimant who leaves work voluntarily is disqualified from the receipt of benefits unless they prove, by a preponderance of the evidence, that they had good cause for leaving work when they did. ORS 657.176(2)(c); *Young v. Employment Department*, 170 Or App 752, 13 P3d 1027 (2000). “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 voluntarily quit work with good cause. The record shows that early on February 12, 2022, the owner hung up on claimant during a phone conversation where claimant, and the dispensary’s other workers, were trying to “get on the same page” over whether the dispensary was going to be opened for business that day given the dispensary’s closure the day before. April 20, 2022 Transcript at 7. Subsequent to hanging up on his employees, the owner removed claimant and the other employees from the dispensary’s security system, and posted on Facebook that he had closed the dispensary. Claimant was aware she had been removed from the security system and, given that her removal would prevent her from gaining physical entry to the dispensary moving forward, reasonably concluded that “there was no need to kick anyone out of security if they weren’t fired.” April 29, 2020 Transcript at 46. The reasonableness of claimant’s belief that she had been discharged was further supported by her view (validated by the owner’s Facebook message) that the owner had planned all along to sell the dispensary, and his subsequent text to her that he would be contacting his attorney and would be “taking every kind of legal action that . . . I can.” April 20, 2022 Transcript at 21.

As a result, and in light of the totality of these circumstances, any reasonable and prudent person in claimant’s position would have believed that the employer had discharged them as of February 12, 2022, despite the owner’s subjective view that no discharge of claimant had taken place on that date. Furthermore, because claimant reasonably believed she had been discharged as of that date, the record shows that no reasonable and prudent person in claimant’s position would have continued to work for the employer for an additional period of time as of that date. Finally, because the record shows that within a very short period of time on February 12, 2022, claimant was hung up on by the employer, had her physical access to the dispensary removed, and was threatened by the employer with legal action, her decision to not report to work for his shift on February 14, 2022 was reasonable, and she was left with no reasonable alternative but to quit work when she did.

Claimant therefore quit working for the employer with good cause and is not disqualified from receiving unemployment insurance benefits based on the work separation.

DECISION: Order No. 22-UI-192611 is affirmed.

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

DATE of Service: August 19, 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 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 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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