

EMPLOYMENT APPEALS BOARD DECISION
2022-EAB-0968

Affirmed
No Disqualification

PROCEDURAL HISTORY: On August 2, 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 benefits effective June 19, 2022 (decision # 140358). Claimant filed a timely request for hearing. On August 31, 2022, ALJ Kaneshiro conducted a hearing, and on September 1, 2022 issued Order No. 22-UI-201934, reversing decision # 140358 by concluding that the employer discharged claimant, but not for misconduct, and that claimant was not disqualified from receiving benefits based on the work separation. On September 16, 2022, the employer filed an application for review with the Employment Appeals Board (EAB).

EVIDENTIARY MATTER: The employer submitted additional evidence for EAB's consideration. However, the employer failed to show that factors or circumstances beyond the employer's reasonable control prevented them from offering the evidence during the August 31, 2022 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.

FINDINGS OF FACT: (1) Papa Murphy's Pizza employed claimant as a store manager from August 28, 2006 to June 29, 2022. The employer took over ownership of the business in 2020 and continued claimant's employment.

(2) The employer granted claimant leave for a vacation lasting approximately one week and ending on June 27, 2022. On June 28, 2022, claimant returned to work.

(3) On June 29, 2022, claimant told the employer's owner that her medical provider advised her to take three weeks of medical leave beginning immediately. The provider detailed the leave recommendation in a letter dated June 28, 2022, which claimant had in her possession. The owner became upset because he had no one to replace claimant during her proposed leave, and the store had experienced several problems due to her absence while she was on vacation. The owner left the worksite abruptly without looking at the letter claimant intended to proffer, and without granting or denying her leave request. Claimant mailed the letter to the employer with other store documents, postmarked the following day.

Claimant removed all scheduled work time, but not her name, from the employer's work schedule to reflect that she would not be working through at least July 11, 2022, the last date on the schedule.

(4) On June 30, 2022, claimant did not report for work as scheduled and did not attempt to contact the employer regarding her absence. That morning at 10:56 a.m., the owner texted claimant, "I need your keys and passwords. I will have your final check ready by Monday." Exhibit 2 at 6. Claimant did not respond. She understood the text to mean she had been discharged.

(5) On July 1, 2022, the owner texted claimant seeking to clarify the circumstances of her work separation. He wrote that he believed she quit and listed the reasons supporting this conclusion. These reasons were that claimant did not report for her shift the previous day, she removed her personal belongings from her office, she removed herself from the schedule, and she did not provide a doctor's note for her requested leave. Exhibit 2 at 6. Claimant did not respond or make any attempt to return to her employment.

CONCLUSIONS AND REASONS: The employer discharged claimant, but not for misconduct.

The parties dispute the nature of the work separation. If an 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).

Claimant was under the impression that if a medical provider makes a written recommendation of leave for an employee, their employer must grant the leave. Transcript at 14. As evidenced by this statement and her failure to report to work or respond to the employer's text on June 30, 2022, the record shows that claimant decided that she would not be working from June 30, 2022 through July 20, 2022, regardless of whether the employer approved her request for medical leave. There is no dispute that claimant removed all scheduled work time, but not her name, from the employer's work schedule to reflect that she would not be working through at least July 11, 2022, the last date on the schedule. However, this is consistent with claimant taking leave rather than quitting. The parties dispute whether claimant removed her personal belongings from her office on June 29, 2022, just after she made her leave request, or sometime months earlier. Even if claimant did remove her belongings that day, that did not show that she was unwilling to continue working for the employer. She had made her mind up to take three weeks of leave without having secured the employer's permission, an action that she likely realized posed a substantial risk of her being discharged or would lead to her quitting if the employer ultimately denied her request. Removing her belongings would not have been unreasonable given the precarious state of her continued employment as of that day, even if she wanted her employment to continue after her leave. Given these circumstances, claimant likely intended that the employment relationship continue as of the morning of June 30, 2022.

On June 30, 2022, the owner noted claimant was absent from work, and discovered her missing personal belongings and the change to the schedule as discussed above. He also claimed that other employees told him that claimant had told them that she had been fired. Transcript at 27. The owner's response was

to text claimant, “I need your keys and passwords. I will have your final check ready by Monday.” The owner testified he sent this message because he thought claimant had quit or abandoned her job. Transcript at 27. However, since he had just learned claimant was under the mistaken belief that she had been fired, such a message would have only served to reinforce that belief in any reasonable person in the same circumstances. If the employer’s intention at that moment was to allow claimant’s employment to continue, the owner likely would have instead sought to tell claimant that she had not been fired, and asked whether she intended to quit or was merely absent for the reasons discussed the previous day. Claimant reasonably concluded from the text message that she was no longer allowed to work for the employer, and the record supports this conclusion. Claimant therefore was discharged on June 30, 2022.

The employer’s owner sent claimant another text the following day, July 1, 2022, explaining to her that he did not fire her and listing the reasons why he thought she had quit. The employer argues that claimant’s failure to respond and dispute the owner’s understanding of the situation or make known an intent to continue her employment after receiving that message, or the message of June 30, 2022, is sufficient show that claimant never intended to return after June 29, 2022. Transcript at 28. However, by operation of OAR 471-030-0038(2)(b), the employer had severed the employment relationship by sending the first text on June 30, 2022, and claimant had no duty after that moment to attempt to reestablish it.

Because the record shows claimant was discharged, the next issue is whether she was discharged for 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). “[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). Absences due to illness or other physical or mental disabilities are not misconduct. OAR 471-030-0038(3)(b).

As the employer steadfastly maintained that they did not discharge claimant, they have not specifically alleged misconduct connected with her work to justify her discharge. However, the record shows claimant willfully failed to report to work as expected on June 30, 2022, and had not been granted leave by the employer to miss that shift. Because absences due to illness or other physical or mental disabilities are not misconduct, claimant’s planned leave beginning on June 30, 2022 was not misconduct. Absent extraordinary circumstances, an employer has the right to expect an employee to provide timely notice of her absence. However, claimant informed the employer on June 29, 2022 that she would be taking three weeks of medical leave beginning immediately. In addition, she was prepared at that time to present a letter from her medical provider confirming the need for this leave. The employer prematurely and unreasonably ended the conversation without approving or denying the leave, or telling claimant what additional documentation would be required for the leave to be approved. Because claimant took sufficient steps to notify the employer in advance that she would be absent, and

the absence was due to illness and recommended by her medical provider, the employer has not established misconduct.

The employer discharged claimant, not for misconduct, and claimant is not disqualified from receiving benefits based on the work separation.

DECISION: Order No. 22-UI-201934 is affirmed.

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

DATE of Service: December 2, 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 ໄດ້ໂດຍປະຕິບັດຕາມຄໍາແນະນໍາທີ່ບອກໄວ້ຢູ່ຕອນທ້າຍຂອງຄໍາຕັດສິນນີ້.

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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