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

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DS 005.00

EMPLOYMENT APPEALS BOARD DECISION
2022-EAB-1040

Reversed
No Disqualification

PROCEDURAL HISTORY: On April 25, 2022, 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 8, 2020 (decision # 132928). Claimant filed a timely request for hearing. On September 21, 2022, ALJ Goodrich conducted a hearing, and on September 28, 2022, issued Order No. 22-UI-203755, affirming decision # 132928. On October 11, 2022, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Thai 2 Go employed claimant as a restaurant worker and lottery attendant from August 17, 2017, through March 14, 2020.

(2) Claimant was ill with influenza for two weeks in January 2019. As a result of this illness, claimant became particularly concerned over the spread of COVID-19 in March 2020. The employer's owner and manager were aware of her concern.

(3) On March 12, 2020, claimant wore protective gloves as she performed her work due to concerns about the spread of COVID-19. When the employer's owner saw the gloves, he "screamed" at claimant and ordered her to remove them out of fear they would scare away customers. Transcript at 10. Claimant explained why her fears of COVID-19 were enhanced by her previous bout of influenza and why she believed this precaution was necessary, but the owner stated he "didn't care" and left. Transcript at 11, 12. The owner had never previously spoken to claimant in this way. Claimant complied and worked the rest of the shift without gloves.

(4) Claimant's direct supervisor was the restaurant's manager. The employer did not have a human resources department or any other owners. Claimant did not discuss the glove issue with the manager prior to resigning.

(5) On March 13, 2020, claimant texted her resignation to the employer, stating her last day of work would be March 19, 2020. Though the message did not cite a reason, claimant quit because she was not

allowed to wear gloves while working to protect herself "from the unknown virus that was going around." Transcript at 20.

(6) On March 14, 2020, the employer texted claimant that they accepted her resignation and her shifts for the week were filled. They directed claimant to drop off her key that day and said her paycheck would be ready on March 20, 2020. The employer stated no reason for filling claimant's shifts rather than letting her work through the end of the notice period. Exhibit 1 at 46.

CONCLUSIONS AND REASONS: Claimant was discharged, but not for misconduct.

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).

Claimant sent a text to the employer on March 13, 2020, stating that she was resigning, effective March 19, 2020. The employer replied with an acceptance of the resignation, telling claimant that her shifts for the week had been filled and that she should drop off her key to the business that day. They further stated that claimant's final paycheck would be ready on March 20, 2020. By filling claimant's remaining shifts and directing her to return her key on March 14, 2020, the employer failed to allow claimant to continue working through March 19, 2020, even though she was willing to do so. The employer therefore discharged claimant on March 14, 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). "'[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 record reveals no reason why the employer did not allow claimant to work through the notice period. To the extent the employer discharged claimant because she gave notice to quit, the employer did not discharge claimant for misconduct because the employer did not have a right to expect claimant to refrain from quitting. The employer has thus failed to prove they discharged claimant for misconduct.

ORS 657.176(8). Because the employer discharged claimant after a planned voluntary leaving, ORS 657.176(8) may apply. ORS 657.176(8) states that "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."

Claimant notified the employer that she was leaving effective March 19, 2020. The employer discharged claimant, but not for misconduct, on March 14, 2020. Because the employer discharged claimant, not for misconduct, within 15 days of her planned voluntarily leaving, the application of ORS 657.176(8) turns on whether claimant's planned voluntary leaving was for good cause.

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.

The order under review found that claimant's reason for leaving work was sufficiently grave, but did not constitute good cause because she did not give the owner a second chance to allow her to wear gloves, or speak to her manager about her concern. Order No. 22-UI-203755 at 3-4. However, these were not reasonable alternatives to quitting because persuading the owner to change his mind, either personally or by enlisting the manager on her behalf, appeared futile under the circumstances.

Claimant felt very strongly about wearing protective gloves while working due to her experience with influenza during the prior year. The owner's reaction to claimant wearing the gloves was objectively unreasonable in tone and in substance and created an unsafe working condition for claimant. Claimant testified that the owner screamed at her to take the gloves off because it would scare off the customers, and said that he did not care about claimant's history of influenza or fears of COVID-19. Transcript at 11. A reasonable and prudent person of normal sensitivity, exercising ordinary common sense, would have considered the owner's disregard of an employee's reasonable health concerns and prohibition of a common safety precaution sufficiently grave to necessitate leaving work.

However, a finding of good cause requires that no reasonable alternatives to leaving were available to claimant. Alternatives may be deemed futile if considering them would be fruitless, or if the employer was unwilling to consider them. If an issue regarding the futility or fruitlessness of an alternative is raised in the record, it must be resolved before concluding that claimant did not have good cause to quit work. *Westrope v. Employment Dept.*, 144 Or App 163, 925 P2d 587 (1996); *Bremer v. Employment Division*, 52 Or App 293, 628 P2d 426 (1981).

The owner's stance on claimant wearing gloves was unequivocal and unlikely to change after further reflection. Claimant testified that the owner had never before yelled at her or behaved in this way. Transcript at 15. Additionally, after claimant explained her reasons for wearing the gloves to the owner,

including her prior illness, the owner replied that he did not care. Further, given the manager's subordinate status to the owner and her lack of response to claimant's resignation over the issue, it is unlikely that intervention from the manager would have changed the employer's policy. The owner and manager accepted claimant's resignation and waived her notice period, rather than attempt to revisit the issue or preserve claimant's employment. These facts demonstrate that any further attempts to rectify the situation would have been fruitless. Accordingly, claimant had no reasonable alternatives to quitting.

Therefore, claimant was discharged, but not for misconduct, within 15 days of a planned voluntary leaving for good cause, and the provisions of ORS 657.176(8) do not apply. In sum, claimant is not disqualified from unemployment insurance benefits based on the work separation.

DECISION: Order No. 22-UI-203755 is set aside, as outlined above.

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

DATE of Service: December 21, 2022

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.

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.

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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