

EMPLOYMENT APPEALS BOARD DECISION
2023-EAB-0020

Reversed
No Disqualification

PROCEDURAL HISTORY: On October 27, 2022, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant voluntarily quit work without good cause and therefore was disqualified from receiving unemployment insurance benefits effective October 2, 2022 (decision # 153145). Claimant filed a timely request for hearing. On November 22, 2022, ALJ Clemons conducted a hearing that was continued on December 12, 2022. On December 14, 2022 ALJ Clemons issued Order No. 22-UI-209946, affirming decision # 153145. On December 23, 2022, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Puddletown Organics, LLC employed claimant as a shift lead budtender from October 24, 2019 until October 5, 2022.

(2) In or around late September 2022, the employer's general manager spoke to claimant about the possibility of a promotion and pay raise. The new position would have required claimant to work more closely with the general manager than he had done as a budtender. Claimant told the general manager that he would get back to him with his decision about the promotion at a later date.

(3) On the morning of October 5, 2022, claimant reported to the employer's store to fill in for another employee who had called out sick. Claimant was not scheduled to work that day, and intended to stay until the general manager arrived later that morning. After the store opened, a disgruntled customer entered the store and started behaving disruptively. In accordance with the employer's protocols, claimant banned the customer from the store, placed the customer's picture on the store's wall, and sent a message to the employer's group chat to alert other employees of what had transpired. Claimant was working alone in the store at the time.

(4) The general manager responded to claimant's message by stating that the incident with the disgruntled customer was the reason that the general manager did not like having employees work alone at the store. Claimant believed this to be a veiled criticism directed at himself, and responded by

suggesting that the store open later so that a manager could always be present to work with the budtender on shift.

(5) Later that morning, the general manager arrived to take over for claimant. Another regularly-scheduled budtender had also started work at that point. When the general manager arrived, he began talking to claimant in a way that the other budtender felt was “very disrespectful.” November 22, 2022 Transcript at 24. The other budtender also felt that the conversation between the two was “heated the whole time.” Transcript at 24. During the course of that conversation, the general manager again asked claimant if he was interested in the promotion. Claimant declined the offer, and stated, in relevant part, that he did not want to work with the general manager. Claimant remained willing to continue working for the employer in his role as a budtender.

(6) The general manager understood claimant’s statement that he did not want to work with him to mean that claimant no longer wanted to work for the employer at all, and that claimant had effectively tendered his resignation. In response, the general manager told claimant to leave, and that he would receive his paycheck. Claimant understood being told to leave by the manager and that he could get his paycheck to mean that he had been discharged, and he left. Claimant never told the general manager that he quit, and the general manager likewise did not tell claimant that he had been discharged. The paycheck was ready for the claimant when paychecks would typically be distributed, which was also within the time period allotted for a final paycheck after a discharge.

(7) Claimant remained on the store’s schedule for October 6, 2022. The general manager suspected that claimant had resigned and would not show up that day, but would have permitted claimant to continue working as a budtender if claimant had arrived for his shift on October 6, 2022. Claimant did not report for his scheduled shift that day because he believed that the general manager had discharged him.

CONCLUSIONS AND REASONS: Claimant was discharged, 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).

Although the parties generally agreed on the material facts relating to claimant’s separation from work, they disagreed as to the nature of the work separation. The record shows that claimant left work on October 5, 2022, and subsequently failed to report for his shift the following day because he believed that the general manager had discharged him by telling him to leave and notifying him that he would receive his paycheck within two days. By contrast, the general manager testified that he believed claimant’s statement that he did not want to work with the general manager to mean that claimant had resigned, and told claimant that he should leave and would get his paycheck on the basis of that belief. November 22, 2022 Transcript at 37. The order under review found that “the employer’s interpretation of claimant’s statement [was] more persuasive,” and subsequently concluded that claimant voluntarily quit work when he left the store on October 5, 2022. Order No. 22-UI-209946 at 3–4. The record does not support this conclusion.

In concluding that the employer's interpretation of claimant's statement was "more persuasive" than claimant's interpretation of the employer's statement, the order under review errs by misapplying OAR 471-030-0038(2)(a). The operative fact upon which a determination of the nature of a work separation turns is not which party more reasonably *interpreted* the statement of the other. Here, for instance, whether the general manager reasonably believed that claimant's statement amounted to claimant tendering his resignation is irrelevant to the analysis because a belief regarding the intention of the other party is simply not an element of the rule. Rather, the rule requires a finding as to whether, and when, one of the parties became unwilling to continue the employment relationship. The determination of the nature of the work separation turns on that finding.

On October 5, 2022, claimant remained willing to continue working for the employer for an additional period of time but *believed* that the general manager had just discharged him. Likewise, the general manager was still willing as of October 5, 2022 to allow claimant to continue working for an additional period of time but *believed* that claimant had quit. Both parties were mistaken as to the meaning and intent of the others' statement, and neither intended to sever the employment relationship on October 5, 2022. Because both parties remained willing to maintain the employment relationship as of that day, a work separation did not occur on October 5, 2022.

Instead, the separation occurred the following day when claimant failed to report for his scheduled shift. At hearing, the general manager testified that he would have permitted claimant to continue working for an additional period of time had claimant arrived for his shift that day, although he suspected that claimant would not because he believed claimant to have quit. November 22, 2022 Transcript at 15–16. Because claimant did *not* report for his shift on October 6, 2022, the general manager concluded that his belief that claimant quit was correct.

The record does not indicate that claimant was scheduled to work on any days after October 6, 2022, and the general manager only testified that he would have allowed claimant to continue working for the employer if claimant had reported for his shift on *that day*. The record also lacks evidence to show that the general manager attempted to contact claimant on or after October 5, 2022 to confirm whether claimant intended to return. Thus, the totality of the evidence suggests that the employer became unwilling to allow claimant to continue working for them after claimant failed to report for his shift on October 6, 2022. Therefore, the work separation was a discharge that occurred on October 6, 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). "[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 October 6, 2022 because claimant did not report for his scheduled shift that day. As discussed above, claimant did not report for his shift because he believed that the employer had discharged him the previous day. Although this belief was incorrect, it was nevertheless a reasonable conclusion to draw based on what the general manager had said to him. Because claimant reasonably believed himself to have been discharged on October 5, 2022, claimant neither knew nor had reason to know that the employer expected him to work that day, and therefore did not fail to report for work without regard for the consequences of his actions. As a result, claimant's failure to report to work on October 6, 2022 was not a wantonly negligent disregard of the employer's standards of behavior.¹ For the same reason, the record does not show that claimant intentionally violated the employer's standards of behavior. Because claimant's failure to report to work that day did not constitute a willful or wantonly negligent disregard of the employer's standards of behavior, claimant was not discharged for misconduct.

For the above reasons, claimant was discharged, but not for misconduct, and is not disqualified from receiving benefits based on the work separation.

DECISION: Order No. 22-UI-209946 is set aside, as outlined above.

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

DATE of Service: February 24, 2023

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.

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.

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¹ The record does not specifically indicate what the employer's standards of behavior were in regards to employee attendance. However, for purposes of this analysis, it is assumed that the employer generally expected their employees to report to work as scheduled.



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

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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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