

EMPLOYMENT APPEALS BOARD DECISION
2024-EAB-0228

Affirmed
No Disqualification

PROCEDURAL HISTORY: On January 2, 2024, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant was discharged by the employer, but not for misconduct, and was not disqualified from receiving benefits based on the work separation (decision # 84254). The employer filed a timely request for hearing. On February 12, 2024, ALJ Frank conducted a hearing, and on February 16, 2024, issued Order No. 24-UI-248260, affirming decision # 84254. On March 1, 2024, the employer filed an application for review with the Employment Appeals Board (EAB).

WRITTEN ARGUMENT: EAB did not consider the employer's written argument when reaching this decision because they did not include a statement declaring that they provided a copy of their argument to the opposing party or parties as required by OAR 471-041-0080(2)(a) (May 13, 2019).

FINDINGS OF FACT: (1) Travel Centers of America employed claimant from November 25, 2022, to October 23, 2023. Claimant worked as a bartender at a lounge the employer operated.

(2) The employer's employee handbook contained a policy that stated, "Walking off the job during a shift will be considered job abandonment and may result in immediate termination." Exhibit 1 at 13. Claimant received a copy of the handbook when he was hired, and was aware of this policy.

(3) Towards the end of his tenure with the employer, claimant had become frustrated with several aspects of his employment, including how much he was earning and the quality of the food that the employer served at the lounge. Claimant was concerned that some of the food served at the lounge was expired or unsafe, and had expressed this to customers, sometimes using foul language.

(4) On the evening of Thursday October 19, 2023, shortly after claimant arrived for his shift, the manager of the lounge approached claimant to inform him of coming changes to the lounge's menu. Claimant began to express that he had not been earning enough money. The manager responded by raising concerns with claimant about how he had been interacting with customers, particularly regarding

claimant having denigrated the lounge's food to customers. The conversation between claimant and the manager became "very heated," at which point claimant stated to the manager, "Take the shift[.] I'm out of here." Audio Record at 22:30; Exhibit 1 at 6.

(5) Claimant went outside to smoke a cigarette and calm himself. The manager followed him outside and asked claimant what he meant when he said, "I'm out of here." Claimant responded by stating that he would be back the following Monday, when he was next scheduled to work. The manager stated, "So let's be clear[,] you're walking out tonight and this is job [a]bandonment. Are we clear[?]." Exhibit 1 at 6. Claimant responded by stating again that he would see the manager on Monday. The manager did not discuss the employer's job abandonment policy with claimant further, other than stating that claimant's actions were considered job abandonment. Claimant then left. When he left, claimant believed the manager had granted him permission to leave. As of that evening, claimant had worked 18 days in a row without a day off, was tired, and did not understand that the manager had not granted him permission to leave early.

(6) After claimant left his shift early, the manager spoke to her own supervisor about claimant's having left the job, and whether claimant should remain employed as a result. They ultimately decided to discharge claimant.

(7) On Monday October 23, 2023, claimant arrived for work shortly before the time he believed his shift was scheduled to start, intending to work. Before he could begin working, claimant's manager and her supervisor met with claimant and discharged him because he had left his shift early on October 19, 2023.

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).

Here, the work separation occurred because claimant left his shift early on October 19, 2023, which the employer characterized as a "voluntary resignation" due to "job abandonment." *See* Exhibit 1 at 5. However, claimant testified, "I would not have left had I known that what I was actually doing was leaving my job." Audio Record at 21:20. The record does not show that claimant ever stated that he was quitting, or that he did not intend to return to work after he left that shift, and further shows that claimant explicitly stated to the manager when he left that he would see her on the following Monday (when he was next scheduled to work). Claimant returned the following Monday as he indicated he would do, intending to work. This shows that claimant was willing to continue working for the employer for an additional period of time, and intended to do so.

In contrast, the record shows that the employer was no longer willing to allow claimant to continue working for them after his decision to leave his October 19, 2023, shift early. After claimant left that night, the manager spoke to her supervisor about the matter, and the two made a decision about claimant's employment status. When claimant arrived for what he believed to be his next scheduled

shift, the manager and her supervisor advised claimant that he no longer had a job because he had left work early on the previous Thursday. Despite characterizing the separation as a voluntary quit, this shows that the employer made the decision to separate claimant from employment. The work separation therefore is a discharge that occurred on October 23, 2023.

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). Good faith errors are not misconduct. OAR 471-030-0038(3)(b).

The employer discharged claimant due to his having “walked off the job during a shift” on October 19, 2023, which the employer’s policy specified was grounds for termination. The record shows that claimant was aware of this policy and generally understood it. Nevertheless, the employer has not met their burden to show that claimant’s having left his shift early constituted misconduct.

The parties offered significantly differing accounts of the interactions between claimant and his manager on October 19, 2023. At hearing, claimant testified that the manager had given him permission to go home after their heated discussion, that he would not have left at that point if he believed he would be discharged for doing so, and that the manager had actually asked claimant if he would like to go home. Audio Record at 20:30, 21:20, 23:00. Claimant also asserted that he had not heard the manager use the term “abandonment” until he returned to work the following Monday. Audio Record at 23:46.

In contrast, the employer offered into evidence an email that the manager drafted on October 20, 2023, containing a narrative of the events of the prior evening. In relevant part, that narrative indicated that claimant had decided to go home of his own accord, that the manager advised claimant that his leaving would be considered job abandonment, and that claimant confirmed the same before leaving for the evening. Exhibit 1 at 6. At hearing, the manager’s testimony largely aligned with her October 20, 2023, email.

Because the manager’s testimony aligned largely with her email that was contemporaneous to the events described and, presumably, while the manager’s recollection of events was still fresh, the employer’s evidence is entitled to more weight than claimant’s testimony alone. Therefore, to the extent that the parties’ accounts of the events of October 19, 2023, differ, the employer’s account is more likely than not to be accurate, and the facts have been found accordingly.

Nevertheless, even considering the events to have occurred as the manager described, the employer did not meet their burden to show that claimant’s decision to leave his shift early on October 19, 2023, constituted misconduct. Despite claimant’s having generally understood the employer’s job

abandonment policy, claimant's uncontroverted testimony indicated that claimant was tired from having worked 18 days in a row, and that he did not understand that the manager had not granted him permission to leave work early that evening. Additionally, the record shows that the manager did not clarify what she meant by explaining that claimant's departure would be considered job abandonment, or explicitly state that he would be discharged if he left. Finally, while claimant told the manager that he would return on Monday, which was his next scheduled shift, the manager did not take exception to this statement or tell claimant afterwards that he would not be allowed to return to the job.

Thus, although claimant left his shift early on October 19, 2023, he did so under the belief that the manager had granted him permission to do so.¹ This understanding was incorrect, but it was reasonable under the circumstances. Because claimant believed himself to be acting with permission from his manager, he did not deliberately violate the employer's policy. Further, because he reasonably believed that he had permission to leave, claimant considered the consequences of his actions prior to engaging in the behavior that ultimately violated the employer's policy, rather than acting without regard for the consequences of his actions. This shows that claimant's early departure on October 19, 2023, was not a willful or wantonly negligent violation of the employer's standards of behavior. Instead, because claimant sincerely believed that he had permission to leave, and had a rational basis for that belief, claimant's decision to do so was, at worst, a good faith error. A good faith error is not 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. 24-UI-248260 is affirmed.

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

DATE of Service: April 10, 2024

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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¹ The manager testified at hearing that she did not clarify this with claimant because she understood his statement about returning the following Monday to mean that he would be coming back to retrieve his personal belongings and drop off company property. Audio record at 11:15. The manager's reason for misunderstanding claimant's statement, while perhaps reasonable as well, is not material for purposes of determining whether claimant's actions were a willful or wantonly negligent violation of the employer's standards of behavior.



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 الاستئناف 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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