

EMPLOYMENT APPEALS BOARD DECISION
2015-EAB-0096

Affirmed
No Disqualification

PROCEDURAL HISTORY: On December 11, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that the employer discharged claimant for misconduct based on theft and canceling all benefit rights based on wages earned prior to the date of discharge (decision # 73035). Claimant filed a timely request for hearing. On January 26, 2015, ALJ Murdock conducted a hearing, and on January 29, 2015 issued Hearing Decision 15-UI-32526, concluding the employer discharged claimant, but not for misconduct and that benefit rights based on wages earned prior to the date discharge were not cancelled. On February 2, 2015, the employer filed an application for review with the Employment Appeals Board (EAB).

EAB considered the employer's written argument to the extent it was based on the record.

FINDINGS OF FACT: (1) Alibi Bar and Grill employed claimant as a bartender and cook from August 31, 2007 to November 16, 2014.

(2) The employer had a policy that allowed employees to buy meals on days they worked at a discounted price. The employer also had a policy that required that a meal rejected by a customer be sent back to the kitchen, recorded as waste and placed in a box in the cooler for later examination by the owner. The owner did not return rejected meals or their ingredients to the kitchen to be reused but "discarded" them. Audio Record ~ 36:50 to 37:25. The employer expected its employees to refrain from committing theft of employer property. Claimant understood the employer's meal policies and expectation regarding theft.

(3) On November 15, 2014, after closing, claimant entered the employer's walk-in cooler and found a box marked "wrong order" that contained a club sandwich. The sandwich appeared old, its ingredients soggy and claimant considered it "garbage" as it was neither resellable nor reusable. Exhibit 1. Claimant was diabetic and needed to eat so he ate part of the sandwich without paying for it. On November 16, 2014, the employer's owner reviewed video of the cooler, observed claimant take part of the sandwich and discharged him for theft.

(4) Claimant filed an initial claim for unemployment benefits on November 24, 2014 and a notice of claim filing was mailed to the employer. The employer filed a timely response in which it alleged that it discharged claimant for theft.

(5) Claimant explained to the Department in writing that the sandwich in question appeared “old” and “not resellable or reusable.” Exhibit 1. He told a Department representative during an interview that the sandwich was “old” and “looked like garbage” and asserted he would “never steal” from the employer. Exhibit 1. The Department representative concluded claimant had admitted to theft. Accordingly, the Department cancelled all of claimant’s benefit rights based on wages earned prior to the date of his discharge.

CONCLUSIONS AND REASONS: We agree with the ALJ. The employer discharged claimant, but not for misconduct under ORS 657.176(2)(a) and claimant’s benefit rights based on wages earned prior to the date of discharge are not canceled.

Misconduct. ORS 657.176(2)(a) requires a disqualification from unemployment insurance benefits if the employer discharged claimant for misconduct connected with work. OAR 471-030-0038(3)(a) (August 3, 2011) defines misconduct, in relevant part, as a willful or wantonly negligent violation of the standards of behavior which an employer has the right to expect of an employee, or an act or series of actions that amount to a willful or wantonly negligent disregard of an employer's interest.

The employer discharged claimant for “theft.” Exhibit 1; Audio Record ~ 14:45 to 15:25. Claimant understood as a matter of common sense that the employer expected him to refrain from committing theft of employer property. However, in Oregon, a person commits “theft” when, “with intent to deprive” another of “property”, the person “takes, appropriates, obtains or withholds such property from an owner thereof. ORS 164.015 (1). For purposes of 164.015 (1), “property” means any article, substance or thing “of value.” ORS 164.005(5). The owner asserted that returned or rejected meals or their ingredients were never reused and were “discarded.” Accordingly, the sandwich in question, which had been returned or rejected by a customer and stored in the cooler, had no value. Because the item which claimant was discharged for eating had no value, it was not “property” under Oregon’s theft statute and claimant did not commit “theft” by eating it. And, because claimant correctly believed the sandwich was, as a practical matter, “garbage”, he did not intend to deprive the employer of “property” and his consumption of a portion of the sandwich was not a willful violation of the employer’s reasonable expectation that he refrain from committing theft; *i.e.* was not misconduct under ORS 657.176(2)(A).

Wage Cancellation. ORS 657.176(3) states that an individual’s benefit rights based on wages earned prior to discharge shall be canceled if the individual admits to an authorized representative of the Department that he committed a felony or theft leading to his discharge, signed a written admission of a felony or theft that has been submitted to the Department, or has been convicted of a felony or theft by a court, and if the individual’s employer notifies the Department of the discharge within ten days of notice from the Department. Here, the employer discharged claimant for theft and the employer responded in a timely manner to the Department’s Form 220. However, for the reasons stated, because claimant did not commit theft by eating the sandwich in question, he did not admit to theft when he admitted to the

Department that he ate the sandwich. Claimant's benefit rights based on wages earning prior to his discharge on November 16, 2014 are not canceled under ORS 657.176(3)(c).

DECISION: Hearing Decision 15-UI-32526 is affirmed.

Tony Corcoran and J. S. Cromwell;
Susan Rossiter, not participating.

DATE of Service: March 19, 2015

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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