EO: 200
BYE: 201936

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

563
DS 005.00

EMPLOYMENT APPEALS BOARD DECISION
2018-EAB-1172

Affirmed
No Disqualifications

PROCEDURAL HISTORY: On October 25, 2018, the Oregon Employment Department (the Department) served notices of two administrative decisions, the first concluding the employer suspended claimant but not for misconduct (decision # 145629) and the second concluding that the employer discharged claimant but not for misconduct (decision # 151357). The employer filed timely requests for hearing on both administration decisions. On November 26, 2018, ALJ S. Lee conducted a consolidated hearing, and on November 28, 2018 issued two orders, the first affirming decision # 145629 (Order No. 18-UI-120379) and the second affirming decision # 151357 (Order No. 18-UI-120382). On December 18, 2018, the employer filed applications for review of both orders with the Employment Appeals Board (EAB).

Pursuant to OAR 471-041-0095 (October 29, 2006), EAB consolidated its review of Orders No. 18-UI-120379 and 18-UI-120382. For case-tracking purposes, this decision is being issued in duplicate (EAB Decisions 2018-EAB-1171 and 2018-EAB-1172).

FINDINGS OF FACT: (1) Capitol Green Leaf LLC hired claimant as a bud tender on November 7, 2017, suspended her on September 7, 2018 and discharged her on September 10, 2018.

(2) The employer expected claimant to arrive at the scheduled starting time for a shift unless she notified her manager in advance that she was going to be absent or tardy. The employer also expected that claimant would perform her duties in accordance with the employer's protocols, have a good attitude, get along with coworkers and avoid hostile or disrespectful behavior. Claimant understood the employer's expectations as a matter of common sense and as she reasonably interpreted them.

(3) On August 12, 2018, the employer issued a written warning to claimant for failing to count her till in the manner required by the employer's protocols. Claimant asked the employer for specific information about what she should have been doing and how her tills had been inaccurate, but the employer did not supply that information. Thereafter, after an employee had counted up the till, the employer wanted a second on duty employee re-count the till to ensure that the first employee's count was accurate. Claimant was not aware that double-counting of tills was required. After receiving the August 12

warning, claimant was reluctant to count tills and because she was working only two or three days per week, she usually allowed her coworkers to count the till rather than doing it herself. However, on a few occasions after August 12, claimant counted the till. Claimant never refused to count the till or told coworkers that she would not do so.

(4) Sometime before September 7, 2018, the employer posted the work schedule for the work week that included Monday, September 7. The schedule showed that claimant was to work on September 7 beginning at 10:00 a.m. Because claimant was only working two or three days per week at that time, claimant did not take a picture of the schedule or take notes of when it showed her to be working, but relied on her memory to know her work schedule.

(5) On September 7, claimant thought her shift was to begin at 4:00 p.m. and did not report for work at 10:00 a.m. At around 11:30 a.m., the assistant manager called claimant and asked claimant why she had not reported for work at 10:00 a.m. Claimant told the assistant manager that she thought she was scheduled to begin work that day at 4:00 p.m. Claimant then hurried to prepare for work, reported to the workplace at approximately 12:15 p.m. and, once at work, waited on two or three customers. Shortly after, the assistant manager issued a warning to claimant for being a "no call/no show," by not reporting for work on time and failing to notify the employer that she was going to be absent or late. Claimant refused to sign the warning because, although she was late, she had showed up at work, and would have showed up at 4:00 p.m. if the assistant manager had not called her to alert her to her error. At that time, the assistant manager told claimant she was suspended from work for the next week.

(6) After September 7, 2018, some of claimant's coworkers told the store manager that claimant refused to count the till on the shifts that she worked. The store manager understood the coworkers to state that they did not like working with claimant.

(7) On September 10, 2018, claimant visited the workplace to pick up her pay check. At that time, in front of customers, claimant asked to be given copies of any warnings that were in her employee file. The store manager thought claimant was loud and disrespectful in that interaction. The store manager also did not like claimant's attitude in refusing to sign the September 7 warning, refusing to count the tills and the general lack of a team attitude that he perceived in claimant. Transcript at 18. On September 10, the employer discharged claimant for her behavior during the interaction that day, as well as her poor attitude.

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

ORS 657.176(2)(a) and (2)(b) require disqualifications from unemployment insurance benefits if the employer has discharged or suspended claimant for misconduct connected with work. OAR 471-030-0038(3)(a) (January 11, 2018) 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. OAR 471-030-0038(1)(c) defines wanton negligence, in relevant part, as 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. The employer carries the burden to show claimant's misconduct

by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

The Suspension. Claimant contended that she did not report for work at the correctly scheduled time of 10:00 a.m. on September 7 because she thought her shift that day was not going to begin until 4:00 p.m. and, when she learned otherwise from the assistant manager at around 11:30 a.m. she rushed to work and arrived at 12:20 p.m. Transcript at 25, 26, 39. The employer contended that claimant should have taken better care to remember the schedule for September 7 and should have remembered that, because she was scheduled to deliver "swag," or complementary gift items from the employer to local businesses that day, she needed to be at work at 10:00 a.m. Transcript at 6, 37. However, both parties agreed that shortly after the assistant manager called claimant on September 7 to let her know she had not reported for work on time, claimant arrived at work, suggesting that she had not deliberately or willfully failed to report for work on time.

While claimant may have not exercised due care in ensuring that she accurately recalled the information in the employer's posted schedule about her starting time on September 7, to disqualify claimant from benefits, it must be shown that claimant consciously engaged in conduct she knew or should have known would probably result in her failure to accurately remember the contents of the schedule. *See* OAR 471-030-0038(1)(c). Violations of an employer's standards that arise from forgetfulness, lapses in attention, errors, accidents or the like generally are not accompanied by the consciously aware state of mind needed to establish that a claimant's behavior was willful or wantonly negligent and that it was disqualifying misconduct. There was no evidence in the record that claimant had failed to accurately remember her schedule before September 7, that the failure of memory that she experienced on September 7 should have been foreseeable to her, and that she should have taken precautions other than relying only on her memory to ensure that she reported for work at the time shown on the employer's work schedule. Absent evidence from which it may be reliably inferred that claimant's failure to remember her scheduled start time on September 7 and to report on time for work was the result of willful or wantonly negligent behavior, claimant may not be disqualified from benefits. The employer did not present sufficient evidence to show that it suspended for misconduct.

The Discharge. The employer contended that it discharged claimant due to her behavior during the September 7 interaction, her failure to sign the September 7 warning that the employer issued to her, her refusal to count the tills after August 12 and her lack of a team attitude as perceived by the store manager. However, the employer's witnesses did not present evidence showing that claimant was instructed to sign the September 7 warning despite disagreeing with its contents, was unable to describe specifically how claimant's behavior on September 7 was disrespectful or inappropriate, and did not describe with specific detail how claimant's attitude violated the employer's standards. Transcript at 22, 23. Moreover, claimant denied that she acted out during the September 7 encounter, stated that she thought she was justified in not signing the September 7 warning because it was in error since she had shown up for work on September 7, that she never refused to count the tills and she did not know what the employer was referring to when it contended that she was not a "good team player." Transcript at 26, 27, 28, 30-31, 32.

The evidence on the matters for which the employer alleged that it discharged claimant was disputed, and there is no principled basis in the record to prefer the evidence of one party over the other on the disputed matters. Where, as here, the evidence on issues in dispute is evenly balanced, those issues must be resolved in favor of claimant, since the employer is the party who carries the burden of proof in a

discharge case. *See Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976). In addition, the employer's inability to provide specific evidence on issues in support of its generalized assertions that claimant behaved inappropriately or disrespectfully also undercuts its position that claimant engaged in disqualifying misconduct by the way she behaved. For these reasons, the employer did not on this record meet its burden to show by a preponderance of the evidence that claimant engaged in misconduct.

The employer suspended claimant on September 7, but not for misconduct. The employer discharged claimant on September 10, but not for misconduct. Claimant is not disqualified from receiving unemployment insurance benefits because of her suspension or discharge by the employer.

DECISION: Order Nos. 18-UI-120379 and 18-UI-120382 are affirmed.

D. P. Hettle and S. Alba;
J. S. Cromwell, not participating.

DATE of Service: January 15, 2019

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.surveymonkey.com/s/5WQXNJH. If you are unable to complete the survey online and wish to have 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 Asuntos Laborales. Si no está de acuerdo con esta decisión, puede presentar una Petición 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.

Employment Appeals Board - 875 Union Street NE | Salem, OR 97311
Phone: (503) 378-2077 | 1-800-734-6949 | Fax: (503) 378-2129 | TDD: 711
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