EO: 200
BYE: 201936

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

236
MC 000.00
DS 005.00

EMPLOYMENT APPEALS BOARD DECISION
2018-EAB-1195

Late Application for Review Allowed
Order No. 18-UI-120124 Reversed ~ No Disqualification

PROCEDURAL HISTORY: On October 19, 2018, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that the employer discharged claimant for misconduct (decision # 144614). Claimant filed a timely request for hearing. On November 14, 2018, ALJ S. Lee conducted a hearing, and on November 21, 2018 issued Order No. 18-UI-120124, concluding that the employer discharged claimant for misconduct. On December 11, 2018, Order No. 18-UI-120124 became final without claimant having filed an application for review with the Employment Appeals Board (EAB). On December 22, 2018, claimant filed a late application for review with EAB.

Claimant submitted written argument to EAB. Claimant's argument contained information about why he filed his application for review late and about the work separation. The information about the separation was not part of the hearing record, and claimant failed to show that factors or circumstances beyond claimant's reasonable control prevented claimant from offering the information during the hearing. Under ORS 657.275(2) and OAR 471-041-0090 (October 29, 2006), the only information we considered about the work separation was that information received into evidence at the hearing. We considered claimant's argument regarding his late application for review with EAB and regarding the work separation, but only to the extent it was based on the record.

FINDINGS OF FACT: (1) Cazadero Inn employed claimant from June 29, 2018 until July 25, 2018 as a bartender in the employer's pub.

(2) The employer expected its employees to treat supervisors with respect and courtesy and conduct themselves in a professional manner while at work. Claimant understood the employer's expectations as a matter of common sense.

(3) Claimant had no incidents before August 24, 2018 for which the employer warned or disciplined him.

(4) On August 24, 2018, the general manager had the day off work. Claimant began his shift at 5:00 p.m. Claimant was exhausted because he had worked 20 hours without interruption, from 4:00 p.m. the prior day until noon on August 24. The owner had planned a magic show at the pub to begin at 5:00 p.m. Claimant became frustrated because the audio system was not functioning properly, the pub had many customers, and claimant was the only employee on duty at the bar. Claimant tried to contact other employees to assist in the pub and restaurant, but no other employees were available. Claimant was further frustrated because the owner and her daughter, who were present with friends to watch the magic show, had to help serve customers. The owner was the general manager's mother; her daughter was the general manager's sister.

(5) Claimant called the general manager and asked for help with the audio system. Claimant gave the telephone to the general manager's sister, who did not work at the pub, and returned to work at the bar. The general manager and his sister did not get along well. The general manager was displeased that claimant had the general manager speak to his sister about a work-related matter and immediately hung up the telephone and called the bar telephone. Claimant answered the telephone and the general manager stated to claimant, "Don't ever put my fucking sister on the fucking phone with me ever again." Audio Record at 27:45 to 27:48. Claimant responded in an agitated tone, "Why don't you get your ass over here and help?" and hung up the telephone. Audio Record at 17:46 to 17:50.

(6) The general manager arrived later at the pub. The sound system issue had already been resolved. The general manager went to the kitchen to assist there. On his way to the kitchen, he confronted claimant in a hallway and stated, "If you ever fucking talk to me like that ever again, you will be fired." Audio Record at 18:30 to 18:34. Claimant said, "Well, I fucking quit." Audio Record at 18:41 to 18:43. Claimant immediately returned to work and continued working until after the pub closed at midnight. Claimant felt overwhelmed because it was late and he was the only employee on duty to clean the bar.

(7) At 2:35 a.m. on August 25, 2018, while still at the pub, claimant sent the general manager a text message stating the following:

> First and foremost fuck you! You dumb son of a bitch! Fuck you for your sibling rivalry and having the audacity to call the business for your childish wishes! If you dont (sic) pull your head out of your ass, your mom will loose (sic) everything she worked for in her life. I have done nothing but try and try again to help your mom and you. If you dont (sic) start making better decisions for your "career" then fail for all I care, that's on you. You dont (sic) own shit until you earn it. Tonight proved that your (sic) no fucking different than any other millennial . . . heres (sic) your trophy for participating. Exhibit 1.

(8) At 6:30 a.m. on August 25, 2018, the general manager read claimant's text message, and decided to discharge claimant because claimant sent a discourteous and disrespectful text message to his supervisor. The general manager sent claimant a text message responding, "I'm sure you've realized this will be considered your resignation. Drop your keys off at some point and we will have your final check ready within 5 days." Exhibit 1.

(9) On August 25, 2018, claimant called the employer's owner and told her that his text message from early that morning was not his resignation. The owner told claimant that she had to support the general manager's decision to discharge claimant.

(10) On December 11, 2018, claimant made three attempts to fax his application for review to EAB. Claimant's fax machine malfunctioned and none of the attempts proved successful. Claimant lacked the money to buy envelopes or stamps to mail his application for review to EAB on that date.

(11) Sometime after December 11, 2018, likely close to December 22, 2018, claimant's friend gave him some bottles and cans to redeem for cash. Claimant purchased envelopes and stamps with the money and on December 22, 2018 mailed his application for review to EAB and mailed copies of his written argument to the employer as required under EAB's rules.

CONCLUSIONS AND REASONS: Claimant's late application for review of Order No. 18-UI-120124 is allowed. The employer discharged claimant not for misconduct.

Late application for review. The first issue is whether claimant's late application for review of Order No. 18-UI-120124 should be allowed. ORS 657.270(6) and ORS 657.270(7)(b) required the application for review in this case to be filed no later than December 11, 2018. Claimant filed his application for review by mail. The filing date of an application for review filed by mail is the date the document is deposited in the U.S. mail as shown by the postmark affixed to the envelope by the U.S. Postal Service. OAR 471-041-0065(1)(b) (October 29, 2006). The envelope claimant used to file his application for review does not include a postmark. The filing date is therefore the date EAB determines to be "the most probable date of filing." OAR 471-041-0065(2). Claimant submitted documents with his application for review upon which he dated his signature with the date December 22, 2018, suggesting it is more likely than not that he had the application for review and accompanying documents in his possession on that date. EAB received the documents through the U.S. mail on December 24, 2018. Given that it generally takes one to three days for documents sent through the mail to be delivered by the U.S. Postal Service (USPS), and considering the facts in the light most favorable to claimant, we conclude it is more likely than not that he put his application for review in the mail on December 22, 2018. December 22, 2018 is therefore the most probable date of filing. Because that date is 11 days after the December 11th deadline for a timely application for review, claimant's application for review was filed late.

The deadline for filing a late application for review may be extended under certain circumstances. *See* ORS 657.875; OAR 471-041-0070. OAR 471-041-0070 (February 18, 2012) provides:

> (2) The filing period may be extended a reasonable time upon a showing of good cause as provided by ORS 657.875.
> (a) "Good cause" exists when the applicant provides satisfactory evidence that factors or circumstances beyond the applicant's reasonable control prevented timely filing.
> (b) "A reasonable time" is seven days after the circumstances that prevented timely filing ceased to exist.

Claimant submitted documentation suggesting that he made three attempts to fax his application for review to EAB on the December 11th deadline and that none of his attempts successfully transmitted his application to EAB on time. He also submitted a statement in which he explained that he was unable to

afford to pay to mail his application for review through USPS, which if received by the USPS and postmarked on December 11th would have resulted in a timely filing. Those circumstances suggest that claimant had good cause to extend the filing period.

The filing period may only be extended a "reasonable time," which is defined as seven days after the circumstances that prevented a timely filing ceased to exist. The circumstances that prevented claimant from filing a timely application for review were his lack of a working fax machine to fax the application for review and a lack of money to pay the cost of mailing his application for review to EAB. Those circumstances ceased to exist when claimant's friend gave him some bottles and cans claimant could redeem for cash to pay the cost of mailing the application for review. The period of time between the deadline for a timely application for review and the date claimant filed his late application for review was 11 days. Claimant did not specify what date his friend gave him the bottles and cans, or what date claimant was able to go to a redemption center to redeem them for cash, or what date he actually purchased the envelopes and stamps, but it is not implausible that such activities likely took four or more days to complete. Given the financial circumstances claimant described in his written statement, however, we infer as a matter of common sense it is more likely than not that those activities took a significant period of time to complete, and just as likely that claimant did not have the stamps, envelopes, and ability to mail his late application for review to EAB until some period of time within a few days of the December 22nd filing date. We therefore conclude that claimant's December 22nd filing occurred within the seven-day "reasonable time" period.

Claimant established good cause to extend the filing period and filed his late application for review within a reasonable time. His late application for review is, therefore, allowed.

Work separation. Although both parties characterized claimant's work separation as a discharge, because claimant declared he was quitting on August 24, it is necessary to assess the 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) (January 11, 2018). 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).

Although claimant stated that he "quit" when the general manager warned him not to involve his sister in work conversations on August 24, claimant immediately returned to work and continued to work his entire shift. However, it is undisputed that after the general manager read claimant's text message to him the morning of August 25, the employer was no longer willing to allow claimant to return to work. Moreover, claimant confirmed with the owner that morning that he did not intend to quit through his text message. The work separation therefore was a discharge.

Discharge. ORS 657.176(2)(a) requires a disqualification from unemployment insurance benefits if the employer discharged claimant for misconduct. OAR 471-030-0038(3)(a) 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. Isolated instances of poor judgment are not misconduct. OAR 471-030-0038(3)(b). 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).

In Order No. 18-UI-120124, the ALJ found that claimant "cursed and was disrespectful of [the general manager] multiple times over the course of two days," and that in doing so, claimant was at least wantonly negligent.[1] The ALJ also summarily concluded that because claimant's conduct was not isolated or a good faith error, the employer discharged claimant for misconduct.[2] We disagree and conclude that although claimant's conduct violated the employer's reasonable expectations on August 25, it was an isolated instance of poor judgment, and not misconduct.

The general manager testified that he discharged claimant because of the disrespectful early morning text message claimant sent him that contained foul language and insults. The general manager warned claimant earlier during claimant's shift that he would discharge claimant if he spoke to him again in a disrespectful manner. Although claimant testified that he sent the text message when he was left alone, exhausted, still having to clean the bar by himself after being spoken to disrespectfully by the general manager earlier that evening, claimant also testified that he knew the language he used in the message was inappropriate. Audio Record at 28:09 to 34:11. Claimant therefore showed that he did not have a good faith belief that the employer would condone his conduct, even though his supervisor spoke in a disrespectful manner toward him, and his behavior was not excused as a good faith error under OAR 471-030-0038(3)(b). Claimant's text message was a willful violation of the employer's expectation of how employees should treat supervisors.

Although claimant's behavior on August 25 was a willful disregard of the employer's expectations, it may be excused from constituting disqualifying misconduct if it was an isolated instance of poor judgment under OAR 471-030-0038(3)(b). An "isolated instance of poor judgment" is behavior that is a single or infrequent occurrence rather than a repeated act or pattern of other willful or wantonly negligent behavior. OAR 471-030-0038(1)(d)(A). A "judgment" is an evaluation resulting from discernment and comparison; "poor judgment" includes a "decision to willfully violate an employer's reasonable standard of behavior." OAR 471-030-0038(1)(d)(B)-(C). To be excused, the behavior at issue also must not have exceeded "mere poor judgment" by causing, among other things, an irreparable breach of trust in the employment relationship or otherwise making a continued employment relationship impossible. OAR 471-030-0038(1)(d)(D).

Claimant had no prior incidents for which the employer warned or disciplined him before August 25. In addition, we disagree with the ALJ's characterization of claimant's conduct during his final shift as conduct that occurred "multiple times over the course of two days."[3] The record shows that claimant used the word "ass" toward the general manager and hung up on him when he called claimant at the bar early in claimant's shift regarding his sister, and sent an inappropriate text message to the same manager

[1] Order No. 18-UI-120124 at 4.

[2] *Id*.

[3] *Id*.

near the end of the same shift. Thus, there were two inappropriate communications, both occurring within the same shift. The Oregon Court of Appeals has consistently held that a series of ostensibly separate acts arising from the same cause may together be considered a single, continuing instance of poor judgment for purposes of OAR 471030-0038(3)(b) if the record indicates that the claimant's conduct was the result of a single exercise of poor judgment. The question is therefore whether claimant's two inappropriate communications were the result of one "decision" or "evaluation resulting from discernment and comparison," or two such decisions. Because claimant's conduct occurred during one shift over a short period of time, and both inappropriate communications occurred as the result of a single argument with the same manager arising from the earlier interaction between claimant and that manager on the telephone and the same other stressors associated with claimant's shift that night, and because the record does not suggest that claimant paused at any point between the two communications to think about the situation and form a new or distinct judgment about how to behave toward the general manager, claimant's behavior during his shift on August 24 and 25 was more likely than not a single, or isolated, instance of poor judgment.[4]

Nor does the record establish that any reasonable employer would have concluded that claimant's conduct during the final incident caused a breach of trust or made a continuing employment relationship with claimant impossible. Claimant's conduct was mitigated by the ongoing stress of his circumstances when the communications occurred. He was exhausted from having worked 20 hours the night before his final shift, only to be the single bar employee working during another full shift. During that shift, urgent issues arose that he lacked the capacity to handle himself, and he was subjected to the foul language and upset behavior of his supervisor. Moreover, although both calling the general manager an ass and the tone and foul language claimant used in his text message were inappropriate, we disagree with the general manager's assertion at hearing that an employee must necessarily "suck it up no matter how [supervisors] treat you"; that claimant was responding with foul language to the general manager's repeated use of foul language toward him was another mitigating factor. *See* Audio Record at 57:51 to 57:56. Claimant's two communications involving use of foul language toward the general manager did not persist over a protracted period despite being told repeatedly to stop. Nor did claimant become physically aggressive toward the general manager or threaten him verbally. Considering the totality of the circumstances and mitigating factors present in this case, we cannot say that any reasonable employer would conclude that claimant's conduct was likely to recur, or caused an irreparable breach of trust in the employment relationship or otherwise made a continued employment relationship impossible. We therefore conclude that claimant's conduct did not exceed mere poor judgment.

[4] *See Perez v. Employment Department*, 164 Or App 356, 992 P2d 460 (1999) (when a claimant willfully refused to comply with his supervisor's instruction on one day and on the next day willfully engaged in a second vulgar outburst when the same supervisor rebuked him for his behavior on the previous day, claimant's behavior on both days was a single isolated instance of poor judgment because each day's behavior was motivated by the supervisor's behavior on the first day and was a continuation of claimant's reaction to it); *Waters v. Employment Division*, 125 Or App 61, 865 P2d 368 (1993) (when a claimant left several separate "harassing and abusive" messages on a coworker's answering machine following a conflict over work schedules, claimant's behavior, although comprising technically separate acts, was a single occurrence of poor judgment because all the messages were motivated by the same underlying conflict and each subsequent message was a continuation of claimant's reaction to the same conflict); *Goodwin v. Employment Division*, 35 Or App 299, 581 P2d 115 (1978) (when a claimant argued with another manager, the supervising store manager told both claimant and the other manager to stop and then told claimant to "shut up" when claimant protested to the store manager about the other manager's behavior, and claimant followed the store manager upstairs loudly complaining about the other manager's behavior, claimant's behavior, although comprising apparently separate episodes of wantonly negligent behavior, was properly considered a single instance of poor judgment since each episode was motivated by the claimant's "continuing conflict" with the other manager and claimant's same continuing "hotheadedness").

For the foregoing reasons, we conclude that the employer discharged claimant for an isolated instance of poor judgment, which is not misconduct. Claimant therefore is not disqualified from receiving unemployment insurance benefits because of this work separation.

DECISION: The application for review filed December 22, 2018 is allowed. Order No. 18-UI-120124 is set aside, as outlined above.

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

DATE of Service: January 24, 2019

NOTE: This decision reverses an order that denied benefits. Please note that payment of any benefits owed may take from several days to two weeks 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.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
www.Oregon.gov/Employ/eab