

EMPLOYMENT APPEALS BOARD DECISION
2019-EAB-0037

Affirmed
No Disqualification

PROCEDURAL HISTORY: On October 18, 2018, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 65721). Claimant filed a timely request for hearing. On December 13, 2018, ALJ Wyatt conducted a hearing, and on December 21, 2018 issued Order No. 18-UI-121693, concluding the employer discharged claimant, but not for misconduct. On January 10, 2019, the Department filed an application for review with the Employment Appeals Board (EAB).

EAB considered the Department's argument when reaching this decision.

FINDINGS OF FACT: (1) Spirit Mountain Gaming, Inc. employed claimant from March 13, 2018 to August 22, 2018. Claimant's occupation was cleaning attendant.

(2) Because the employer is a gaming casino all of its employees must, at a minimum, pass a background check and hold a temporary gaming license as an ongoing condition of employment. Claimant understood the policy and obtained a temporary gaming license.

(3) On August 16, 2018, claimant engaged in "just an argument" with his domestic partner. Audio recording at ~ 16:10. He did not engage in violence or any specific action during that incident that he thought would result in police being called or result in a criminal charge. Police arrested claimant, charged him with harassment, and incarcerated him until August 17, 2018.

(4) Upon being notified of claimant's arrest and the pending charges, the gaming commission suspended claimant's temporary gaming license. Claimant therefore no longer satisfied the conditions of employment with the employer, and the employer discharged him on August 22, 2018.

(5) Claimant subsequently pled not guilty to the criminal charges resulting from his August 16th arrest and expects to be acquitted.

CONCLUSIONS AND REASONS: Claimant's discharge was not for misconduct.

ORS 657.176(2)(a) requires a disqualification from unemployment insurance benefits if the employer discharged claimant for misconduct connected with work.

The ALJ concluded that claimant's discharge was not for misconduct under OAR 471-030-0038(3)(c), which provides that the willful or wantonly negligent failure to maintain a license necessary to the performance of the occupation is misconduct so long as such failure is reasonably attributable to the individual. The ALJ concluded that claimant cannot be disqualified under that rule because his occupation, cleaning assistant, does not require a license, and even if it had, claimant maintains his innocence so the record does not prove that the loss of license was reasonably attributable to his own conduct. *See* Order No. 18-UI-121693 at 3.

The Department appealed, alleging that the ALJ erred because the employer had a blanket policy, dictated by state law, requiring all employees to hold a license regardless of their occupation, so the OAR 471-030-0038(3)(c) licensing rule *should* disqualify claimant from benefits. *See* Department's written argument. We disagree with the ALJ and the Department.

The definition of misconduct set forth in OAR 471-030-0038(3)(c) does not apply to this case. It only applies to case in which the loss of license, certification, or other similar authority is required by *the occupation*. The Department's laws and rules do not define the term "occupation" for purposes of this rule, nor has the Department defined the term by policy. *See e.g.* ORS 657.176; OAR 471-030-0038; UI Benefits Manual Chapter 430 (Revised 4/01/10). In common usage, however, the primary definition of "occupation" is "an activity in which one engages" or "the principal business of one's life : vocation;" for example, "Teaching was her occupation."¹ The definition does not refer to the location or type of business for which an activity or vocation is performed.

The activity or business of a cleaner is to clean. The occupation of a cleaning attendant would therefore be cleaning, not gaming. There is no basis in the record for concluding that the occupation of cleaner generally required those who engaged in that occupation to hold a gaming license, or any other particular license, certification, or other similar authority. OAR 471-030-0038(3)(c) therefore is not applicable to this case.

In this case, the specific employer involved had a policy requiring all of its employees to hold a gaming license as a condition of employment. The requirement was specific to this specific employer, not to any particular occupation its employees performed. The applicable definition of "misconduct" in this case is therefore OAR 471-030-0038(3)(a).

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

¹ <https://www.merriam-webster.com/dictionary/occupation>

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 where the individual is conscious of his conduct and knew or should have known that his conduct would probably result in a violation of the standards of behavior which an employer has the right to expect of an employee.

In this case, the employer had a policy that required claimant to hold, at a minimum, a temporary gaming license as a condition of ongoing employment. Claimant lost his temporary gaming license, thereby violating the employer's policy. To determine whether claimant's loss of license was "misconduct," the next question is whether claimant's violation was willful or wantonly negligent.

In this case, claimant lost his license because he argued with his domestic partner and was arrested and incarcerated for harassment. He has pled not guilty in that case, so his criminal culpability and mental state during the alleged act has not been determined by a court as a matter of law and cannot reasonably be inferred from the mere fact that he has been charged with harassment.

The only evidence about claimant's conduct and mental state at the time of his arrest and incarceration is that he engaged in "just an argument" with his domestic partner, without doing anything he thought would result in his arrest or criminal charges. "Just" arguing with one's domestic partner is not the type of behavior that suggests claimant acted with the intent of bringing about a loss of license and violating the employer's policy. Nor is "just" arguing with one's domestic partner the type of behavior that claimant knew or reasonably should have known would probably result in the loss of the gaming license that was a condition of his ongoing employment with the employer. Since the conduct that caused claimant to lose his license, in violation of the employer's policy, was not willful or wantonly negligent, his loss of license cannot be considered "misconduct" under OAR 471-030-0038(1)(a).

The employer therefore discharged claimant, but not for misconduct. Claimant is not disqualified from receiving unemployment insurance benefits because of his work separation.

DECISION: Order No. 18-UI-121693 is affirmed.

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

DATE of Service: February 7, 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.

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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 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 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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