EO: 200
BYE: 201940

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

605
DS 005.00

EMPLOYMENT APPEALS BOARD DECISION
2019-EAB-0064

Affirmed
No Disqualification

PROCEDURAL HISTORY: On November 1, 2018, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 155514). Claimant filed a timely request for hearing. On January 9, 2018, ALJ Griffin conducted a hearing, and on January 15, 2019 issued Order No. 19-UI-122739, concluding claimant's discharge was not for misconduct. On January 17, 2019, the employer filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) C&K Market, Inc. employed claimant, last as a BBQ attendant, from approximately 2017 to October 8, 2018.

(2) The employer expected claimant to exhibit good grooming at work and take care of hygiene matters away from food service areas. Because claimant's position as BBQ attendant outside the employer's grocery store meant claimant was often the first and last person the customers saw when arriving to and departing from the store, the employer expected claimant to act as an "ambassador" for the company and present a positive image at all times.

(3) The employer's store manager discussed grooming and the ambassadorship concept with claimant during the hiring process. Beyond that, the employer delegated claimant's training to the bakery and deli manager, and her second-in-command. The employer did not require individuals in claimant's position to hold a food handler's permit.

(4) The store manager developed concerns about claimant's work performance over time. He thought claimant listened to his instructions and would honestly try to comply, but that claimant's performance would usually decline a few days or weeks after each conversation they had. The store manager did not think claimant tried to comply with instructions from other managers, however, and was concerned that claimant was not trying to succeed anymore.

(5) On October 7, 2018, while assigned to the BBQ station, claimant held a toothpick in his mouth. Claimant did not understand that he was not allowed to have a toothpick in his mouth. A customer, who had ordered a hot dog from claimant, complained to the person in charge (PIC) that claimant had been "flossing his teeth" while he handled food and had put his hands in his mouth. Exhibit 1. The customer asked the PIC for a refund.

(6) While the customer was in the store, the PIC went to the BBQ station and saw claimant "picking/flossing his teeth." Exhibit 2. The PIC made an "offhand remark" to claimant that "you shouldn't be doing that." *Id*. The PIC did not specifically tell claimant that it was the toothpick in his mouth that was the problem, did not tell claimant to remove the toothpick from his mouth and wash up, did not tell claimant that a customer had complained that he had a toothpick in his mouth, and did not remove claimant from the BBQ station. Claimant did not remove the toothpick after the PIC's remark.

(7) On October 8, 2018, the employer discharged claimant for "flossing" or "picking" his teeth while at the BBQ station the previous day.[1]

CONCLUSIONS AND REASONS: We agree with the ALJ that 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. 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 has the burden to prove misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

The employer had the right to expect claimant to comply with grooming and hygiene standards, but only to the extent the employer made claimant aware that those standards existed. In this case, claimant was not required to hold a food handler's permit. The employer's witness alluded to grooming and ambassadorship standards set forth during the hiring process and an additional two to three days of training thereafter. However, while the store manager understood claimant had received training after hire that ostensibly should have included grooming and hygiene standards, he did not describe, and the record does not show, specifically what that training entailed. The record therefore fails to show that claimant knew or had reason to know the employer did not want him to have a toothpick in his mouth at work, or that doing so would violate the employer's standards of behavior.

[1] The employer's witness identified the discharge as having occurred on October 7th. However, he later testified that the final incident occurred on October 7th, and that he came to work "the following day," got a call from his boss, and began investigating claimant's behavior. Transcript at 12-13, 30. It is therefore more likely than not that the discharge could not have occurred on October 7th, but more likely occurred on October 8th or thereafter.

The record is also unclear about what happened in the final incident. The customer complained claimant was "flossing" his teeth, but the PIC who saw claimant minutes later wrote that claimant was "picking/flossing" his teeth. Neither specified what they actually saw claimant do, for example, what he was using to pick or floss his teeth, what motion they observed, or whether they had clear views of claimant. However, the store manager was not able to speak to the customer who complained, so the evidence about what she saw is hearsay in the form of her email, or hearsay twice removed in the form of the store manager's testimony about what the PIC discussed when he spoke with the customer. Likewise, the PIC's written statement is hearsay. The only eyewitness evidence about what was said or did on October 7th at the BBQ station is claimant's, and he testified that he simply he had a toothpick in his mouth. It is at least as likely as not that claimant's eyewitness testimony is true. The preponderance of the evidence therefore fails to show that claimant did anything worse than having a toothpick in his mouth while working at the BBQ station.

Next, the store manager testified that the PIC told claimant to stop what he was doing, and claimant "must have continued to do it anyway because later on that evening we got this complaint." Transcript at 12. The implication of the store manager's testimony is that there were two separate events, first involving the PIC, and later involving the customer. However, the store manager also testified that the complaining customer spoke with the PIC, and that the PIC actually talked to claimant while the customer was still in the store, suggesting that there was only one continuous event in which claimant had a toothpick in his mouth. Transcript at 13. Notably, also, the PIC's statement does not include any information about the PIC's interaction with the customer. *Compare* Transcript at 13; Exhibit 2.

To the extent the PIC told claimant to stop anything on October 7th, neither the store manager's testimony nor the PIC's written statement identified what it was that the PIC told claimant to stop doing. It is not clear that the PIC communicated to claimant that having a toothpick in his mouth was not allowed, much less told him to stop, and in fact the PIC allowed claimant to continue working at the BBQ station without removing the toothpick from his mouth, suggesting that claimant had no reason to know that it was his use of a toothpick that the PIC found problematic.

While any individual as a matter of common sense should know not to floss one's teeth in a food service area, the question of whether it might be acceptable to have a toothpick in one's mouth is less intuitive or obvious. The preponderance of the evidence fails to show that claimant was doing anything worse than holding a toothpick in his mouth. Because it is unclear whether or to what extent claimant knew or should have known that holding a toothpick in his mouth would violate the employer's expectations of his conduct, the preponderance of the evidence also fails to show that claimant engaged in willful or wantonly negligent misconduct by doing so.

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. 19-UI-122739 is affirmed.

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

DATE of Service: <u>February 15, 2019</u>

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.

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