

EMPLOYMENT APPEALS BOARD DECISION
2019-EAB-0438

Reversed
No Disqualification

PROCEDURAL HISTORY: On April 5, 2019, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 152700). Claimant filed a timely request for hearing. On April 25, 2019, ALJ Shoemake conducted a hearing, and on May 3, 2019, issued Order No. 19-UI-129298, affirming the Department's decision. On May 7, 2019, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant asserted in her written argument that the ALJ should not have excluded documents she offered into evidence at the hearing because claimant had tracking that showed the employer had received the documents before the hearing. The employer testified that it did not receive the documents before the hearing. Audio Record at 7:53 to 12:26. Despite what the tracking showed, the employer may not have received the documents in time to review them before the hearing. For these reasons, the ALJ did not err in failing to admit the employer's documents offered into evidence at the hearing, and EAB did not consider them on review.

Claimant's written argument contained information that was not part of the hearing record, and did not show that factors or circumstances beyond claimant's reasonable control prevented them from offering the information during the hearing. Under ORS 657.275(2) and OAR 471-041-0090 (May 13, 2019), EAB considered only information received into evidence at the hearing when reaching this decision.

FINDINGS OF FACT: (1) IHOP 661 employed claimant from May 18, 2018 until February 6, 2019 as a general manager at one of its restaurants.

(2) The employer expected claimant to go straight to the bank and refrain from making stops along the way when she took deposits from the employer's restaurant to the bank. Claimant understood the employer's expectation.

(3) On November 19, 2018, claimant went to work to complete an order and take the restaurant's deposit to the bank. Claimant left the restaurant after dark with the deposit to take it to the bank. As claimant left

work and was walking “right outside” the restaurant, someone “snatched her purse,” which contained the deposit. Transcript at 22, 8. Claimant immediately reported the incident to the police. After the incident, the employer told claimant that it expected claimant to make the deposits daily and to refrain from doing deposits after dark. After November 19, 2018, claimant did all deposits from the restaurant she managed on a daily basis during daylight.

(4) On February 3, 2019, claimant was in training at a restaurant where she was not the manager. The training manager at that restaurant asked claimant to take the deposit from that restaurant to the bank. Claimant had to leave work early that day because her son was having surgery. Claimant told the training manager that she could not take the deposit because she “had a lot to do when [she] got off work,” including stopping at her home to change clothes, dropping off laundry at the laundromat, and going to the hospital. Transcript at 23. The training manager, who did not drive, told claimant that it was “fine” for claimant to take the deposit after she finished her personal business. Transcript at 24. The training manager told claimant that it was “better” that claimant complete the deposit than “[the training manager] walking.” Transcript at 24. Claimant agreed to do the deposit.

(5) Claimant put the deposit money in her glove compartment in her car. Claimant went home and loaded laundry into her car, dropped the laundry at a laundromat, and went to the hospital. At the hospital, claimant parked her car in a parking garage and locked her car. When claimant’s son was out of recovery from his surgery, claimant left the hospital and drove to the bank. At the bank, claimant discovered that the deposit was no longer in her glove compartment. Claimant reported to the police that someone had stolen the money.

(6) On February 6, 2019, the employer discharged claimant for “poor decisions” after claimant made several stops before taking the deposit to the bank on February 3, 2019. Transcript at 19.

CONCLUSIONS AND REASONS: The employer discharged claimant, but 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. “As used in ORS 657.176(2)(a) . . . a willful or wantonly negligent violation of the standards of behavior which an employer has the right to expect of an employee is misconduct. An act or series of actions that amount to a willful or wantonly negligent disregard of an employer’s interest is misconduct.” OAR 471-030-0038(3)(a) (December 23, 2018). “[W]antonly negligent’ means 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.” OAR 471-030-0038(1)(c). Good faith errors are not misconduct. OAR 471-030-0038(3)(b).

The employer decided to discharge claimant after the February 3 incident, which was the proximate cause of claimant’s discharge. Accordingly, that incident must be examined to determine whether claimant’s discharge was for misconduct. Only if claimant’s failure to go straight to the bank to complete the employer’s deposit without stopping for personal matters was willful or wantonly negligent would it then be appropriate to analyze the prior incidents of alleged willful or wantonly negligent behavior the employer described at hearing. 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).

Order No. 19-UI-129298 concluded that claimant's failure to go straight to the bank in the final incident was a wantonly negligent disregard of the employer's interests, and that it was not an isolated instance of poor judgment.¹ The order also concluded that claimant's failure to go straight to the bank was not a good faith error because claimant had been a victim of a robbery of a previous deposit.²

It is undisputed that claimant did not go directly to the bank to complete the employer's deposit on February 3, in violation of the employer's policy. The record shows that claimant knew the employer's policy because she was reluctant to take the deposit on February 3 because she had other tasks to complete immediately after work, and because she acknowledged she had violated the employer's policy in a text apologizing to the employer on February 4. Transcript at 13.

However, although claimant violated the employer's expectations by failing to complete the deposit immediately after leaving the workplace, claimant's conduct was a good faith error, and therefore not misconduct. A "good faith error" usually involves a mistaken but honest belief that one is in compliance with the employer's expectation, and some factual basis for believing that to be the case. *Accord, Goin v. Employment Department*, 203 Or App 758, 126 P3d 734 (2006). As a basis for her good faith belief, claimant had told the training manager that she had to make three stops before she could complete the deposit. The training manager told claimant that it was "fine" for claimant to complete her personal business first, and that it was better that claimant complete the deposit than the training manager, who did not drive.

The sincerity of claimant's belief that she was acting consistent with the employer's expectations is reinforced by the training manager's request that claimant complete the deposit despite claimant's circumstances, and both parties' testimony about the importance of completing the deposits daily. Transcript at 9, 21. Although claimant's failure to go straight to the bank violated the employer's expectation, claimant did so with the knowledge and permission of the training manager at the training restaurant. Under OAR 471-030-0038(3)(b), claimant's conduct was a good faith error, and not misconduct. Claimant therefore is not disqualified from receiving unemployment insurance benefits because of this work separation.

DECISION: Order No. 19-UI-129298 is set aside, as outlined above.

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

DATE of Service: June 10, 2019

NOTE: This decision reverses an order that denied benefits. Please note that payment of benefits, if any are owed, may take approximately a week 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

¹ Order No. 19-UI-129298 at 3.

² Order No. 19-UI-129298 at 3.

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 desisyong ito.

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 ໄດ້ໂດຍປະຕິບັດຕາມຄໍາແນະນຳທີ່ບອກໄວ້ຢູ່ຕອນທ້າຍຂອງຄໍາຕັດສິນນີ້.

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 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 دستور العمل 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

The Oregon Employment Department is an equal opportunity employer/program. Auxiliary aids and services are available upon request to individuals with disabilities. Language assistance is available to persons with limited English proficiency at no cost.

El Departamento de Empleo de Oregon es un programa que respeta la igualdad de oportunidades. Disponemos de servicios o ayudas auxiliares, formatos alternos y asistencia de idiomas para personas con discapacidades o conocimiento limitado del inglés, a pedido y sin costo.