

EMPLOYMENT APPEALS BOARD DECISION
2019-EAB-0482

Reversed
No Disqualification

PROCEDURAL HISTORY: On April 6, 2019, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 73740). Claimant filed a timely request for hearing. On May 1, 2019, ALJ Seideman convened a hearing and continued it to allow the parties to review documents. On May 15, 2019, ALJ Seideman conducted the continued hearing, and on May 17, 2019, issued Order No. 19-UI-130146, affirming the Department's decision. On May 21, 2019, claimant filed an application for review with the Employment Appeals Board (EAB).

EAB considered the entire hearing record except for the copy of text messages offered by the employer and admitted as Exhibit 4, which was illegible. However, it does not appear necessary to obtain a legible copy. The texts were not mentioned during the hearing, and likely are not material to EAB's determination of whether claimant's discharge was for misconduct, as discussed below.

EAB considered also considered claimant's written argument. However, claimant's 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) Salem Group Restaurant LLC employed claimant as a server from October 3, 2015 until March 19, 2019.

(2) The employer expected claimant to avoid rude and uncooperative behavior when interacting with coworkers, supervisors, guests or other business contacts. On three occasions during her employment, the employer issued written warnings to claimant for rude or uncooperative behavior.

(3) On March 17, 2019, St. Patrick's Day, the employer's restaurant was busy. One of claimant's coworkers had been serving drinks and appetizers to a party for some time. As the end of the coworker's shift approached, the party had not finished and the coworker thought the party would continue ordering. The coworker thought that the employer had assigned claimant to take over serving the party's table when the coworker's shift was over. The party's bill was large. The coworker asked her lead if she should cash out the table or transfer the table and the party to claimant, as her shift was ending. The lead told the coworker to cash the party out.

(4) After speaking with the lead, the coworker told claimant that she was going to cash out the table before claimant began serving it. Claimant responded, "[W]ell, I just got another table so I hope it all works out." Transcript at 16. The coworker proceeded to cash out the table. Later, a second coworker approached and told the first coworker that the party at the table wanted more drinks. The first coworker told the second coworker that claimant had taken over the table, and to inform claimant of the party's needs. The first coworker tried to get claimant's attention to tell her that the table wanted to order additional drinks. The first coworker thought claimant ignored her.

(5) Before she left work that evening, the first coworker observed claimant speaking to the lead and, she thought, to a third coworker. The first coworker did not hear fully what claimant was saying. The first coworker thought she heard claimant comment, "Yeah. Table 45. She just left them there for me to deal with." Transcript at 18. The first coworker interpreted claimant's comment as a reference to her having cashed out the party and turned it over to claimant. The first coworker thought claimant was speaking "poorly" about her in a "negative tone." Transcript at 17. The first coworker was upset and began crying. Shortly after, the first coworker went home.

(6) Later on March 17, the general manager called claimant to her office and told her that it had been reported that she was rude to the first coworker. The general manager then sent claimant home. On March 19, 2019, the employer discharged claimant for allegedly rude and uncooperative behavior on March 17, 2019.

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). The employer has 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) (in a discharge case, the employer has the burden to establish misconduct by a preponderance of evidence).

Order No. 19-UI-130146 concluded that the employer showed that claimant engaged in misconduct. The order reasoned that, during her employment, "claimant had several episodes in which she was rude or disrespectful with superiors or co-workers," and "from time to time they occurred again." Order No. 19-

UI-130146 at 3. The order determined that claimant's actions constituted misconduct because she willfully disregarded the employer's standards. Order No. 19-UI-130146 at 3. However, the order is not supported by the record and must be reversed.

Order No. 19-UI-130146 appeared to rely on the sum of all the warnings that the employer issued to claimant for its conclusion that claimant willfully violated the employer's standards. However, it is undisputed that the employer did not discharge claimant until she allegedly violated the employer's standard against rude and uncooperative behavior on March 17, 2019. Absent evidence to the contrary, it appears that claimant's behavior on March 17 triggered, or was the proximate cause of the discharge. As such, claimant's behavior on March 17 is the proper focus of the misconduct analysis.

The issue is whether what claimant did or said on March 17 was rude or uncooperative. Claimant's comment to the first coworker upon learning that the coworker had cashed out the table, that she "hoped it all worked out," did not reasonably appear rude or uncooperative and the coworker did not contend that it was. The first coworker's interpretation that claimant was ignoring her when she later tried to get claimant's attention to inform claimant that the party wanted to order more drinks does not, without more, establish that claimant was being rude or uncooperative. All parties agreed that the restaurant was unusually busy on March 17, and it is just as likely that claimant was otherwise occupied when the first coworker tried to attract her attention, or that claimant simply failed to notice the first coworker's attempts.

The employer's principal evidence that claimant was rude or uncooperative on March 17 was what the first coworker allegedly overheard claimant state about her to the lead and a third coworker. Notably, those comments were not directed at the first coworker. The first coworker did not suggest that claimant called her names or directly made unflattering references about her in the comments that she overheard. Viewed on its face, the partial comment that the first coworker thought she overheard claimant make could plausibly be construed as a neutral one about how claimant came to be serving the table that the first coworker turned over to her, and not as impolite, discourteous, or disrespectful. From the conversational fragment the first coworker overheard, while she may have thought that claimant had characterized her poorly and negatively in the full conversation, the evidence does not support that claimant did so. The preponderance of the evidence does not show that claimant's alleged comments about the first coworker on March 17 were rude or uncooperative. In sum, the employer failed to demonstrate that claimant consciously behaved in a manner that she knew or should have known probably violated the employer's standard against rude or uncooperative behavior.

The employer failed to establish that claimant's discharge was for misconduct. Claimant is not disqualified from receiving unemployment insurance benefits.

DECISION: Order No. 19-UI-130146 is set aside, as outlined above.

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

DATE of Service: June 25, 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 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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