

EMPLOYMENT APPEALS BOARD DECISION
2019-EAB-1047

Affirmed
No Disqualification

PROCEDURAL HISTORY: On September 13, 2019, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant, but not for misconduct (decision # 110405). The employer filed a timely request for hearing. On October 8, 2019, ALJ Murray-Roberts conducted a hearing that was continued to October 23, 2019. On October 23, 2019, ALJ Murdock conducted a hearing, and on October 28, 2019, issued Order No. 19-UI-138810, affirming the Department's decision. On November 5, 2019, the employer filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) McDonalds Restaurants employed claimant from October 17, 2018 to July 26, 2019 as a sous chef.

(2) The employer expected employees to refrain from arguing with customers and threatening them. Claimant understood the employer's expectations. The employer had a zero tolerance drug policy that prohibited the use of cannabis in the workplace.

(3) On July 18, 2019, a manager smelled marijuana coming from the drive-through window area of the restaurant. Claimant was working at the window. The manager suspended claimant for allegedly using marijuana while working. Claimant was not using marijuana while working.

(4) On July 24, 2019, while still suspended from work, claimant went to the workplace to ask the onsite general manager if he would be returning to work. Claimant waited in the customer line while he was trying to speak with the manager, who was in her office. A customer ahead of him was trying to pay for his meal with Canadian currency. The cashier told the customer they could not accept Canadian currency for payment. The customer became argumentative with the cashier and delayed service for the customers waiting in line.

(5) Claimant told the customer who was holding up the line that the cashier could not accept Canadian currency. The customer called claimant an "idiot." Audio Record (October 23, 2019) at 18:04. Claimant told the customer that if he had a problem, they could talk about it outside. Audio Record (October 23,

2019) at 18:12. Claimant did not intend his statement as a threat. The customer, however, ran around the store, yelling, “He threatened me!” Audio Record (October 23, 2019) at 18:32.

(6) The onsite general manager heard the customer, came out of her office, and asked what had occurred with the customer. Claimant attempted to explain what had occurred. The manager gave claimant a written warning for the incident. Claimant told the manager he disagreed with the warning because he had not done anything wrong. The manager told claimant to go home and that the employer was “still trying to decide what to do with you.” Audio Record (October 23, 2019) at 22:28 to 22:42.

(7) On July 26, 2019, the employer discharged claimant because he allegedly used marijuana at work on July 18, 2019, and argued with and threatened a customer on July 24, 2019.

CONCLUSIONS AND REASONS: The employer discharged claimant, but not for misconduct.

The employer discharged claimant for allegedly using marijuana while working on July 18, 2019, and for allegedly arguing with a customer and threatening him on July 24, 2019. 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). The employer did not meet its burden to establish that it discharged claimant for misconduct or that claimant committed a disqualifying act under the Employment Department’s drug and alcohol adjudication policy.

Disqualifying Act. To the extent the employer discharged claimant for using marijuana while working, the employer did not show that claimant committed a disqualifying act. ORS 657.176(2)(h) requires a disqualification from unemployment insurance benefits if the individual has committed a disqualifying act. ORS 657.176(9)(a)(A) provides that an individual is considered to have committed a disqualifying act when the individual fails to comply with the terms and conditions of a reasonable written policy established by the employer that governs the use, sale, possession or effects of drugs, cannabis or alcohol in the workplace. OAR 471-030-0125(3)(A) provides that a written employer policy is reasonable if the policy prohibits the use, sale, possession, or effects of drugs, cannabis, or alcohol in the workplace, the policy has been published and communicated to the individual or provided to the individual in writing, and the employer follows their own policy.

The record is scant regarding the details necessary to determine if the employer’s drug policy was reasonable. The policy prohibited the use of cannabis in the workplace, and claimant apparently knew the policy, making it reasonable to presume that the employer communicated it to him. The record does not show that the employer failed to follow its own policy, and drug testing is not at issue in this case. The preponderance of the evidence shows the employer’s policy was reasonable.

The record does not show, however, that claimant failed to comply with the employer’s drug policy. The employer contended that claimant violated its drug policy by using marijuana while working on July 18, 2019. The employer asserted that “two employees” saw claimant smoke marijuana at work and reported the conduct to a manager, who suspended claimant. Claimant was the only person present at the restaurant on July 18 who testified at the hearing. Claimant denied having used marijuana at work that day, and asserted that the smoke came from a customer at the drive-through window. Audio Record (October 23, 2019) at 22:09 to 24:57. The preponderance of the evidence shows that claimant did not

use marijuana at work on July 18, and did not therefore violate the employer's drug policy. Claimant was not discharged for committing a disqualifying act.

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's witness asserted that claimant argued with and threatened a customer in the employer's store on July 24, 2019. Audio Record (October 23, 2019) at 9:18 to 9:30. The only evidence from the employer regarding the July 24 incident was testimony from an employer representative who did not witness the incident. The employer's witness stated that she was "just repeating" second-hand information told to her by an area manager who likewise did not witness the incident between claimant and the customer on July 24. Audio Record (October 23, 2019) at 28:08 to 29:09. Claimant, who provided the only firsthand information of the incident, testified that he did not argue with the customer, and that his suggestion that they discuss the currency matter outside was not a threat. Audio Record (October 23, 2019) at 18:12 to 18:18. The onsite manager who gave claimant a warning for the incident did not see what occurred because she was in her office at the time. The employer did not show by a preponderance of the evidence that claimant violated its expectations during his interaction with a customer on July 24. The employer discharged claimant, but not for misconduct.

In sum, the record shows that the employer discharged claimant, but not for a disqualifying act or for misconduct. Claimant is not disqualified from receiving unemployment insurance benefits based on this work separation.

DECISION: Order No. 19-UI-138810 is affirmed.

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

DATE of Service: December 9, 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 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 Empleo. Si no está de acuerdo con esta decisión, puede presentar una Aplicación 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.

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