

EMPLOYMENT APPEALS BOARD DECISION
2020-EAB-0213

Reversed
No Disqualification

PROCEDURAL HISTORY: On January 2, 2020, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct and claimant was disqualified from receiving benefits effective December 1, 2019 (decision # 152754). Claimant filed a timely request for hearing. On February 13, 2020, ALJ Shoemake conducted a hearing, and on February 21, 2020, issued Order No. 20-UI-144927, affirming the Department's decision. On March 9, 2020, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Maid to Perfection LLC employed claimant as a residential cleaner from September 18, 2018 until December 6, 2019.

(2) The employer expected its employees to refrain from removing items from the residence of a client. The employer's expectation was contained in a written policy, which it provided to claimant at the time of hire. Claimant was aware of the employer's expectation.

(3) On December 3, 2019, claimant provided a house cleaning service for an employer client whose home she had cleaned on a biweekly basis for approximately a year. One of her job duties consisted of removing trash from the residence and placing it in the garbage area outside of the home. When she performed that duty on December 3, she noticed a bag of bottles and cans next to the client's garbage and "thought they were throwing them out." Audio Record at 21:20 to 22:00. Claimant knew the bottles and cans had value and placed the bag into the trunk of her car for that reason. In the past, claimant had observed bottles and cans inside a recycling bin, but not in a bag next to the garbage. No one was present at the client residence other than claimant when claimant cleaned the residence.

(4) A few days later, the client noticed the bag of bottles and cans was missing, reviewed its security video, and observed claimant place the bag of bottles and cans into her car. The client then contacted the employer and reported its observations.

(5) On December 6, 2019, the employer discharged claimant “for theft.” Audio Record at 20:00 to 20:20.

(6) The employer had never disciplined or given claimant any warnings in the past.

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). 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. 20-UI-144927 concluded the employer discharged claimant for misconduct because “claimant knew that it was not ok [sic] to remove [bottles and cans that had value from a client’s residence] because she had been working for the same client for almost a year and had never been given permission to remove them and keep them.” Order No. 20-UI-144927 at 3. However, the record fails to support that conclusion.

The employer’s witness testified that the evidence on which the employer based their decision to discharge claimant consisted of the client’s video, which showed that claimant removed a bag from the garbage area of the client’s residence. Audio Record at 15:00 to 18:00. The witness admitted that she was not present when claimant was confronted with the client’s video and was not aware of any explanation claimant provided at that time. Audio Record at 14:45 to 15:45. Claimant admitted that she removed the bag shown in the video provided by the client and that it contained bottles and cans that she intended to redeem for cash. Audio Record at 21:00 to 25:00. However, she explained that when she deposited trash from the client’s residence into the client’s garbage, she noticed a bag of bottles and cans that was next to the garbage and only took the bag because she “thought they were throwing them out.” Claimant further explained that in the past, she had observed bottles and cans inside a recycling bin outside the client’s residence, but never in a bag next to the garbage where she found the bag in question. Audio Record at 22:00 to 24:00. The record as a whole fails to show that claimant “knew that it was not okay” at the time she removed the bag of bottles and cans from the garbage area of the client’s residence.

Where misconduct is alleged, the employer has the burden to show, by a preponderance of the evidence, that claimant willfully or with wanton negligence violated a reasonable employer expectation. Such a showing requires more than evidence of a mistake or failure to exercise due care; it requires evidence of a willful disregard of, or indifference to, the consequences of an act where the individual acting is conscious of her conduct and knew or should have known her conduct would probably result in violation of a standard of behavior the employer had the right to expect of her. Willful or wantonly negligent

conduct may not be inferred from actions alone. Here, even assuming claimant violated the employer's expectation to refrain from removing items from the residence of a client, her actions did not demonstrate conscious indifference to the employer's interests. Accordingly, the employer failed to meet its burden to show that claimant's conduct was at least wantonly negligent.

The employer discharged claimant, but for misconduct under ORS 657.176(2)(a). Claimant is not disqualified from receiving unemployment insurance benefits on the basis of her work separation.

DECISION: Order No. 20-UI-144927 is set aside, as outlined above.

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

DATE of Service: April 15, 2020

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 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 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.

Employment Appeals Board - 875 Union Street NE | Salem, OR 97311
 Phone: (503) 378-2077 | 1-800-734-6949 | Fax: (503) 378-2129 | TDD: 711
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