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

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EMPLOYMENT APPEALS BOARD DECISION
2020-EAB-0243

Affirmed
Request to Reopen Allowed
No Disqualification
Wage Credits Not Cancelled

PROCEDURAL HISTORY: On December 3, 2019, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that the employer discharged claimant for misconduct and was disqualified from receiving benefits effective October 20, 2019, but that claimant's benefit rights based on wages earned prior to the date of her discharge would not be cancelled (decision # 71807). Claimant filed a timely request for hearing. On January 2, 2020, the Office of Administrative Hearings (OAH) served notice of a hearing scheduled for January 17, 2020 at 10:45 a.m., at which claimant failed to appear. On January 21, 2020, ALJ Monroe issued Order No. 20-UI-142990 dismissing claimant's request for hearing for failing to appear on January 17, 2020.

On February 10, 2020, claimant filed a timely request to reopen the hearing. On February 27, 2020, OAH served notice of a hearing scheduled for March 9, 2020 at 3:30 p.m. On March 9, 2020, ALJ Monroe conducted a hearing, and on March 11, 2020, issued Order No. 20-UI-146035, allowing claimant's request to reopen, concluding that claimant's discharge was not for misconduct and that claimant's benefit rights based on wages earned prior to the date of her discharge would not be cancelled. On March 20, 2020, the employer filed an application for review of Order No. 20-UI-146035 with the Employment Appeals Board (EAB).

EVIDENTIARY MATTER: The ALJ admitted Exhibits 1 through 4 into evidence without objection, but failed to mark them as such. As a clerical matter, we identified the exhibits based on the ALJ's description of them, and marked them as Exhibits 1, 2, 3, and 4. Audio Record at 9:15 to 11:10; Transcript at 3.

Based on a *de novo* review of the entire record in this case, and pursuant to ORS 657.275(2), those portions of the order under review concluding that claimant demonstrated good cause for reopening the hearing and that her wage credits would not be cancelled are **adopted**. The remainder of this decision will address whether the employer discharged claimant for misconduct under ORS 657.176(2)(a).

FINDINGS OF FACT: (1) Catmint Inc. employed claimant as a convenience store sales clerk from April 14, 2018 to October 25, 2019.

(2) The employer's convenience store had an Oregon Liquor Control Commission (OLCC) license that permitted the store to sell alcoholic beverages on-site but prohibited their consumption on-site. The employer's owner expected his sales clerks to prohibit on-site liquor consumption. The owner also expected sales clerks to prohibit non-employees from standing idly around the freezer storage and beer storage areas of the store. Claimant was aware of the owner's expectations.

(3) The owner also expected his sales clerks to pay for any store items they took for their personal use, or for any store items they permitted others to take for their personal use, at the times the items were removed from the shelf, consumed or otherwise appropriated. Claimant was unaware that the owner required immediate payment and customarily paid for items she took, or allowed others to take, at the conclusion of her shift.

(4) The owner had equipped the store with several security cameras located throughout the store. On October 25, 2019, the owner viewed video footage from the cameras during claimant's shifts on October 16, 23 and 24, 2019. The owner concluded that during her shifts, claimant permitted a customer to consume alcohol within the store, allowed others to take soda, ice cream, and other food items without requiring payment or furnishing payment herself, allowed non-employee patrons of the store to enter prohibited areas restricted to only employees, and took candy items and pepperoni sticks from the store without paying for them. The owner discharged claimant that day for theft and those other alleged policy violations.

(5) On or after October 25, 2019, the owner gave the video footage to the police, who interviewed claimant on November 12, 2019 about the alleged theft of store items. Claimant provided police with receipts and bank statements to prove she had purchased the goods from the employer's store. Claimant was never charged or cited for any crime.

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 the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

The owner discharged claimant for theft of store items for herself and others, allowing a customer to consume alcohol within the store, and allowing non-employee patrons of the store to enter prohibited

areas restricted to only employees on October 16, 23 and 24, 2019. The owner based his discharge decision on his review of store security footage and sales records from the dates in question.

To the extent the owner discharged claimant for theft, he failed to establish misconduct. Claimant disputed that she took any items for herself without paying or allowed others to take soda, ice cream, or other food items without requiring payment or furnishing payment herself. Transcript at 75-76, 95, 102. Claimant asserted that she was unaware of the employer's policy requiring immediate payment for such items, which the owner admitted was not in writing, and that the prior store she worked at required payment for such items at the end of the day, which is when claimant typically paid for such items. Transcript at 61-62 and 71-74. Claimant also asserted, and the owner did not dispute, that her tills were never short at the end of her shifts. Transcript at 74, 92.

Although the owner asserted that his till records did not show that claimant rang up or made payment at the end of her shift for the items allegedly taken, claimant explained that when the police spoke to her on November 12, 2019, she presented them with receipts and bank statements that showed she had made payment. Exhibit 4 at 2. Although the police presumably reviewed the footage provided by the owner before they spoke to claimant about the events in question, claimant was not charged with a crime or cited for theft. Exhibit 4 at 2. From those facts, it may reasonably be inferred that if the video footage showed claimant committing or likely committing a crime or crimes, the police probably would have arrested her. The record as a whole fails to show that one party was more credible than the other. Therefore, the evidence regarding whether claimant willfully took any items from the store without paying for them or allowed others to take items without requiring payment or furnishing payment herself was no more than evenly balanced. When the evidence on any issue is evenly balanced, the party with the burden of proof, here the employer and its owner, has failed to meet their burden. Accordingly, the owner failed to establish misconduct based on theft.

To the extent the owner discharged claimant for permitting a customer to consume alcohol within the store or allowing non-employee patrons of the store to enter prohibited areas restricted to only employees, the owner also failed to establish misconduct. Although the owner asserted that the video showed that claimant had a line of sight to the patron when he allegedly drank beer within the store and to the patrons when they entered prohibited sections of the store, claimant denied that she was aware that those things had occurred. Transcript at 30, 82-85, 104-105. Here too, the record as a whole fails to show that one party was more credible than the other and the evidence was evenly balanced. Accordingly, the employer failed to establish misconduct based on those discharge allegations.

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

DECISION: Order No. 20-UI-146035 is affirmed.

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

DATE of Service: April 24, 2020

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 ໂດຍປະຕິບັດຕາມຄໍາແນະນໍາທີ່ບອກໄວ້ຢູ່ຕອນຫ້າຍຂອງຄໍາຕັດສິນນີ້.

Arabic

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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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