

EMPLOYMENT APPEALS BOARD DECISION
2020-EAB-0325

Affirmed
No Disqualification

PROCEDURAL HISTORY: On January 22, 2020, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant, but not for misconduct (decision # 75849). The employer filed a timely request for hearing. On April 10, 2020, ALJ Wymer conducted a hearing and issued Order No. 20-UI-147890, affirming the Department's decision. On April 28, 2020, the employer filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Stein Oil Co. Inc. employed claimant from July 11, 2018 to June 10, 2019 as a cashier and gas station attendant at the employer's gas station and convenience store.

(2) The employer expected the closing gas station attendant to close the work site on time at the end of its scheduled hours of operation. The station alarm self-armed at closing time, and if anyone was on site after the alarm was set, they activated the alarm, which notified the police. The employer also expected there to be at least two gas station attendants on site at all times. Claimant understood the employer's expectations.

(3) One of claimant's closing duties was to print out an order paper from a "TOS machine" and put it on the front door of the gas station store. Transcript at 10. Claimant normally clocked out and printed the order several minutes before closing time and would "make sure it's there [on the door] before we walk out the door." Transcript at 30. The machine measured the gasoline in the tanks for the delivery trucks that delivered gasoline during the night. The employer was subject to a fine if the order was not on the door when the delivery trucks arrived. The employer had not trained claimant how to load paper in the machine, and claimant had never seen anyone load paper in the machine. It was the manager's duty to reload the paper.

(4) On April 19, 2019, the gas station was scheduled to close and the alarm to set at 10:00 p.m. Claimant mistakenly thought the closing time was 11:00 p.m. that night, and continued to work for an hour after 10:00 p.m. cleaning a fryer machine in the convenience store. Claimant's presence triggered the station

alarm, causing the police to respond. Claimant was the only attendant on site at that time. The employer gave claimant a final written warning for remaining on the work site after the scheduled hours of operation, and for being alone at that time.

(5) On approximately June 6, 2019, claimant saw that the paper in the TOS machine was running low because the pink border at the end of the paper roll was showing. Claimant told the manager that the TOS machine paper needed to be reloaded.

(6) On June 8, 2019, claimant was working the closing shift with one other employee. Claimant clocked out about five minutes before she was scheduled to leave work and tried to print the order from the TOS machine. However, the TOS machine paper ran out. It had always contained paper in the past, and claimant did not know where the paper was located or how to load paper in the machine. It took claimant several minutes to find the paper, and more time to load paper in the machine. Claimant called the manager several times throughout the incident, but the manager did not answer their telephone. Claimant left messages. The other employee left the store at some time during the incident. The store alarm went off. Claimant printed the order and put it on the gas station door to avoid what claimant understood was a \$1,000 fine. The alarm company called the store and claimant answered the telephone. Claimant did not know the alarm code the alarm company requested to show it was a false alarm. Claimant had tried to contact the manager to get the code. The alarm company told claimant to stay at the store until she was able to get the code and call the alarm company back with the code. Claimant waited outside the store until the manager arrived some time later.

(7) On June 10, 2019, the employer discharged claimant because she remained at the work site after the scheduled closing time and was alone at the work site.

CONCLUSIONS AND REASONS: The employer discharged claimant 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). Isolated instances of poor judgment, good faith errors, or mere inefficiency resulting from lack of job skills or experience are not misconduct. OAR 471-030-0038(3)(b).

The employer discharged claimant for remaining at work after the scheduled closing time on June 8, 2019, and for being alone at the gas station with no other employees. The employer’s expectations that claimant not work alone and that she complete her closing duties and leave the premises at the scheduled closing time were reasonable. Claimant understood the employer’s expectations. Although the record shows that claimant had violated these expectations several times before June 8, the initial focus of the discharge analysis is on the final incident that prompted the employer to discharge claimant. *See e.g. Appeals Board Decision 12-AB-0434*, March 16, 2012 (discharge analysis focuses on proximate cause

of the discharge, which is generally the last incident of misconduct before the discharge); *Appeals Board Decision* 09-AB-1767, June 29, 2009 (discharge analysis focuses on proximate cause of discharge, which is the incident without which the discharge would not have occurred when it did).

The employer did not meet its burden to show that it discharged claimant for misconduct because the record does not show by a preponderance of the evidence that claimant engaged in a willful or wantonly negligent disregard of the employer's expectations on June 8. *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). Although the employer expected claimant to leave work at closing time, the employer also expected claimant to post an order printed from the TOS machine at the end of her shift, or risk incurring a fine for the employer. Claimant's regular practice was to print the order just before she walked out of the door to leave work. The record does not show that the employer expected claimant to print the order earlier in her closing routine or to check the TOS machine for paper. More likely than not, claimant had initiated her closing procedures in time to leave work by the scheduled closing time had the TOS machine not run out of paper. Claimant remained on site after the alarm was triggered and until the manager arrived because the alarm company told her to do so. As claimant testified and the record otherwise showed, claimant "was just trying to follow the directions of what everybody wanted [her] to do." Transcript at 30. If the employer expected claimant to leave work at closing time in lieu of posting the TOS machine order, or without providing the alarm code to the alarm company, claimant's failure to do so was no more than a good faith error, which is not misconduct.

Alternately, if the employer discharged claimant because she did not successfully reload the paper, post the order, and leave work by closing time, claimant's discharge was due to mere inefficiency resulting from a lack of training about reloading the TOS machine paper. It was the manager's duty to reload the paper in the TOS machine. Claimant had not seen how to load the paper or been trained to do so, and had told the manager before June 8 that the machine needed paper. Mere inefficiency resulting from lack of job skills or experience is not misconduct. Nor does the record show that the other employee's departure, leaving claimant alone at the gas station on June 8, was attributable to claimant as misconduct.

The employer discharged claimant, but not for misconduct. Claimant is not disqualified from receiving unemployment insurance benefits based on this work separation.

DECISION: Order No. 20-UI-147890 is affirmed.

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

DATE of Service: May 21, 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.

Please help us improve our service by completing an online customer service survey. To complete the survey, please go to <https://www.surveygizmo.com/s3/5552642/EAB-Customer-Service-Survey>. You can access the survey using a computer, tablet, or smartphone. If you are unable to complete the survey online and need 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 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
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.