

EMPLOYMENT APPEALS BOARD DECISION
2020-EAB-0328

Order No. 20-UI-146248 Affirmed – Request to Reopen Denied
Order No. 20-UI-142913 Reversed – No Disqualification

PROCEDURAL HISTORY: On November 22, 2019, the Oregon Employment Department (the Department) served notice of an administrative decision that allowed claimant benefits, concluding the employer discharged claimant, not for misconduct (decision # 153840). The employer filed a timely request for hearing. On January 2, 2020, the Office of Administrative Hearings (OAH) served notice of a hearing scheduled for January 16, 2020. On January 16th, ALJ Wymer conducted a hearing at which claimant failed to appear, and on January 17, 2020 issued Order No. 20-UI-142913, reversing decision # 153840 by concluding the employer discharged claimant for misconduct, disqualifying claimant from receiving benefits, effective October 27, 2019. Claimant filed a timely request to reopen the January 16th hearing. On March 12, 2020, ALJ Wymer conducted a hearing on whether claimant's request for a reopening should be allowed, and on March 13, 2020 issued Order No. 20-UI-146248 denying the request, leaving Order No. 20-UI-142913 undisturbed. On April 1, 2020, claimant filed an application for review with the Employment Appeals Board (EAB).

Pursuant to OAR 471-041-0095 (October 29, 2006), EAB consolidated its review of Orders No. 20-UI-146248 and 20-UI-142913. For case-tracking purposes, this decision is being issued in duplicate (EAB Decisions 2020-EAB-0321 and 2020-EAB-0328). On *de novo* review of the entire hearing record and pursuant to ORS 657.275(2), Order No. 20-UI-146248, which denied claimant's request to reopen the January 16th hearing, is **adopted**.

The remainder of this decision addresses whether the employer discharged claimant for misconduct. With her application for review, claimant submitted written argument on that issue. However, claimant did not declare that they provided a copy of their argument to the opposing party or parties as required by OAR 471-041-0080(2)(a) (May 13, 2019). The argument also contained information that was not part of the hearing record. Because claimant failed to show that circumstances beyond their reasonable control prevented her from appearing at the January 16th, hearing, they also failed to show that factors or circumstances beyond their reasonable control prevented them from offering information during the hearing as required by OAR 471-041-0090 (May 13, 2019). EAB considered only information received into evidence at the hearing when reaching this decision. *See* ORS 657.275(2).

FINDINGS OF FACT: (1) Hilton Portland and Executive Tower employed claimant from April 21, 2014 to October 31, 2019, last as a guest service agent. The employer expected that a guest service agent's "bank should remain at the exact amount issued at the end of each shift," Exhibit 1 at 1. The employer expected a guest service agent to "count and balance his/her bank at the end of each shift," and immediately deposit, or "drop," any cash necessary to balance his/her bank into the employer's vault. Exhibit 1 at 1. Claimant understood those expectations.

(2) On January 21, 2019, the employer gave claimant a written warning, in part, for dropping the wrong amount of cash into the employer's vault at the end of her shift on January 4, 2019. The written warning stated, in part, that, "15 minutes before [claimant's] shift ends she needs to step away from the desk to the back office and ensure that her bank is counted and her accounts are closed." Exhibit 1 at 3.

(3) On October 29, 2019, claimant did not "drop her cash" into the employer's vault "at the end of her shift." Exhibit 1 at 6. She deposited the cash into the employer's vault when she reported for the next day. When questioned about the incident on October 31, 2019, claimant stated that she "forgot" to deposit the cash at the end of her shift on October 29th. Audio Record at 17:15 to 17:25.

(4) On October 31st, the employer discharged claimant for failing to deposit her cash into the employer's vault at the end of her shift on October 29th.

CONCLUSIONS AND REASONS: The employer failed to establish that claimant's discharge was 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 order under review found that the employer discharged claimant because, on October 29, 2019, she took a guest's cash payment for a room home instead of depositing it into the employer's vault at the end of her shift as required, and did not deposit the cash in the employer's vault until she reported for work the following day.¹ The order then reasoned that because the record showed claimant understood she was expected to deposit the cash into the employer's vault at the end of her shift on October 29th, the employer had produced *prima facie* evidence that her failure to do was willful or wantonly negligent, and claimant did not participate in the hearing or otherwise provide evidence to the contrary.²

¹ Order No. 20-UI-146248 at 2-3.

² Order No. 20-UI-146248 at 3-4.

In a discharge case, however, the employer has the burden to establish willful or wantonly negligent misconduct by a preponderance of evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976). Here, that means the employer had the burden to show that claimant deliberately neglected to deposit the cash into the employer's vault at the end of her shift on October 29th, or that she consciously engaged in other conduct she knew or should have known would probably result in her failure to do so. A showing that claimant understood she was expected to deposit the cash into the employer's vault at the end of her shift is not by itself *prima facie* evidence that her failure to do so was willful or wantonly negligent. And although a further showing that claimant instead took the cash home would constitute *prima facie* evidence that she acted willfully or with wanton negligence, the employer did not assert at hearing that claimant took the cash home, and the record fails to support the order under review's finding that she did.

At hearing, the employer instead speculated that claimant failed to deposit the cash in the employer's vault at the end of her shift on October 29th because she did not follow the employer's January 2019 instruction to use the last 15 minutes of her shift to ensure that her bank was counted and her accounts were closed. Audio Record at 18:15 to 18:36. However, the employer also admitted that when claimant was asked why she did not deposit the cash into the employer's vault at the end of her shift, she stated that she simply "forgot" to do so. Audio Record at 17:15 to 17:25. The record therefore fails to show that claimant willfully neglected to drop the cash into the employer's vault at the end of her shift, and the evidence as to whether she consciously neglected to use the last 15 minutes of her shift to ensure that she deposited the cash is, at best, equally balanced. The record therefore establishes only that claimant was careless, arguably negligent, but not that her conduct rose to the level of wanton negligence, as defined under OAR 471-030-0038(1)(c).

The employer therefore failed to establish that claimant's discharge was for misconduct. Claimant is not disqualified from receiving benefits based on her work separation from the employer.³

DECISION: Order No. 20-UI-146248 is affirmed. Order No. 20-UI-142913 is set aside.

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

DATE of Service: May 6, 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.

³ 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.

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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.

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