

EMPLOYMENT APPEALS BOARD DECISION
2021-EAB-0191

Affirmed
Disqualification

PROCEDURAL HISTORY: On January 4, 2021, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that the employer discharged claimant for misconduct, disqualifying claimant from receiving unemployment insurance benefits effective October 11, 2020, and that claimant's benefit rights based on wages earned prior to the date of her discharge would be canceled (decision # 145228). Claimant filed a timely request for hearing. On March 2, 2021, ALJ Amesbury conducted a hearing at which the employer failed to appear, and on March 9, 2021 issued Order No. 21-UI-162294, modifying decision # 145228 by concluding that claimant's discharge was for misconduct disqualifying claimant from receiving benefits effective October 11, 2020, but that claimant's benefit rights based on wages earned prior to the date of her discharge would not be canceled. On March 16, 2021, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Quikserve Northwest Inc. employed claimant as a crew member at the employer's Taco Bell restaurant from March 13, 2020 until October 15, 2020.

(2) The employer had a "no theft" policy. Audio Record at 30:30. Under this policy, the employer expected employees to refrain from engaging in theft of the employer's property. The employer also expected employees to refrain from attempting to steal the employer's property. Claimant was aware of the employer's expectations and, as a matter of common sense, knew that she was not permitted to commit theft or attempted theft of the employer's property.

(3) On October 12, 2020, during her work shift, claimant decided to steal a bag of the employer's avocado ranch sauce. The sauce came in one-pound bags that were stored in a cooler in the restaurant, "where they always sit." Audio Record at 34:16. Claimant took a bag of the sauce, put it in a Taco Bell sack, and placed it back in the cooler.

(4) Minutes later, claimant asked a coworker whether they thought claimant's manager would let claimant buy the bag of sauce, to which the coworker replied, "No." Audio Record at 32:58. Claimant

left the sauce sitting in the sack inside the cooler because she “hadn’t quite decided what [she] was going to do” or “whether [she] . . . had enough nerve to do it.” Audio Record at 33:02, 34:54. Thereafter, claimant’s manager became aware from watching camera footage that claimant had put the bag of sauce in a sack and placed it back in the cooler. The manager yelled at claimant, “You could be fired for this incident.” Audio Record at 28:01. In response, claimant clocked out, set the bag of sauce on the manager’s desk, and exited the restaurant. About 15 to 30 minutes elapsed from the time claimant put the bag of sauce in the sack to the point that she clocked out and left the restaurant.

(5) On October 15, 2020, the employer informed claimant that she was discharged for violating the employer’s “no theft” policy.

(6) On October 28, 2020, Claimant filed an initial claim for unemployment insurance benefits. On November 13, 2020, the Department issued to the employer a notice of claim determination pursuant to ORS 657.266. In response to the notice of claim determination, the employer notified the Department of the discharge in writing on Monday, December 14, 2020, which was 31 days after the notice issued.

(7) On December 11, 2020, a Department representative interviewed claimant about her work separation. In the interview, claimant explained that she had been “accused of taking one bag of avocado ranch dip from the cooler” but “never took it from the property.” Audio Record at 18:53. The representative then asked claimant, “Did you do what the employer accused you of, which is actually taking the dip?” to which claimant answered, “Yes.” Audio Record at 19:07. On the basis of this interview, the Department representative found that claimant was discharged for misconduct because of the commission of theft in connection with claimant’s work.

CONCLUSIONS AND REASONS: The employer discharged claimant for misconduct. Claimant’s wage credits are not subject to cancellation.

Discharge 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) (September 22, 2020). “[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). Isolated instances of poor judgment are not misconduct. OAR 471-030-0038(3)(b).

The employer discharged claimant for violation of their “no theft” policy in connection with the incident involving the bag of sauce. Under the “no theft” policy, the employer expected claimant to refrain from committing theft of the employer’s property. The evidence in the record is not sufficient to establish that claimant committed theft of the employer’s property in violation of the employer’s policy. The record shows that claimant decided to steal a bag of the employer’s avocado ranch sauce and, to that end,

concealed a bag of the sauce in a sack and returned it to the cooler where the bags of sauce were stored. Within minutes thereafter, claimant's manager learned what claimant had done and yelled at her. Claimant then placed the bag of sauce on the manager's desk and left the restaurant. These facts fail to show that a completed offense of theft occurred. Under ORS 164.015, a person commits theft when "with intent to deprive another of property," the person "takes, appropriates, obtains or withholds such property from an owner thereof." Here, the record shows that claimant formed the intent to deprive the employer of the bag of sauce, at least briefly, before asking a coworker whether the manager would let her buy it and trying to decide whether she "had enough nerve" to complete the theft. However, claimant's conduct was not sufficient to establish that she took, appropriated, obtained, or withheld the bag of sauce from the employer. While claimant concealed the bag of sauce in a sack, the sauce never left the employer's restaurant nor was it ever removed from the cooler where the bags "always sit" for any significant period of time until claimant placed it on her manager's desk. Thus, claimant did not exercise sufficient control over the bag or bring about any transfer of ownership in it such that one may reasonably conclude that claimant took, appropriated, obtained, or withheld the bag of sauce from the employer.

Nevertheless, the record shows that claimant willfully violated the employer's expectation by attempting to steal the bag of sauce. The employer expected claimant to refrain from attempted theft of the employer's property. This expectation was reasonable and claimant was aware of it as a matter of common sense. Under ORS 161.405(1), a person is guilty of an attempt to commit a crime "when the person intentionally engages in conduct which constitutes a substantial step toward commission of the crime." The record indicates that claimant attempted to commit theft of the employer's bag of sauce because, by concealing the bag of sauce in a Taco Bell sack, claimant took a substantial step in furtherance of stealing it. At hearing, claimant candidly admitted that she placed the bag of sauce in the sack because "I was gonna take it." Audio Record at 34:33. Further, when asked, "So you were planning to take it but you didn't take it?" claimant responded, "Yes sir, exactly." Audio Record at 28:34. Claimant willfully violated this expectation by attempting to steal the employer's bag of sauce.

Isolated instances of poor judgment are not misconduct. OAR 471-030-0038(3)(b). The following standards apply to determine whether an "isolated instance of poor judgment" occurred:

(A) The act must be isolated. The exercise of poor judgment must be a single or infrequent occurrence rather than a repeated act or pattern of other willful or wantonly negligent behavior.

(B) The act must involve judgment. A judgment is an evaluation resulting from discernment and comparison. Every conscious decision to take an action (to act or not to act) in the context of an employment relationship is a judgment for purposes of OAR 471-030-0038(3).

(C) The act must involve poor judgment. A decision to willfully violate an employer's reasonable standard of behavior is poor judgment. A conscious decision to take action that results in a wantonly negligent violation of an employer's reasonable standard of behavior is poor judgment. A conscious decision not to comply with an unreasonable employer policy is not misconduct.

(D) Acts that violate the law, acts that are tantamount to unlawful conduct, acts that create irreparable breaches of trust in the employment relationship or otherwise make a continued employment relationship impossible exceed mere poor judgment and do not fall within the exculpatory provisions of OAR 471-030-0038(3).

OAR 471-030-0038(1)(d).

Applying these standards, claimant's conduct was not an isolated instance of poor judgment because her conduct in attempting to take the bag of sauce exceeded mere poor judgment in that it was tantamount to unlawful conduct. Claimant's conduct was tantamount to unlawful conduct because, by concealing the bag of sauce in a sack, claimant intentionally took a substantial step toward commission of the crime of theft. By intentionally taking a substantial step toward commission of theft, claimant engaged in conduct that met the definition of the separate crime of attempted theft. *See* ORS 161.405(1) ("A person is guilty of an attempt to commit a crime when the person intentionally engages in conduct which constitutes a substantial step toward commission of the crime."). Engaging in conduct that met the definition of the crime of attempted theft means that claimant's conduct was tantamount to unlawful conduct.

Claimant's conduct also exceeded mere poor judgment in that it created an irreparable breach of trust in the employment relationship. The record shows that claimant's attempt to steal the employer's sauce was a breach of trust because it was an attempt to steal the employer's property. The record supports that the breach of trust was irreparable because claimant abandoned the effort to steal the bag of sauce not of her own accord but only after claimant's manager learned what claimant did with the bag of sauce and yelled at her that she could be discharged for it.

For these reasons, claimant's conduct cannot be excused as an isolated instance of poor judgment. The employer discharged claimant for misconduct.

Wage Cancellation. ORS 657.176(3) provides, in pertinent part:

If the [Department] finds that an individual was discharged for misconduct because of the individual's commission of a felony or theft in connection with the individual's work, all benefit rights based on wages earned prior to the date of the discharge shall be canceled if the individual's employer notifies the director of the discharge within . . . 30 days following issuance of the notice provided for in ORS 657.266 [Initial determination of eligibility and amount of benefits], and:

- (a) The individual has admitted commission of the felony or theft to an authorized representative of the [Department];
- (b) The individual has signed a written admission of the felony or theft and the written admission has been presented to an authorized representative of the [Department]; or
- (c) The felony or theft has resulted in a conviction by a court of competent jurisdiction.

Applying the elements of ORS 657.176(3), the record does not support that claimant's wage credits should be canceled. As a preliminary matter, although the employer notified the Department of claimant's discharge 31 days after issuance of the notice of claim determination, the employer's

notification was timely. This is because the 30th day after the Department issued the notice of claim determination on November 13, 2020, was Sunday, December 13, 2020. Under ORS 187.010(1), “[e]ach Sunday” is a legal holiday, and under ORS 187.010(3), “any act . . . required . . . to be performed on a holiday . . . may be performed on the next succeeding business day; and no liability or loss of rights of any kind shall result from such delay.”

Nevertheless, the remaining elements of ORS 657.176(3) outlined above were not met. As discussed in detail in the first section of this decision, the evidence in the record is not sufficient to establish that claimant committed theft of the employer’s property, notwithstanding the Department representative’s contrary finding that claimant was discharged on that basis.

Moreover, the record is not sufficient to establish that claimant admitted to commission of a theft when a Department representative interviewed her on December 11, 2020. The record indicates that during that interview claimant explained that she had been accused of taking a bag of the employer’s sauce but clarified that she never took the bag of sauce from the property. Claimant then gave an affirmative answer to the question, “Did you do what the employer accused you of, which is actually taking the dip?” This exchange is too vague to constitute an admission that claimant committed theft. Claimant’s affirmative answer can be interpreted as conveying that she “took” the dip by concealing it in the sack and returning it to the cooler, not that she had completed the theft. Viewed objectively, claimant’s interview statements establish only that claimant admitted to contemplating or attempting to commit theft, and not to the commission of a completed offense of theft.

As for subparts (b) and (c) of ORS 657.176(3), the record does not show that claimant ever prepared a signed written admission of committing a theft or that such a signed written admission was ever presented to the Department. Nor does the record show that claimant was ever convicted of theft by a court of competent jurisdiction. Accordingly, claimant’s wage credits are not subject to cancellation pursuant to ORS 657.176(3).

Claimant was discharged for misconduct and is disqualified from receiving benefits effective October 11, 2020. Claimant’s wage credits are not subject to cancellation.

DECISION: Order No. 21-UI-162294 is affirmed.

S. Alba and D. P. Hettle.

DATE of Service: April 22, 2021

NOTE: This decision denies payment of your Unemployment Insurance (UI) benefits.

However, you may be eligible for Pandemic Unemployment Assistance (PUA) benefits for the period you are not eligible for other benefits as long as you are unable to work, unavailable for work, or unemployed due to the COVID-19 public health emergency. PUA is a new unemployment benefits program available through the Oregon Employment Department in response to the COVID-19 pandemic.

Visit <https://unemployment.oregon.gov> for more information, to apply for PUA, or to contact the Oregon Employment Department using the “Contact Us” form. You can also apply for PUA by calling 1-833-410-1004, but please be aware that the PUA staff cannot answer questions about this decision that denies payment of regular Unemployment Insurance (UI) benefits.

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 ໂດຍປະຕິບັດຕາມຄຳແນະນຳທີ່ບອກໄວ້ຢູ່ຕອນຫ້າຍຂອງຄຳຕັດສິນນີ້.

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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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.