

EMPLOYMENT APPEALS BOARD DECISION
2021-EAB-0257

Reversed
No Disqualification

PROCEDURAL HISTORY: On November 16, 2020, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant was discharged for misconduct, disqualifying claimant from receiving unemployment insurance benefits effective March 8, 2020 (decision # 75009). Claimant filed a timely request for hearing. On March 19, 2021, ALJ Schmidt conducted a hearing, and on March 26, 2021 issued Order No. 21-UI-163540, affirming decision # 75009. On April 6, 2021, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Ole Investments Inc. employed claimant as a bartender from April 12, 2019 until March 8, 2020.

(2) The employer prohibited its bartenders from being under the influence of intoxicants while on duty, and from reporting to work impaired by illness or other conditions that would make them unable to, or appear unable to, judge if a patron was too visibly intoxicated to be served alcoholic beverages. Claimant understood those expectations.

(3) On March 6, 2020, claimant attended school and, after class, was experiencing “nasal issues,” and felt as though she might be getting a cold. Transcript at 23. Claimant did not believe her illness was serious, and because she was scheduled to work that evening, reported on time for her shift beginning at 7:30 p.m. Although claimant felt she was performing her duties “a little slower than usual,” claimant did not feel as though she was unable to perform her work duties and did not know she might seem impaired to customers. Nor was claimant under the influence of intoxicants at work.

(4) Early in claimant’s shift, more than one patron contacted the employer’s general manager and told her that claimant seemed to have a problem being able to take and complete drink orders, and was walking around the workplace without addressing customers. Believing that claimant was not able to perform her work duties, the general manager sent another bartender to substitute for claimant.

(5) Claimant left work at 9:30 p.m. and drove herself to the hospital where she waited to have a medical provider assess her “nasal issues.” At approximately 2:00 a.m. on March 7, 2020, a medical provider at the hospital diagnosed claimant as having a nasal infection.

(6) On March 8, 2020, the general manager viewed videotape of claimant working on March 6, 2020. The general manager observed that claimant appeared to take orders, start pouring the drinks, and walk away or start other “projects” without completing preparation of the drinks, or serving them to customers. Transcript at 7. The general manager observed claimant “walking in circles, and turning in circles,” in an “aimless” manner. Transcript at 7.

(7) When claimant reported to work on March 8, 2020, the general manager discussed what she had seen on the videotape with claimant. Claimant told the general manager that she was sick and experiencing “weird smells” on March 6, 2020. Transcript at 25. The general manager discharged claimant because she had reported to work while sick on March 6, 2020 and customers had reported to the general manager that claimant appeared as though she was impaired. Claimant understood that the employer would not permit her to return to work after March 8, 2020.

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) (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 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).

The order under review concluded that claimant was discharged for misconduct. The order found that the employer discharged claimant for reporting to work too impaired “by substances or illness” to be able to judge the sobriety of patrons to whom she served alcohol. Order No. 21-UI-163540 at 3. The order reasoned that because claimant knew and understood that she was prohibited from reporting to work in such a condition, and knew that she was sick on March 6, 2020 when she reported to work, her conduct was at least wantonly negligent. Order No. 21-UI-163540 at 3. The order further reasoned that claimant’s conduct on March 6, 2020 violated Oregon Liquor Control Commission (OLCC) guidelines and was therefore tantamount to illegal conduct, and not excusable as an isolated instance of poor judgment. Order No. 21-UI-163540 at 4. However, the record does not support the conclusion that claimant was discharged for misconduct.

The parties agreed that claimant was discharged, although claimant asserted that it was not due to her conduct on March 6, 2020, but rather, due to the employer closing on March 17, 2020 due to COVID-19. Transcript at 20-21. The record is persuasive that claimant was discharged on March 8, 2020 due to claimant’s conduct on March 6, 2020, and was not discharged on March 17, 2020, when the employer closed temporarily due to COVID-19.

The order under review found that claimant was impaired “by substances or illness.” Order No. 21-UI-163540 at 3. However, the record does not show that claimant was impaired by substances when she was working on March 6, 2020. Claimant testified that she was not under the influence of intoxicants. Transcript at 23. The employer testified that it had “no proof” that claimant was intoxicated. Transcript at 8, 14. Thus, to the extent the order under review implies that claimant was impaired by intoxicants, the record does not support that implication. Nor, therefore, does the record show that claimant violated OLCC’s rule prohibiting the employer’s agents from being under the influence of intoxicants while on duty. *See* OAR 845-006-0345 (December 17, 2020).

Claimant reported to work sick on March 6, 2020, but the record does not show that in doing so, claimant violated the employer’s expectations. Although the record contains hearsay evidence and the general manager’s testimony regarding the videotape as evidence that claimant was not performing her duties in her normal manner on March 6, 2020, the record does not show that claimant’s physical condition affected her ability to judge the sobriety of the business’ patrons on March 6, 2020. Even assuming that claimant appeared impaired to patrons, the record does not show by a preponderance of evidence that claimant knew her illness would cause her to appear impaired to patrons. Before she reported to work, claimant thought that she was developing a cold, and was experiencing “nasal issues” and “weird smells.” Claimant testified that she did not think her illness was “serious,” and was making drinks for customers, serving the drinks, and was “maybe a little slower” but “was on top of the job.”

Transcript at 23. Because the record does not show that claimant knew or should have known that she was too impaired to follow OLCC guidelines or appeared too impaired to follow those guidelines, the record does not show that claimant willfully or wantonly violated the employer's expectations. The record therefore fails to show that the employer discharged claimant for a willful or wantonly negligent violation of the standards of behavior which an employer has the right to expect of an employee.

Claimant was discharged, but not for misconduct. Claimant is not disqualified from receiving benefits based on her work separation from the employer.

DECISION: Order No. 21-UI-163540 is set aside, as outlined above.

S. Alba and D. Hettle;
Angela Steger-Bentz, not participating.

DATE of Service: May 14, 2021

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.

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.

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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 desisyong ito.

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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