

EMPLOYMENT APPEALS BOARD DECISION
2021-EAB-0302

Affirmed
No Disqualification

PROCEDURAL HISTORY: On January 8, 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 25, 2020 (decision # 131802). Claimant filed a timely request for hearing. On April 15, 2021, ALJ Janzen conducted a hearing, and on April 16, 2021 issued Order No. 21-UI-164977, reversing decision # 131802 by concluding that claimant's discharge was not for misconduct, and did not disqualify claimant from receiving benefits. On April 19, 2021, the employer filed an application for review with the Employment Appeals Board (EAB).

WRITTEN ARGUMENT: The employer's argument contained information that was not part of the hearing record, and did not show that factors or circumstances beyond the employer's reasonable control prevented them from offering the information during the hearing. Under ORS 657.275(2) and OAR 471-041-0090 (May 13, 2019), EAB considered only information received into evidence at the hearing when reaching this decision. EAB considered the employer's argument to the extent it was based on the record.

FINDINGS OF FACT: (1) Myrtle Lane Inn employed claimant as a clerk and shift manager from April 22, 2019 to October 24, 2020. As part of her compensation, the employer permitted claimant to reside in a motel unit that was near the office and lobby.

(2) The employer expected claimant to perform her assigned managerial duties and assist with performing housekeeping duties as able during her shift. The employer expected claimant to avoid creating interpersonal problems with employees based on the performance of her management duties. The employer expected employees to refrain from smoking on the premises other than at a designated smoking area. Claimant was aware of the employer's expectations.

(3) Claimant did not smoke cannabis. Claimant used “CBD” products such as a CBD drink she purchased at a grocery store and CBD gummies and vape pens which helped her control personal anxiety. Transcript at 22. Claimant did not smoke cigarettes or anything else on the employer’s premises other than at its designated smoking area.

(4) Claimant performed her management duties and assisted with the performance of housekeeping duties when able during her shifts. Claimant performed management duties such as office paperwork, answered the phones, checked guests in to the motel, filed necessary applications with the local municipality and ran the business websites. When claimant was able, she did laundry, shampooed carpets, cleaned rooms, performed maintenance activities when necessary, and otherwise assisted in performing housekeeping duties.

(5) In late September 2020, claimant notified the employer’s owner about some deficiencies in the performance of housekeeping duties that resulted in some motel rooms containing fleas and emitting an odor of urine. When the owner spoke to the housekeepers, she received complaints about claimant’s work scheduling and repeated failure to assist in performing housekeeping duties during her shift. She also received a report that claimant had been smoking cannabis on the premises.

(6) Claimant’s report of the housekeeping deficiencies, the performance of her scheduling duties, and the perception of some employees that claimant did not sufficiently assist with housekeeping duties when able, created interpersonal problems between claimant and some employees.

(7) On October 24, 2020, the employer’s owner discharged claimant after concluding she had an “inconsistent . . . work ethic, [was] smoking pot on the premises . . . [and had created] . . . interpersonal problems with other employees,” one of whom threatened to quit. Transcript at 6, 9.

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) (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).

As a preliminary matter, the parties offered conflicting testimony about the matters at issue, including whether claimant smoked cannabis on the premises, assisted in performing housekeeping duties when able, and created interpersonal problems with employees by the manner in which she performed her management duties. Claimant testified that she did not smoke cannabis, assisted in performing described housekeeping duties whenever she was able, and was unaware of interpersonal problems with

employees other than the bookkeeper who worked at another business of the owner. Transcript at 22, 23-25, 27.

The employer's owner presented only hearsay evidence that claimant smoked cannabis on the premises, although she testified that one day she observed "pot smoke" in the employer's lobby, but not who had smoked it. Transcript at 9-10. The owner also presented only hearsay testimony that claimant did not always assist with housekeeping duties when able, and had created interpersonal problems with other employees based on the performance of her work duties. Transcript at 37. Absent a basis for concluding that claimant was not a credible witness, claimant's firsthand testimony under oath on these issues was afforded more weight than the owner's hearsay evidence, and EAB therefore found facts in accordance with claimant's testimony on those issues.

The employer failed to meet its burden to show that the employer discharged claimant for misconduct. The owner discharged claimant, in part, because she concluded that claimant had an inconsistent work ethic based on the reports of employees who complained that claimant did not assist with housekeeping duties when she was able. However, the evidence in the record shows that claimant not only performed her many and varied management duties during her shift, but regularly assisted in performing various housekeeping activities whenever her clerk and management duties permitted.

The owner also discharged claimant, in part, because she concluded that claimant had smoked cannabis on the employer's premises.¹ However, the credible evidence on that issue shows that claimant did not smoke cannabis at all and did not smoke cigarettes or anything else on the employer's premises other than at its designated smoking area.

The owner also discharged claimant, in part, because she concluded that claimant had created interpersonal problems with other employees the owner did not want to lose, because of the manner in which in which claimant performed her management duties. However, the credible evidence in the record shows that the performance of the management duties that created any interpersonal problems resulted from such things as work scheduling and notifying the owner of the housekeeping deficiencies claimant observed which, viewed objectively, would be expected of a management employee.

The record fails to show that the employer made its decision to discharge claimant because she willfully or with wanton negligence violated a standard of behavior that the employer had the right to expect of her, or because she disregarded the employer's interest. Accordingly, the employer discharged claimant, but not for misconduct under ORS 657.176(2)(a), and claimant is not disqualified from receiving unemployment insurance benefits based on the work separation.

DECISION: Order No. 21-UI-164977 is affirmed.

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

DATE of Service: May 27, 2021

¹ The record shows the employer did not have a written drug and alcohol policy. Transcript at 6. Accordingly, the Department's drug, cannabis and alcohol adjudication policy does not apply. *See*, OAR 471-030-0125 (January 11, 2018).

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

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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