

EMPLOYMENT APPEALS BOARD DECISION
2021-EAB-0555-R

Order No. 21-UI-169162 Reversed
Disqualification

PROCEDURAL HISTORY: On April 21, 2021, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant quit working for the employer with good cause and was not disqualified from receiving unemployment insurance benefits based on the work separation (decision # 123225). The employer filed a timely request for hearing. On June 7, 2021, ALJ Frank conducted a hearing and continued the hearing to June 18, 2021. On June 18, 2021, ALJ L. Lee conducted the continued hearing, and on June 22, 2021 issued Order No. 21-UI-169162, concluding that the employer discharged claimant, but not for misconduct and that claimant was not disqualified from receiving benefits based on the work separation. On July 12, 2021, the employer filed an application for review with the Employment Appeals Board (EAB). On August 13, 2021, EAB issued Appeals Board Decision 2021-EAB-0555, reversing Order No. 21-UI-169162 as unsupported by a complete record, and remanding the case to the Office of Administrative Hearings (OAH) for further proceedings to complete the record. On September 17, 2021, OAH supplemented the record and returned this matter to EAB for review of Order No. 21-UI-169162.

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) House of Thai Inc. employed claimant as a food server and cashier from 2019 until January 13, 2021.

(2) The employer expected its employees to refrain from engaging in theft of the employer's property. The employer did not have a formal written policy against theft but claimant understood the employer's expectation as a matter of common sense.

(3) The employer was a family-owned restaurant in Ashland, Oregon, started by claimant's grandmother in approximately 1991. The employer was an incorporated business and various family members were the employer's shareholders, including claimant's grandmother, mother, and aunt. Claimant's mother and aunt were sisters. Claimant's aunt was the president of the corporation, and had been living and working in Hawaii while claimant's grandmother and mother operated the restaurant in Oregon.

(4) For many years, the employer, through claimant's grandmother and mother, had engaged in a procedure to hide income from the government. The procedure consisted of altering customers' original guest tickets when guests paid for their tickets in cash by creating replacement tickets that eliminated some of their ordered items from the tickets. Thereafter, whoever created the replacement ticket removed the cash paid for the eliminated items from the cash register, and gave that cash to the employer. Whenever original guest tickets were created, carbon copies of those tickets also were created and went to the kitchen so that whoever was cooking prepared all of the items ordered. The restaurant's financial records did not include the cash proceeds removed from the register for guest tickets paid for in cash.

(5) In August of 2019, claimant's grandmother became ill with cancer and was unable to work in the restaurant as she had in the past. Claimant began working in the restaurant. Generally, claimant and her sister worked in the restaurant as servers, while their mother worked both in the kitchen as the cook, and in the office preparing the financial records of the restaurant for an independent bookkeeper. Following instructions from their grandmother and mother, claimant and her sister continued to engage in the procedure to divert cash for the employer so that the restaurant's financial records did not include the cash proceeds removed from the register for guest tickets paid for in cash.

(6) In April of 2020, claimant's grandmother died. Around that time, claimant's aunt returned to Ashland from Hawaii for a brief period in October of 2020 to assist temporarily in managing tax matters for her mother's estate. In December of 2020, claimant's aunt moved to Ashland to operate as the trustee of her mother's estate, which included her mother's 50 percent ownership interest in the restaurant, which had remained open.

(7) After claimant's aunt returned in December of 2020, the employer's independent bookkeeper told her that based on the bookkeeper's review of the restaurant's financial records, bank deposits "pretty often" appeared "short" of the amount of cash that should have been deposited. Transcript at 97-99. On or about January 5, 2021, claimant's aunt decided to investigate the shortages, and reviewed past customer guest tickets and restaurant videos. The guest tickets she reviewed appeared to have been altered, and videos she reviewed showed that often after a customer paid cash for their meals, claimant altered the original guest ticket by erasing some of the items purchased, creating a replacement ticket, and reducing the total amount of the sale. In addition, the videos showed that after modifying the guest ticket, claimant put some of the cash received from customers into her pocket. The guest tickets and videos reviewed showed that both claimant and her sister had engaged in the same actions. However, the carbon copies of the original guest tickets, which went to the kitchen so that all of the items ordered would be prepared, had not been destroyed. By comparing the carbon copies of the original guest tickets to the guest tickets that had been altered, claimant's aunt determined that she was able to approximate the total amount of the money taken by claimant and her sister.

(8) On January 13, 2021, claimant's aunt confronted claimant and her sister about what the aunt saw in the videos, and accused them of stealing money from the restaurant. Claimant's aunt also showed the videos to claimant's mother, after which claimant's mother asked claimant, "[W]hy did you do that?" without receiving a response from claimant. Transcript at 79-82. Claimant initially was silent, but then admitted that she had taken money from the restaurant because "she thought it was okay" to take it because she had calculated that she was substantially underpaid for all of the hours that she had worked at the restaurant. Transcript at 82. After claimant admitted to the theft and apologized to her aunt, claimant's aunt terminated claimant's employment for "stealing money from the restaurant," and demanded repayment of the money claimant had taken. Transcript at 77.

(9) On January 14, 2021, claimant's aunt sent claimant a text message stating that she must return any keys in her possession that belonged to the restaurant. Exhibit 1 (January 14, 2021 iMessage).

(10) On or about January 15, 2021, claimant and her sister gave the employer an envelope that contained \$1,500 in cash and a written apology requesting "forgiveness" for "what we did." Exhibit 1 (telephone screen shot of apology and money).

(11) On January 16, 2021, claimant's aunt sent claimant a text message stating that she had calculated that the total amount of money "stolen" from the employer was \$12,902.64, and that claimant and her sister had seven days to pay the employer that amount. Exhibit 1 (January 16, 2021 iMessage). Later that day, claimant disputed that they had taken \$12,902.64, stating, "This only occurred recently and not everyday . . . [and] . . . was a . . . dumb thing we did." Exhibit 1 (January 16, 2021 text message). Transcript at 35-36.

(12) On January 22, 2021, claimant paid the employer \$5,701.32 for her share of the remaining amount of the \$12,902.64 demanded by claimant's aunt. Exhibit 1 (photocopy of checks to House of Thai Inc.; January 22, 2021 text message).

CONCLUSIONS AND REASONS: The employer discharged claimant for misconduct.

Nature of the Work Separation. If the employee could have continued to work for the same employer for an additional period of time, the work separation is a voluntary leaving. OAR 471-030-0038(2)(a) (September 22, 2020). If the employee is willing to continue to work for the same employer for an additional period of time but is not allowed to do so by the employer, the separation is a discharge. OAR 471-030-0038(2)(b). "Work" means "the continuing relationship between an employer and an employee." OAR 471-030-0038(1)(a).

At hearing, the parties disagreed on the nature of the work separation. The employer's witness, claimant's aunt, asserted that she discharged claimant on January 13, 2021 when claimant admitted to taking money from the restaurant. Transcript at 77-79, 82. However, claimant asserted that she quit on January 13, 2021, but gave inconsistent testimony, initially asserting that she quit after she was shown the video on that day, and later asserting that she quit before she was shown the video. Transcript at 66-67. The order under review concluded that the evidence showed that the employer discharged claimant at the January 13, 2021 meeting. Order No. 21-UI-169162 at 3. The more consistent, reliable, and uncontested evidence supports that conclusion, including the fact claimant's aunt asked claimant to return her keys to the restaurant on January 14, 2021, which shows that the employer had likely severed

the employment relationship. Accordingly, because claimant was willing to continue to work for the employer up to the January 13, 2021 meeting, but the employer did not allow claimant to continue working after that meeting, the record shows that the employer likely discharged claimant on January 13, 2021.

Discharge. 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). “[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 and good faith errors are not misconduct. OAR 471-030-0038(3)(b). 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).

After finding that the employer discharged claimant on January 13, 2021 for “stealing from the restaurant,” the order under review concluded that the employer discharged claimant, but not for misconduct. Order No. 21-UI-169162 at 2, 5. The order reasoned that although claimant’s actions may have contributed to “tax fraud” when she followed directions from her grandmother and mother to alter guest tickets to conceal income for the employer’s tax purposes, claimant had not acted in disregard of the employer’s interests. Order No. 21-UI-169162 at 5. However, the order’s reasoning ignores the weight of the evidence that shows that the employer discharged claimant for stealing money for herself from the restaurant, and that claimant admitted to doing so.

The employer discharged claimant for “stealing money from the restaurant.” Transcript at 77. The employer expected its employees to refrain from engaging in theft of the employer’s property. Although the employer did not have a formal written policy against theft, claimant understood that expectation as a matter of common sense. Claimant violated that expectation whenever she altered guest checks of customers who paid for their food in cash, removed cash from cash register, and then kept some of the cash for herself rather than turning it over to the employer.

Claimant asserted at hearing that she did not steal money from the restaurant because the money “stay[ed] in the restaurant.” Transcript at 112. However, the record shows that claimant admitted to her aunt on January 16, 2021 that she had taken money from the restaurant without permission, and although she disputed the total amount that was taken, she admitted that the theft “only occurred recently and not everyday . . . [and] . . . was a . . . dumb thing we did.” Claimant also did not dispute the employer’s testimony that when claimant was confronted on January 13, 2021 about taking cash from the restaurant, she apologized and stated that she “she thought it was okay” to take the money because she had calculated that “she only got paid \$4.00 an hour” for all of the hours that she had worked at the restaurant. Transcript at 82.

Finally, on January 15, 2021, claimant and her sister gave the employer an envelope that contained \$1,500 in cash with a written apology requesting “forgiveness” for “what we did,” and on January 22,

2021, claimant paid the employer \$5,701.32 for her share of the remaining amount of the \$12,902.64 demanded by claimant's aunt. The weight of the evidence shows, more likely than not, that rather than return all of the cash removed from the register for tax purposes to the employer, claimant deliberately kept at least some of the cash for herself, and thereby committed theft of money from the restaurant. Accordingly, claimant's violation of the employer's common sense expectation that she refrain from engaging in theft of the employer's property was willful.

Claimant's conduct is not excusable as an isolated instance of poor judgment under 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).

Claimant's conduct in keeping customers' cash for herself without the employer's permission was not a single or infrequent occurrence of poor judgment. The record fails to show how many times claimant kept guests' cash for herself, but the record shows that more likely than not, it was a repeated act occurring multiple times over several months. The amount of money claimant reimbursed the employer in January 2021 likely resulted from more than a single or infrequent occurrence of claimant keeping guests' cash for herself. Moreover, viewed objectively, claimant's conduct exceeded mere poor judgment because it was tantamount to theft.¹

Nor is claimant's conduct excusable as a good faith error. Claimant essentially asserted that both her deceased grandmother and her mother were aware of her conduct in removing money for herself.

¹ See ORS 164.015(1) ("A person commits theft when, with intent to deprive another of property or to appropriate property to the person or to a third person, the person takes, appropriates, obtains or withholds such property from an owner thereof...")

Transcript at 25-28. However, claimant did not start working for the employer until her grandmother stopped working in the restaurant in August 2019, claimant's grandmother died in April 2020, and claimant's January 19, 2021 text to her aunt indicated that claimant's removal of money for herself "only occurred recently." It therefore is unlikely that claimant's grandmother was aware that claimant was removing money for herself. When claimant's aunt showed claimant's mother the videos of claimant putting cash in her pocket, claimant's mother expressed surprise and asked claimant, "[W]hy did you do that?" without receiving a response from claimant. Transcript at 79-82. By expressing surprise and confusion about what she saw, claimant's mother showed that she likely was unaware of, and did not condone, claimant's conduct. Although the employer appeared to have condoned the practice of claimant redirecting guests' cash to the employer, the record does not show that claimant had a good faith belief that the employer would condone the practice of keeping some of the guests' cash for herself.

For the reasons stated above, claimant was discharged for misconduct and is disqualified from receiving benefits effective January 10, 2021 and until she has earned at least four times her weekly benefit amount from work in subject employment.

DECISION: Order No. 21-UI-169162 is set aside, as outlined above.

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

DATE of Service: October 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.

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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

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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
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