

EMPLOYMENT APPEALS BOARD DECISION
2022-EAB-0574

Affirmed
No Disqualification

PROCEDURAL HISTORY: On June 25, 2021, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant was discharged for misconduct and was disqualified from receiving unemployment insurance benefits effective September 20, 2020 (decision # 104613). Claimant filed a timely request for hearing. On May 6, 2022, ALJ Smith conducted a hearing, and on May 11, 2022 issued Order No. 22-UI-193466, reversing decision # 104613 by concluding that the employer discharged claimant, but not for misconduct, and claimant was not disqualified from receiving benefits based on the work separation. On May 16, 2022, the employer filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) CJ Eateries LLC employed claimant as a server in their video poker deli and bar from June 4, 2020 until September 26, 2020.

(2) The employer expected claimant refrain from allowing customers to enter the employer's deli after the deli closed. Claimant understood these expectations.

(3) On three occasions between June 4, 2020 and September 26, 2020, claimant locked her deli keys in the employer's main office and had to call management at closing time to unlock the office door for her so she could obtain her keys.

(4) On September 26, 2020, the employer assigned claimant to close the deli. Claimant locked the doors at closing time, 11:00 p.m., and began her closing duties. At about 11:30 p.m., a customer from earlier in the evening, who was also claimant's acquaintance, knocked on the door and stated he lost his backpack and that his wallet and cell phone were in it. The customer asked claimant if he could look around the deli to check if his backpack was there. Claimant allowed the customer in to look around. Claimant then briefly went to the back of the deli to check for the backpack. While claimant was away, the customer stole a carton of cigarettes. Claimant then returned from the back, and the customer departed the deli. The customer was in the deli for about five minutes.

(5) Within minutes of claimant allowing the customer into the deli, the employer received anonymous calls advising that claimant was seen allowing someone into the deli after closing time. The employer accessed their security camera footage and observed claimant allowing the customer in after closing time.

(6) The employer believed that claimant's conduct of allowing the customer into the deli after closing time was egregious and had put herself and the deli at risk of being robbed. Transcript at 13. On September 26, 2020, after viewing the footage, the employer discharged claimant.

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).

The record shows that by allowing the customer into the deli after closing time, claimant breached the employer's reasonable expectations by acting with at least wanton negligence. Claimant understood the employer's expectation that claimant refrain from allowing customers to enter the deli after the deli closed. Although the customer persuaded claimant to allow him in by telling her that he was looking for his lost backpack, which may have been a falsehood intended to gain entry by trick, the record shows that claimant consciously allowed him in and knew or should have known that doing so was a policy violation. Even if tricked, claimant acted with indifference to the consequences of her actions by allowing the customer in because she could have performed a search for the backpack herself without letting the customer inside or simply told the customer to return in the morning. For these reasons, the record evidence is sufficient to conclude that claimant's conduct on September 26, 2020 of allowing the customer inside the deli after closing time was a wantonly negligent violation of the employer's expectations.

However, claimant's wantonly negligent conduct on September 26, 2020 was not misconduct because it was an isolated instance of poor judgment. Under OAR 471-030-0038(3)(b), isolated instances of poor judgment are not misconduct. 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, the record shows that claimant's wantonly negligent violation of the employer's expectations was isolated. The record is devoid of evidence showing any prior instances of claimant allowing customers into the employer's deli after closing time. At hearing, the employer's witness testified that, on three occasions, claimant had locked her deli keys in the employer's main office and had to call management at closing time to unlock the office door so she could obtain her keys. Transcript at 14. However, the employer did not establish that these incidents amounted to a pattern of other willful or wantonly negligent behavior such that claimant's breach of the employer's expectations on September 26, 2020 would be considered more than an isolated act. The employer offered no evidence to show that claimant knew and understood that locking her keys in the main office violated the employer's standards of behavior or that the conduct was willful or otherwise done consciously and with indifference to the consequences of her actions. Thus, claimant's breach of the employer's expectations that she not allow customers into the deli after closing time was an isolated act.

Further, the record does not show that claimant's conduct on September 26, 2020 exceeded mere poor judgment. Claimant's conduct neither violated the law nor was tantamount to unlawful conduct. Claimant's conduct also did not amount to an irreparable breach of trust because it did not involve an act of dishonesty, theft, or the like. Further, the record does not show that claimant's behavior made a continued employment relationship impossible. Although the employer believed that allowing the customer into the deli was egregious and had put claimant and the deli at risk of being robbed, there is no evidence that claimant's wantonly negligent conduct in allowing the customer into the deli posed interfered with the employer's interests such as would make a continued employment relationship impossible.

For these reasons, claimant was discharged for an isolated instance of poor judgment, and not misconduct. Claimant therefore is not disqualified from receiving unemployment insurance benefits based on the work separation.

DECISION: Order No. 22-UI-193466 is affirmed.

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

DATE of Service: August 3, 2022

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 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 الإستئناف 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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