

EMPLOYMENT APPEALS BOARD DECISION
2022-EAB-0691

Affirmed
No Disqualification

PROCEDURAL HISTORY: On April 25, 2022, 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 March 27, 2022 (decision # 112356). Claimant filed a timely request for hearing. On May 27, 2022, ALJ S. Lee conducted a hearing, and on June 9, 2022 issued Order No. 22-UI-64486, reversing decision # 112356 by concluding that claimant was discharged, but not for misconduct, and was not disqualified from receiving benefits based on the work separation. On June 16, 2022, the employer filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) McMenamin’s employed claimant as an assistant assistant manager (AAM) at McMenamin’s Edgefield from August 5, 2021 to March 31, 2022. Claimant’s role consisted of managerial duties and bartending duties.

(2) The employer had an alcohol sales policy which prohibited employees from serving alcohol to guests who were visibly intoxicated. This policy included techniques for recognizing guests who were intoxicated and listed the 50 most common signs of a visibly-intoxicated guest. Exhibit 1. Claimant was aware of this policy, had been trained on recognizing the signs of intoxicated guests, and was a licensed bartender.

(3) Though not permitted to serve visibly-intoxicated patrons, claimant was permitted to and regularly did serve drinks to people who were “a little bit drunk.” Transcript at 29.

(4) On March 30, 2022, a guest was involved in a single-car crash while attempting to leave the employer’s premises. Following the accident, the guest left their car laying upside-down in a ditch while they returned to the bar and ordered a vodka tonic from claimant.

(5) Claimant checked the guest for visible signs of intoxication. He believed that the individual was “a little bit drunk” but did not appear to be visibly intoxicated. Transcript at 29. Claimant then served the guest a vodka tonic, and the guest left with his drink.

(6) Police arrived at the employer’s premises because of a call about the car crash. Police then performed a field-sobriety test on the guest, and determined that they had sufficient evidence to charge the guest with a DUII. Another employee observed some of this testing and noticed seven signs of visible intoxication. The employer sent claimant home while they investigated the matter.

(7) On March 31, 2022, the employer discharged claimant because they believed that he had served a visibly-intoxicated person the prior day.

CONCLUSIONS AND REASONS: Claimant was discharged 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 employer discharged claimant because of an alleged violation of the employer’s expectation that he not serve a visibly-intoxicated person. The parties disagree about the facts surrounding the alleged violation. Claimant testified at hearing that he served the guest one vodka tonic, that the guest was “a little bit drunk,” but that the guest was not visibly intoxicated. Transcript at 29. Claimant further testified that the guest was quiet, did not say much, was relaxed, was acting generally normal, did not have bloodshot eyes, was not stumbling or off-balance, and did not slur or repeat his words. Transcript at 27. After claimant served the guest, the guest then left that bar area. The employer’s witness, on the other hand, testified that when she saw the guest, he was visibly intoxicated and that the witness noticed seven signs of intoxication.¹ The employer’s witness observed the guest after he consumed some of the vodka tonic and while police officers were questioning him. The employer’s witness did not know the amount of time between when claimant served the guest and when she observed him, but believed it was a short amount of time. Transcript at 21. The employer’s witness also testified that when police confronted the guest, he was drinking the drink that claimant had served him. Transcript at 21.

Claimant testified to a first-hand account of the guest’s actions and demeanor at the time that claimant served him a drink. The employer’s witness, on the other hand observed the guest in notably different circumstances: more time had passed, the guest had consumed more alcohol, and he was being

¹ Bloodshot eyes, face was flush, blank stare when people tried to talk to him, slurred speech, slow to respond to questions, repetitive, staggering. Transcript at 19-20.

questioned by police officers regarding the potential commission of a crime. When comparing these conflicting accounts, more weight is given to claimant's first-hand testimony because it is the only account of the guest at the time of the incident. Further, while the car accident is circumstantial evidence that the guest was intoxicated, the fact that the guest crashed his car does not prove that he was visibly intoxicated at the time that claimant served him a drink. Similarly, the fact that the guest performed poorly on his field-sobriety test and was subsequently arrested does not prove that he was visibly intoxicated at the time that claimant served him. Therefore, the employer has not met their burden to show that the guest was visibly intoxicated when claimant served him. As a result, the record does not show that claimant actually violated the policy that led to his discharge.

Because claimant's discharge was the result of an alleged policy violation that did not actually occur, claimant was discharged, but not for misconduct, and is not disqualified from receiving benefits based on the work separation.

DECISION: Order No. 22-UI-195773 is affirmed.

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

DATE of Service: September 14, 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.

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 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 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.

Employment Appeals Board - 875 Union Street NE | Salem, OR 97311
 Phone: (503) 378-2077 | 1-800-734-6949 | Fax: (503) 378-2129 | TDD: 711
www.Oregon.gov/Employ/eab

The Oregon Employment Department is an equal opportunity employer/program. Auxiliary aids and services are available upon request to individuals with disabilities. Language assistance is available to persons with limited English proficiency at no cost.

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.