

EMPLOYMENT APPEALS BOARD DECISION
2022-EAB-0758

Affirmed
No Disqualification

PROCEDURAL HISTORY: On February 5, 2021, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant was discharged, but not for misconduct, and was not disqualified from receiving unemployment insurance benefits based on the work separation (decision # 94641). Claimant filed a timely request for hearing. On May 31, 2022, ALJ Griffin conducted a hearing that was continued on June 8, 2022, and on June 16, 2022 issued Order No. 22-UI-196314, affirming decision # 94641. On July 5, 2022, the employer filed an application for review with the Employment Appeals Board (EAB).

WRITTEN ARGUMENT: EAB considered the employer's written argument when reaching this decision.

FINDINGS OF FACT: (1) Marie's Carriage House, LLC employed claimant as a caregiver from September 29, 2019 until January 13, 2021. Exhibit 4 at 11. Claimant had previously worked for the employer on several occasions starting in 2010. The company was jointly owned by a married couple, "L" and "M."

(2) The employer operated a "complex medical home" in which they cared for five "high needs" adult residents. May 31, 2022 Transcript at 5. As part of their care protocol, the employer served all of the residents three meals per day at a dining table where the residents could eat and socialize together. Claimant was responsible for serving the residents meals during her shifts, and was aware that each resident was entitled to three meals per day.

(3) On eleven occasions between December 26, 2020 and January 13, 2021 (herein "the period at issue"), claimant was on-shift while the residents were served lunch. On those occasions, claimant

generally did not serve lunch to one resident, “E,” who suffered from dementia. Instead, claimant offered him the option of having a snack instead of lunch. Claimant did so because E had a habit of overeating at breakfast, which generally led him to refuse dinner and then wake up hungry in the middle of the night. During the period at issue, E typically elected to eat a snack in his favorite chair in the living room, rather than joining the other residents for lunch at the table.

(4) On January 5, 2021, claimant and her daughter, who was also a caregiver at the employer’s facility, observed an elderly resident whom M had restrained to a bed in a fashion that claimant and her daughter believed was a violation of patient care standards. Claimant’s daughter made a report to Adult Protective Services (APS), who sent a representative to investigate the facility on January 7, 2021.

(5) On January 13, 2021, around lunchtime, a resident approached L and told him that “they never feed [E] lunch.” May 31, 2022 Transcript at 9. Based on this information, L investigated the matter. By reviewing surveillance footage of the period at issue, L determined that claimant had not been escorting E to the dining table to eat with the other residents at lunchtime, instead leaving E to sit in his favorite chair and eat snacks. That day, the employer discharged claimant.

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 parties disagreed on the reason that claimant was discharged. The employer asserted that they discharged claimant due to claimant not having fed E lunch for the period at issue. May 31, 2022 Transcript at 5. By contrast, claimant asserted that during the January 7, 2021 APS visit, M stated to claimant, “I know you reported me,” and that the employer discharged claimant in retaliation for the report made to APS. June 8, 2022 Transcript at 43–44, 48. At hearing, the employer denied this as a reason for discharge. May 31, 2022 Transcript at 19–20. While both parties testified credibly, the record shows that the employer discharged claimant due to claimant’s not feeding E lunch during the period at issue. The employer had the opportunity to discharge claimant at the time of the APS visit, but did not discharge her at that time. Instead, the employer discharged claimant shortly after learning about claimant not having fed E lunch for the period at issue. Claimant did not offer evidence to show that the employer ever stated that they had decided to discharge her because of the APS report. Thus, claimant’s account of why she was discharged was based on circumstantial evidence relating to the relative closeness in time between the APS report and the discharge. Because the employer discovered the matter of E’s lunches closer in time to when they actually discharged claimant, the preponderance of the evidence supports the conclusion that the employer discharged claimant for the latter reason.

The employer has not met their burden to show that claimant’s decision not to feed E lunch during the period at issue constituted misconduct. The fact of claimant’s actions themselves are uncontroverted in the record, as both parties agreed that claimant generally did not feed E lunch during the period at issue. Notably, however, the parties disagreed about whether claimant had permission to act as she did. At hearing, claimant testified that, about a month prior to the period at issue, M specifically instructed claimant to offer E the option of a snack at lunchtime, rather than a full lunch, in order to preserve his appetite for dinner and not get hungry at night. June 8, 2022 Transcript at 46–48. Claimant also testified that she was “told to put that in the log book.” Transcript at 47.

By contrast, M testified at hearing that “whatever [claimant] said is not correct,” and referred to the communication logs from around that time period to support her assertion. The employer submitted into the hearing record four pages of untitled documents—ostensibly the communication logs from the time up to and including part of the period at issue—which contain short narratives of E’s care from July 4, 2020 until January 5, 2021. *See* Exhibit 2 at 8–11. Those narratives do not contain any obvious references to the instructions that claimant alleged M had given to her, but do repeatedly reference E’s loss of appetite. An absence of an obvious reference to M’s instructions do not prove that M did not give those instructions to claimant. Further, while claimant stated that she was “told to put that in the log book,” she did not testify as to what she actually entered into the communication log, nor even if she entered anything about it into the log at all. As a result, the log books add little to the determination of whether M instructed claimant to act as she did. On this record, the evidence on whether M told claimant not to feed E lunch at the table is equally balanced. Therefore, as the employer bears the burden of proof in a discharge case, the employer is unable to meet its burden that claimant failed to feed E lunch in violation of the employer’s standards of behavior and that she did so willfully or with wanton negligence. Claimant therefore was not discharged for misconduct, and as a result is not disqualified from receiving benefits based on the work separation.

DECISION: Order No. 22-UI-196314 is affirmed.

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

DATE of Service: October 7, 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 ໄດ້ໂດຍປະຕິບັດຕາມຄຳແນະນຳທີ່ບອກໄວ້ຢູ່ຕອນທ້າຍຂອງຄຳຕັດສິນນີ້.

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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