

EMPLOYMENT APPEALS BOARD DECISION
2023-EAB-0320

Affirmed
No Disqualification

PROCEDURAL HISTORY: On December 13, 2022, 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 benefits based on the work separation (decision # 152805). The employer filed a timely request for hearing. On February 6, 2023, ALJ Enyinnaya conducted a hearing at which claimant failed to appear, and on February 14, 2023 issued Order No. 23-UI-215975, affirming decision # 152805. On March 6, 2023, the employer filed an application for review with the Employment Appeals Board (EAB).

WRITTEN ARGUMENT: EAB did not consider the employer's written argument when reaching this decision because they did not include a statement declaring that they provided a copy of their argument to the opposing party as required by OAR 471-041-0080(2)(a) (May 13, 2019).

FINDINGS OF FACT: (1) Aramark Corporation employed claimant from November 1, 2021 until November 10, 2022. The employer was a temporary agency or employee leasing company that employed claimant on a work assignment as a food services director at a jail of one of their clients, Yamhill County, Oregon.

(2) The employer expected their employees to refrain from fraternizing with inmates as set forth in Exhibit 1. The employer also expected employees to refrain from supplying inmates with drugs or contraband. The employer advised claimant of these expectations during onboarding.

(3) At some point before November 5, 2022, claimant met socially at a hotel with an individual who had been an inmate at the client's jail, but had been released recently. Also at some point before November 5, 2022, claimant brought the prescription drug Xanax into the client's jail in an amount larger than a single use amount.

(4) On or about November 5, 2022 the client learned that claimant had met socially with the former inmate and had brought Xanax into the jail in larger than a single use amount. On November 10, 2022,

the client notified the employer of these facts. That day, the employer's district manager spoke to claimant about the matter, and claimant confirmed what the employer had learned from the client.

(5) On November 10, 2022, the client terminated claimant's security clearance to work at the client's jail. Also that day, the employer concluded that claimant had violated their expectations that she refrain from fraternizing with inmates and refrain from supplying inmates with drugs or contraband, and discharged claimant.

CONCLUSIONS AND REASONS: Claimant was discharged, but not 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). In the case of individuals working for temporary agencies, employee leasing companies, or governmental programs where a state agency serves as the employer of record for individuals performing home care services, the employment relationship "shall be deemed severed at the time that a work assignment ends." OAR 471-030-0038(1)(a) (September 22, 2020).

At hearing, claimant failed to appear and the employer's district manager testified for about fifteen minutes then abruptly departed the hearing due to an emergency. Audio Record at 7:34 to 22:43. The manager testified that claimant was discharged for violating the employer's prohibition against fraternizing with inmates and supplying them with contraband. Audio Record at 9:33 to 10:20. The manager further testified that, because of claimant's conduct, the employer's client terminated claimant's access to their jail, and the manager described maintaining a security clearance to access the jail as "a condition of employment." Audio Record at 10:22. The manager received notification of the alleged fraternization and that the client was terminating claimant's security clearance on November 10, 2022. Audio Record at 11:26. The manager testified he then spoke with claimant who confirmed the client's account and that this discussion occurred probably on the same day the manager received the client's November 10, 2022 notification. Audio Record at 12:25. This evidence suggests that the work separation was a discharge that occurred on November 10, 2022.

However, the manager also testified that when a client terminates an employee's access to their facility, the employer will "try to find another location if possible." Audio Record at 17:48. The manager stated that at some point, he discussed finding another location with claimant but claimant "asked [the manager] not to pursue because any other facility . . . would have inquired why her access with that facility was terminated and she didn't want to go through that." Audio Record at 18:01. This suggests that if claimant had pursued trying to find another location or facility she may have been able to work for the employer for an additional period of time, which suggests the work separation might have been a voluntary quit.

The record supports the inference that the employer was a temporary agency or employee leasing company and when the client terminated claimant's security clearance to work at the client's jail on November 10, 2022, claimant's work assignment ended. At hearing, the witness for the employer described the employer as a "contractor," and Yamhill County as the "client" for whom claimant worked. Audio Record at 9:12 to 10:07. These descriptions are consistent with a work assignment

arrangement involving a temporary agency or employee leasing company arrangement. That maintaining a security clearance to access the client's jail was regarded as a condition of employment further supports that the client's termination of claimant's access had the effect of ending the work assignment.

Therefore, more likely than not, the employer was a temporary agency or employee leasing company and discharged claimant on the same day, November 10, 2022, that claimant's work assignment ended via the client terminating claimant's security clearance. Thus, the November 10, 2022 ending of the work assignment severed the employment relationship. As a result, the subsequent discussion between the manager and claimant in which claimant declined to pursue placement at a different facility came after the Yamhill County work assignment ended and the employment relationship ceased. Therefore, claimant's decision not to pursue placement at a different facility related to the possibility of placing claimant in a new work assignment and did not amount to evidence that continuing work was available as to the Yamhill County work assignment. For these reasons, the work separation was a discharge that occurred on November 10, 2022.

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) (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 for allegedly violating their expectations that she refrain from fraternizing with inmates, and refrain from supplying inmates with drugs or contraband. The employer failed to meet their burden to show that claimant violated these expectations.

With respect to the prohibition on fraternizing with inmates, the record shows that claimant had met socially at a hotel with an individual who had been an inmate at the client's jail but had been released recently. The fact that the individual was recently released suggests that the individual claimant met with was not an inmate at the time of the meeting, and therefore was merely a *former* inmate. The record does not indicate that the employer prohibited fraternizing with former inmates or that claimant knew and understood that the prohibition extended to former inmates. The employer's expectation against fraternizing with inmates was in writing and admitted into evidence. *See Exhibit 1*. Nowhere does the policy specify that employees are prohibited from fraternizing with former inmates. At hearing, the employer's witness, without further elaboration, summarized the policy as applying to inmates "whether in custody or out of custody." Audio Record at 14:28. This description similarly would only appear to cover those who are currently inmates, both those who are confined inside the client's jail and others who are not, such as individuals who remain inmates but are perhaps allowed to leave the jail for periods of time such as via a work program. Because the employer did not establish that their expectation included meeting socially with *former* inmates, they failed to prove that claimant violated their policy

against fraternizing with inmates. Accordingly, the employer did not establish that claimant's conduct in meeting with the former inmate constituted misconduct.

The employer also did not establish that claimant's conduct amounted to misconduct with respect to their prohibition on supplying inmates with drugs or contraband. The employer reasonably expected employees to refrain from supplying inmates with drugs or contraband. However, the record only shows that claimant brought the prescription drug Xanax into the client's jail and did not establish that she supplied the drug to inmates or to anyone at all. Accordingly, the employer failed to meet their burden to show that claimant violated their policy against supplying inmates with drugs or contraband.

For these reasons, the employer discharged claimant, but not for misconduct. Claimant is not disqualified from receiving unemployment insurance benefits based on the work separation.

DECISION: Order No. 23-UI-215975 is affirmed.

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

DATE of Service: April 14, 2023

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 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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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.