

EMPLOYMENT APPEALS BOARD DECISION
2023-EAB-0696

Reversed
No Disqualification

PROCEDURAL HISTORY: On March 16, 2023, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant was discharged by the employer for misconduct and disqualified from receiving benefits effective February 12, 2023 (decision # 81852). Claimant filed a timely request for hearing. On June 1, 2023, ALJ Adamson conducted a hearing interpreted in Mandarin, and on June 9, 2023 issued Order No. 23-UI-227485 affirming decision # 81852. On June 20, 2023, claimant filed an application for review with the Employment Appeals Board (EAB).

WRITTEN ARGUMENT: Claimant did not declare that he provided a copy of his argument to the opposing party or parties as required by OAR 471-041-0080(2)(a) (May 13, 2019). The argument also contained information that was not part of the hearing record, and did not show that factors or circumstances beyond claimant's reasonable control prevented him from offering the information during the hearing as required by OAR 471-041-0090 (May 13, 2019). EAB considered only information received into evidence at the hearing when reaching this decision. *See* ORS 657.275(2).

FINDINGS OF FACT: (1) Providence Health Services employed claimant as a cook from August 1, 2022 until February 16, 2023.

(2) The employer expected claimant not to cross-contaminate cooked food with raw food. The employer also expected claimant to heat and cool food according to the employer's instructions. The employer also expected claimant to close kitchen cabinets and drawers to eliminate tripping hazards for coworkers. The employer also expected claimant to wash his hands when returning to the kitchen from the bathroom. Claimant understood these expectations.

(3) At some point prior to January 20, 2023, claimant was carrying a hot pan in the employer's kitchen area. A coworker made contact with the pan and was burned. On another occasion prior to January 20, 2023, claimant cut his finger and bled in the food preparation area of the kitchen. On January 20, 2023, as a result of these incidents, the employer placed claimant on administrative leave and required him to

take certain corrective actions. The corrective actions were for claimant to retake and pass the test for his food handler's card and complete a workplace safety orientation

(4) On February 6, 2023, after completing the corrective actions, claimant returned to work from administrative leave. On February 6, 2023, the employer believed that claimant cross-contaminated food by placing his hand in a pan with raw meat in it without first re-gloving his hand. On February 7, 2023, the employer suspected claimant cross-contaminated a cooked quesadilla by using a spatula meant for raw hamburger patties to pick up the quesadilla. The employer also believed that claimant improperly heated or cooled food on occasions on February 6, 7, and 10, 2023. The employer also believed that at some point from February 6 through 10, 2023, claimant returned to the kitchen from the bathroom without washing his hands and left drawers open that two employees almost tripped over.

(5) On February 16, 2020, the employer discharged claimant for allegedly violating, from February 6 through 10, 2023, the employer's expectations regarding cross-contamination, heating and cooling food, hand-washing, and leaving drawers open

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 order under review concluded that claimant wantonly negligently violated safety standards related to cross-contamination on a continual basis during the period of February 6 through February 16, 2023 and therefore was discharged for misconduct. Order No. 23-UI-227485 at 3. The record does not support this conclusion.

The order did not individually analyze any of the alleged incidents of cross-contamination during the period beginning February 6, 2023 for whether they constituted willful or wantonly negligent violations of the employer's expectations. Rather, the order reasoned that claimant's testimony regarding the pre-January 20, 2023 hot pan incident contradicted aspects of a corrective action form issued in connection with that incident, and because of this supposed contradiction, the order found the employer "more credible with regards to other matters that occurred during the period from February 6 through 16, 2023." Order No. 23-UI-227485 at 3. The order therefore found the employer's evidence more persuasive, and because the employer's witness testified at hearing that claimant "was talked to repeatedly about claimant's actions" regarding cross-contamination during the period beginning February 6, 2023, concluded that claimant violated the employer's prohibition on cross-contamination with wanton negligence. Order No. 23-UI-227485 at 3.

It was not appropriate to conclude claimant lacked credibility on the basis of a contradiction between his testimony and the corrective action form. The corrective action form was hearsay entitled to less weight than firsthand testimony, and in any event, was drafted by the employer and does not bear claimant's signature. Exhibit 1 at 5-7. Claimant is characterized in the form as conceding that he should have said "hot" when carrying the pan, whereas at hearing claimant testified that he was holding the pan still and the coworker bumped into him. Exhibit 1 at 5; Transcript at 15-16. It is not evident that these two propositions are contradictory because it is possible for both to be true at the same time. Moreover, at hearing, claimant gave answers to questions at times in Mandarin translated by an interpreter into English and at other times spoken by him personally in English. *See, e.g.*, Transcript at 20. Claimant's English proficiency was far from perfect, and given this, along with the fact that most of his answers were filtered through a third party interpreter, it was not warranted to make adverse credibility judgments based on supposed contradictions in claimant's testimony. Any seemingly contradictory testimony offered by claimant was just as likely to have been the product of confusion or translation errors.

At hearing, the witness for the employer testified that the employer discharged claimant based on what "happened during the entire week prior to his discharge" or, put another way, what occurred "between the 6th and the 10th of February [2023]." Transcript at 5, 9. The employer's witness stated that during February 6 through 10, 2023, claimant "continually" cross contaminated food with raw meat. Transcript at 7. The specific examples of alleged cross-contamination attested to by the employer's witness were that on February 6, 2023, the witness observed claimant place his hand inside a pan that had raw hamburger meat in it. Transcript at 27. The witness stated she told claimant to change gloves, and claimant eventually did so, although he was initially resistant to the idea. Transcript at 27. The witness further testified that on February 7, 2023, she saw claimant use a spatula to move a raw beef patty and noticed that claimant had also just finished cooking a quesadilla. Transcript at 28. The witness stated she told claimant that if he also used the spatula to pick up the quesadilla he would be cross-contaminating, and stated that claimant looked confused and frustrated when the witness told him that. Transcript at 28.

For his part, claimant testified that on February 6, 2023, when the employer witness observed him, he had already changed the glove for his hand that he had placed inside the pan with the raw meat in it. Transcript at 29. Claimant stated that he initially did not feel he had to change the glove for his other hand because he had not handled meat with that hand, but after the employer's witness raised the matter, he agreed and changed both gloves. Transcript at 29. Claimant further testified that on February 7, 2023, the kitchen had a spatula assigned to use on the raw beef patties and a different spatula assigned to use on the quesadilla. Transcript at 30. Claimant explained that he used the spatulas as assigned and did not handle the quesadilla with the spatula meant to be used on the raw beef patties. Transcript at 30.

Thus, as relates to the specific instances on February 6 and 7, 2023 in which the employer asserted claimant had cross-contaminated, claimant rebutted that any cross-contamination had occurred. Given the conflicting accounts, and that the burden of proof is assigned to the employer in a discharge case, this decision accepts claimant's account of what occurred regarding these instances of cross-contamination. Therefore, as to the occasion on February 6, 2023 when claimant placed his hand inside the pan with raw meat, the record fails to show that that particular hand was not re-gloved. With respect to the instance on February 7, 2023 in which the employer was concerned claimant had mixed spatulas, the record fails to show that claimant did not use the correct spatulas as assigned. Accordingly, the

employer failed to establish that claimant's conduct was a willful or wantonly negligent violation of the prohibition against cross-contamination.

Additionally, the employer's witness testified that on February 6, 2023, she observed claimant improperly heat chicken that was used in a meal that day. Transcript at 10. The witness stated claimant then served the improperly heated chicken again the next day, February 7, 2023. Transcript at 10. The witness also testified that a different supervisor saw claimant improperly heat food on February 10, 2023. Transcript at 11. In contrast, claimant testified that he properly followed the employer's instructions for heating and cooling food. Transcript at 20. Claimant explained that on one occasion, the employer's witness had checked the temperature of the meat he was cooking in the mid-morning before his work was complete and assumed it was heated improperly because she checked the temperature prematurely. Transcript at 25-26. Given that claimant rebutted the assertion that he improperly heated or cooled food, the employer did not meet their burden to establish that claimant violated this expectation willfully or with wanton negligence.

The employer's witness also testified that on an occasion from February 6 through 10, 2023, an employee observed claimant not washing his hands when he returned from the bathroom. Transcript at 9-10. In contrast, claimant testified that he always washed his hands when returning from the bathroom, once in the bathroom itself and a second time at a hand-washing station near the kitchen. Transcript at 31. Accordingly, the employer did not meet their burden to show that claimant breached their expectation to wash his hands when returning to the kitchen from the bathroom.

Finally, the employer's witness testified that on an occasion from February 6 through 10, 2023, claimant left drawers out and two employees almost tripped over the drawers. Transcript at 11. Claimant testified that on one occasion he opened a drawer for "a split second" to get a fish patty and as he was doing so a coworker "took a half-step back and they hit that drawer," after which claimant closed the drawer "right away[.]" Transcript at 23. The record evidence does not show that claimant's failure to close the drawer before the coworker took a half-step and hit the drawer was a willful or wantonly negligent violation of the employer's expectations. Claimant did not intend to leave the drawer open such that it would create a tripping hazard to the coworker. Nor does the record show that claimant left the drawer open with wanton negligence, because claimant was not indifferent to the consequences of his actions given that the drawer was open only a split second and claimant closed it right away.

For the reasons outlined above, the employer failed to establish that claimant's discharge was for misconduct. Claimant is not disqualified from receiving unemployment insurance benefits based on the work separation.

DECISION: Order No. 23-UI-227485 is set aside, as outlined above.

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

DATE of Service: August 3, 2023

NOTE: This decision reverses an order that denied benefits. Please note that payment of benefits, if any are owed, may take approximately a week for the Department to complete.

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

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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.

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