

EMPLOYMENT APPEALS BOARD DECISION
2024-EAB-0063

Affirmed
No Disqualification

PROCEDURAL HISTORY: On October 20, 2023, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant was discharged by the employer for misconduct and was disqualified from receiving benefits effective August 6, 2023 (decision # 133105). Claimant filed a timely request for hearing. On December 11, 2023, ALJ Enyinnaya conducted a hearing, and on December 19, 2023 issued Order No. 23-UI-243726, reversing decision # 133105 by concluding that claimant was discharged, but not for misconduct, and was not disqualified from receiving benefits based on the work separation. On January 8, 2024, 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 or parties as required by OAR 471-041-0080(2)(a) (May 13, 2019).

FINDINGS OF FACT: (1) Jacksons Food Stores employed claimant as an assistant manager at one of their retail stores from November 8, 2021 until August 8, 2023.

(2) The employer maintained a policy regarding how employees should respond to shoplifting incidents. The policy emphasized de-escalation in such incidents, and prohibited employees from putting themselves in harm's way, blocking a thief's exit from the store, chasing a thief out of the store, or starting a physical altercation with a thief. In cases in which a thief refused to pay for or relinquish an item they were attempting to leave with, employees were required to "let the individual go, file a report with the authorities, and fill out an incident report." Exhibit 3 at 4. The employer's handbook stated that violations of the de-escalation policy could lead to immediate discharge. Claimant was aware of the employer's policy.

(3) On August 6, 2023, a customer entered the store whom claimant knew from "the recovery community." Transcript at 21. The customer, who was acting erratically, admitted to claimant that he had relapsed. Claimant responded, "yes, that's... pretty clear, but you should step away and chill out for

a minute, man. You're kind of freaking everybody out." Transcript at 21–22. The customer did not comply. A short time later, the customer walked behind the check-out counter, pushed the customer service representative (CSR) behind the counter in order to get past him, and attempted to steal a pack of cigarettes. During the skirmish, the CSR called claimant for help, and was able to wrest the pack of cigarettes from the customer. The CSR then shouted at the customer to leave the store, and claimant followed behind the customer to ensure that he left. The customer muttered a physical threat towards claimant and the CSR while he was leaving.

(4) As the customer was near the door, claimant shoved the customer out of the door, then followed the customer out the door. Claimant and the customer argued briefly while standing immediately outside of the door. During the exchange, claimant pushed the door towards the customer, who pushed it back at claimant before getting on his bicycle and leaving. The entire sequence of events, from the initial attempted theft to claimant's disengaging with the customer and re-entering the store, took place over the course of approximately 45 seconds.

(5) The CSR sustained minor injuries due to the assault from the customer. No other persons involved in the incident were injured.

(6) After the incident, claimant contacted his manager and filed an incident report.

(7) On August 8, 2023, after having reviewed claimant's incident report and the security camera footage of the incident, the employer discharged claimant because he violated their de-escalation policy during the August 6, 2023 incident. Had claimant not followed the customer out the front door, the employer would not have discharged him.

(8) Prior to the August 8, 2023 incident, claimant had not been issued any warnings for other violations of the employer's policy.

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).

Isolated instances of poor judgment are not misconduct. OAR 471-030-0038(3)(b). 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).

The employer discharged claimant for his actions during an attempted shoplifting incident on August 6, 2023, because claimant violated the employer's de-escalation policy during that incident. That policy prohibited employees from, among other things, putting themselves in harm's way, blocking a thief's exit from the store, chasing a thief out of the store, or starting a physical altercation with a thief. The uncontested evidence in the record shows that claimant followed the thief out of the store, and, in doing so, arguably put himself in harm's way. At hearing, claimant denied having pushed the door into the thief, asserting instead that he only hit the thief's bicycle with the door. Transcript at 23. However, the employer's video evidence contradicts this, as it unambiguously shows claimant pushing the door towards the thief, who then pushed the door back at claimant. Exhibit 1, part 3 of 3, at 24:02. Therefore, claimant also violated the prohibition on starting a physical altercation.

The record shows that claimant violated the employer's policy willfully or with wanton negligence. However, claimant's conduct was not misconduct because it was an isolated instance of poor judgment. The record does not show that claimant had previously engaged in any other willful or wantonly negligent violations of the employer's standards of behavior. As such, claimant's conduct during the August 6, 2023 incident was isolated. Further, the record does not show that claimant's conduct made a continued employment relationship impossible. While claimant's engagement with the thief outside the store briefly became physical, the evidence in the record is insufficient to show that claimant's conduct either violated the law or was tantamount to unlawful conduct. Furthermore, claimant's conduct did not involve an element of dishonesty, deceit, or any other quality that would create an irreparable breach of trust in the employment relationship. Likewise, the record does not show that a continued employment relationship would have been objectively impossible for any other reason. Therefore, claimant was discharged for an isolated instance of poor judgment, which is not misconduct.

For the above reasons, claimant was discharged, but not for misconduct, and is not disqualified from receiving unemployment benefits based on the work separation.

DECISION: Order No. 23-UI-243726 is affirmed.

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

DATE of Service: February 12, 2024

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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