EO: 700
BYE: 202433

State of Oregon
Employment Appeals Board
875 Union St. N.E.
Salem, OR 97311

403
DS 005.00

EMPLOYMENT APPEALS BOARD DECISION
2024-EAB-0179

Affirmed
No Disqualification

PROCEDURAL HISTORY: On November 29, 2023, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant was discharged for misconduct, and therefore was disqualified from receiving unemployment insurance benefits effective July 30, 2023 (decision # 135649). Claimant filed a timely request for hearing. On January 25, 2024, ALJ Buckley conducted a hearing, and on January 26, 2024, issued Order No. 24-UI-246626, reversing decision # 135649 by concluding that claimant was discharged, but not for misconduct, and therefore was not disqualified from receiving benefits based on the work separation. On February 14, 2024, the employer filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Big O Country Nook Cafe employed claimant from approximately February 2022 until August 4, 2023. Claimant performed various roles at the employer's high-volume restaurant, including waiting tables, tending bar, hosting, and washing dishes.

(2) On or around August 3, 2023, claimant was working during a particularly busy evening shift. Over the course of that shift, claimant waited on a party consisting of an intellectually disabled adult and his support worker. When claimant served the intellectually disabled patron the hamburger he had ordered, the patron expressed dissatisfaction with the bun on which the hamburger was served. Claimant explained to the party that claimant would have to charge them for another order, which upset them. Claimant placed the replacement order, which the party took to-go.

(3) Throughout the shift, claimant was overwhelmed with the amount of patrons in the restaurant, and was unable to provide them all with adequate service. Claimant attempted to contact the restaurant's manager for help, but the manager did not immediately answer her. When the manager eventually arrived, she opened claimant's register to make change for patrons. Claimant angrily protested this, as she believed that employees, including the manager, were not permitted to access the register drawers of other employees. The manager responded by getting "really nasty" with claimant and giving her "dirty looks." Transcript at 18.

(4) On August 4, 2023, the owner of the restaurant, along with the restaurant's manager, met with claimant over concerns regarding claimant's interactions with customers and staff the night before. The owner outlined three separate incidents during that shift in which she felt that claimant behaved inappropriately. In the first incident, claimant allegedly ignored a couple of patrons, causing them to seek service at the bar, and referring to them as "whiners or winos." Transcript at 6. The second incident was the encounter with the intellectually disabled patron. In the third incident, claimant allegedly referred to the manager as a "fucking bitch" during their exchange over the register drawer. Transcript at 7–8.

(5) Prior to the meeting, which lasted for approximately five minutes, the owner had not intended to discharge claimant. During the discussion of the second incident, however, claimant referred to the intellectually disabled patron as "retarded." Transcript at 8. At the time, claimant, who was 64 years old and had grown up using that term regularly, was unaware that it is considered an offensive and derogatory term. The owner and manager informed claimant of this, and claimant responded by asking what term she should use instead. However, the owner and manager had become angry at claimant's use of the term and did not offer her an alternative. Claimant, frustrated by the tone of the meeting, also became angry. The owner had hoped that claimant would understand the employer's concerns about how she interacted with customers and other staff. However, the owner felt that claimant's response indicated a lack of remorse or willingness to address her behavior and, accordingly, discharged claimant at the end of the short meeting.

(6) Prior to the shift the night before, the employer never raised any concerns with claimant about her behavior.

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 due to claimant's responses during the meeting regarding her alleged behavior during the previous shift. While it is clear that the employer was concerned about the alleged behavior, the employer's witness (the owner) explicitly testified at hearing that she had not intended to discharge claimant prior to the start of the meeting, and that it was claimant's "very angry" demeanor during the meeting which led to the decision to discharge her. Transcript at 10. Therefore, claimant's behavior during the August 4, 2023, meeting is considered the final incident for purposes of determining whether claimant's discharge was for misconduct.[1]

As a preliminary matter, the employer failed to identify any specific policies or procedures which claimant allegedly violated and either knew or had reason to know about. The employer testified at hearing, "[s]omewhere in the [employee] handbook I'm sure it says that you need to have good customer service and treat all customers equally. And you're not supposed to, uh, it's [I] guess insubordination to calling [*sic*] your manager a fucking bitch in the middle of the dining room." Transcript at 9. However, this testimony at best would establish the workplace expectations relating to claimant's alleged violations during the August 3, 2023, shift. It does not bear on whether claimant knew or should have known that her choice of words during the August 4, 2023, was prohibited. The employer also admitted that claimant was never given a copy of the handbook, and suggested that claimant should have known these policies as a matter of "common knowledge." Transcript at 9. The employer's use of the phrase "I'm sure it says" suggests that her testimony in this regard was speculative, and that she herself was uncertain of what those policies stated.

In any case, much of the employer's concern regarding claimant's behavior during the meeting related to claimant's use of an offensive term for an intellectually disabled patron she served during the previous shift. While the employer's concern is understandable, it is clear from the record that claimant was

[1] *See e.g. Appeals Board Decision* 12-AB-0434, March 16, 2012 (discharge analysis focuses on proximate cause of the discharge, which is generally the last incident of misconduct before the discharge); *Appeals Board Decision* 09-AB-1767, June 29, 2009 (discharge analysis focuses on proximate cause of discharge, which is the incident without which the discharge would not have occurred when it did).

previously unaware that the term is no longer considered socially acceptable. There is no indication in the record that the employer had previously explained to claimant that the term was offensive, or that claimant otherwise had any reason to know that the employer expected her not to use it. Therefore, while claimant's use of the term during the meeting was inappropriate, it was not a willful or wantonly negligent violation of the employer's standards of behavior, and was not misconduct.

To the extent that the employer discharged claimant for her angry tone or lack of contrition during the short meeting, the employer has also failed to meet their burden to show that this constituted misconduct. The record shows that all three participants in the meeting became heated due to the subject matter they were discussing. As noted above, the record does not show that the employer had provided claimant with a clear explanation of how she expected claimant to behave, such that claimant might have known that the employer expected her to respond more calmly during the meeting. Assuming that claimant did understand this expectation as a matter of common sense, however, claimant's response, given the short duration of the meeting, was more likely than not an automatic reaction and not a conscious decision to act angrily. The record does not show that claimant had sufficient time in that meeting to compose herself and respond dispassionately to the employer's concerns. Therefore, claimant's response was not, more likely than not, the result of her indifference to the consequences of her actions.

Even if claimant's behavior during the meeting *was* a willful or wantonly negligent violation of the employer's standards of behavior, however, her behavior was, at worst, an isolated instance of poor judgment. The record shows that the employer did not raise any concerns with claimant about her behavior prior to claimant's last shift. While the employer was concerned about claimant's behavior during that shift, they have not met their burden to show that any of those alleged incidents constituted misconduct.

In regard to the first incident, the owner's account of the incident was the result of her having heard "a lot of chattering" about it. Transcript at 5. By contrast, claimant denied having ignored the couple or referring to them by a derogatory term. Transcript at 17. Because claimant's testimony is first-hand and the employer's is hearsay, claimant's testimony is entitled to more weight. Accordingly, the record does not show that claimant acted as the employer alleged. In regard to the second incident, involving the intellectually disabled patron, the owner suggested at hearing that claimant should have "just replace[d] the cheeseburger to keep the customer happy" instead of charging the party for another order. Transcript at 7. However, the owner did not show that claimant knew or had reason to know that the employer expected her to do so. Therefore, claimant's failure to replace the patron's meal without charging him for a second order was not a willful or wantonly negligent violation of the employer's standards of behavior. In regard to the final incident, the employer was concerned with claimant having allegedly called the manager a "fucking bitch." The owner testified that she was told this by the restaurant's patrons. Transcript at 7–8. By contrast, claimant denied having used that language. Transcript at 18. Again, claimant's first-hand account is entitled to more weight than the employer's account which was based on hearsay. Accordingly, the record does not show that claimant acted as the employer alleged.

Because the record does not show that claimant previously engaged in any willful or wantonly negligent violations of the employer's standards of behavior, her conduct during the meeting on August 4, 2023 was isolated. Additionally, there is no indication in the record that her behavior during the meeting violated the law or was tantamount to unlawful conduct, created an irreparable breach of trust in the

employment relationship, or otherwise made a continued employment relationship impossible. As such, to the extent that claimant's behavior during the meeting was a willful or wantonly negligent violation of the employer's standards of behavior, it was an isolated instance of poor judgment, which is not misconduct.

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

DECISION: Order No. 24-UI-246626 is affirmed.

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

DATE of Service: March 21, 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 – 本判决会影响您的失业救济金。 如果您不明白本判决， 请立即联系就业上诉委员会。 如果您不同意此判决，您可以按照该判决结尾所写的说明，向俄勒冈州上诉法院提出司法复审申请。

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 ໄດ້ ໂດຍປະຕິບັດຕາມຄຳແນະນຳທີ່ບອກໄວ້ຢູ່ຕອນທ້າຍຂອງຄຳຕັດສິນນີ້.

Arabic

هذا القرار قد يؤثر على منحة البطالة الخاصة بك، إذا لم تفهم هذا القرار، إتصل بمجلس منازعات العمل فورا، 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 دستورالعمل موجود در پایان آن، از دادگاه تجدید نظر اورگان درخواست تجدید نظر کنید.

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