

EMPLOYMENT APPEALS BOARD DECISION
2024-EAB-0208

Affirmed
No Disqualification

PROCEDURAL HISTORY: On December 22, 2023, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant was discharged, but not for misconduct, and therefore was not disqualified from receiving unemployment insurance benefits based on the work separation (decision # 143106). The employer filed a timely request for hearing. On February 8, 2024, ALJ Messecar conducted a hearing at which claimant failed to appear, and on February 16, 2024, issued Order No. 24-UI-248268, affirming decision # 143106. On February 26, 2024, the employer filed an application for review with the Employment Appeals Board (EAB).

WRITTEN ARGUMENT: The employer's argument contained information that was not part of the hearing record, and did not show that factors or circumstances beyond the employer's reasonable control prevented them from offering the information during the hearing. Under ORS 657.275(2) and OAR 471-041-0090 (May 13, 2019), EAB considered only information received into evidence at the hearing when reaching this decision. EAB considered the employer's argument to the extent it was based on the record.

FINDINGS OF FACT: (1) Sunset Park 1991, LLC employed claimant as a server and bartender at their restaurant and bar from approximately March 2023 until October 8, 2023.

(2) Claimant initially worked for the employer full time, and had no restrictions on her work availability. On or around July 31, 2023, claimant reduced her availability to approximately 3.5 days per week, as she had taken another job. The employer accommodated this change in availability.

(3) On August 25, 2023, claimant sent a message to the owner of the company, regarding a request to use some of her sick pay for prior absences. After about an hour without a response from the owner, claimant became upset and walked out during her shift. The owner was later informed that claimant, prior to leaving, had "started to get really agitated and started to badmouth [the management team]... for not responding quickly enough" to her request. Transcript at 21.

(4) On September 11, 2023, claimant again changed her availability with the employer, this time to only two days per week. The employer “did [their] best to” accommodate this change in availability. Transcript at 10.

(5) On September 22, 2023, claimant notified the general manager that she was not feeling well, and left her shift. Claimant “apologized and said that she felt crappy about it,” but the general manager felt that claimant “just didn’t want to be there more or less.” Transcript at 12. The general manager, who was working alongside claimant at the time, did not believe that claimant was genuinely feeling unwell due to claimant’s having previously walked off of the job on August 25, 2023.

(6) Following claimant’s early departure on September 22, 2023, the general manager discussed claimant’s employment status with the owner and another manager. The management team determined that, due to claimant’s limited availability, “unreliability” regarding her scheduled shifts, and behavior that they felt was “unprofessional and flat out rude,” claimant was no longer a good fit for the employer.

(7) Claimant last worked for the employer on October 7, 2023. On October 8, 2023, the owner discharged claimant via email. That email stated, in relevant part, “The newest schedule has been posted. While we appreciate you updating us with your current availability we unfortunately can’t work around such limited hours. Should there be a need for any extra hands through the holiday season we will be sure to reach out. Thank you for your understanding.” Transcript at 18.

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 record suggests that the employer was motivated to discharge claimant based on several factors: her limited work availability, concerns about her reliability for shifts she was scheduled for, and allegedly rude or unprofessional behavior. The last incident regarding any of these concerns occurred on September 22, 2023, when claimant left her shift early after she claimed she was not feeling well. Typically, the misconduct analysis under OAR 471-030-0038(3)(a) focuses on the last incident that occurred prior to discharge.¹ In this case, however, the record shows that the proximate cause of

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).

claimant's discharge was claimant's limitations on her work availability. Therefore, the correct focus of the misconduct analysis is whether claimant's work availability was misconduct.

At hearing, the general manager testified that, even if claimant had not walked off of the job twice (as she did in August and September 2023), the employer still would have discharged her "based off of her schedule changes." Transcript at 7. Further, the owner's email to claimant at the time of discharge exclusively mentioned claimant's limited availability as the reason for discharge, and further indicated that they would be willing to have claimant return on a seasonal basis if the need arose. Taken together, these show that the employer's primary concern that led to the discharge was claimant's availability, and that the employer would not have discharged claimant when they did if claimant's availability was not so limited.

The record does not show that claimant's limited availability was misconduct. In fact, the general manager specifically testified that, following both of claimant's availability changes, the employer attempted to accommodate the changes. Transcript at 9, 10. Further, the fact that the employer continued to employ claimant for nearly a month after her most recent availability change suggests that they were, at least temporarily, willing to permit her to limit her availability as she had. Given these facts, the record suggests that the employer initially attempted to accommodate claimant's limited availability, but later determined that they were unable to do so. While this may have been a valid and understandable business decision, it did not constitute a willful or wantonly negligent violation of the employer's standards of behavior on claimant's part and, therefore, was 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-248268 is affirmed.

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

DATE of Service: April 2, 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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