

EMPLOYMENT APPEALS BOARD DECISION
2024-EAB-0429

Modified
Late Request for Hearing Allowed
No Disqualification

PROCEDURAL HISTORY: On February 6, 2024, 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 October 29, 2023 (decision # 125158). On February 26, 2024, decision # 125158 became final without claimant having filed a request for hearing. On March 12, 2024, claimant filed a late request for hearing. ALJ Kangas considered claimant's request, and on March 18, 2024, issued Order No. 24-UI-250291, dismissing claimant's request for hearing as late, subject to claimant's right to renew the request by responding to an appellant questionnaire by April 1, 2024. On March 21, 2024, claimant filed a timely response to the appellant questionnaire. On April 2, 2024, the Office of Administrative Hearings (OAH) mailed a letter stating that Order No. 24-UI-250291 was vacated and that a new hearing would be scheduled to determine whether claimant had good cause to file the late request for hearing and, if so, the merits of decision # 125158. On April 17, 2024, ALJ Christon conducted a hearing, and on April 19, 2024, issued Order No. 24-UI-252625, allowing claimant's late request for hearing and affirming decision # 125158 on the merits.¹ On May 7, 2023, claimant filed an application for review of Order No. 24-UI-252625 with the Employment Appeals Board (EAB).

EAB considered the entire hearing record. EAB agrees with the portion of Order No. 24-UI-252625 allowing claimant's late request for hearing. Pursuant to ORS 657.275(2), that portion of Order No. 24-UI-252625 is **adopted**. The remainder of this decision addresses claimant's separation from work.

¹ The order under review stated that claimant was disqualified from benefits effective October 27, 2023, differing from decision # 125158's determination that claimant was disqualified effective October 29, 2023. Order No. 24-UI-252625 at 6. However, as October 27, 2023 was a Friday, and disqualifications under ORS 657.176 begin on Sundays, the October 27 date is presumed to be scrivener's error.

FINDINGS OF FACT: (1) Jasper’s Food Management, Inc. employed claimant as a lottery attendant from June 2022 until October 30, 2023. The employer operated an establishment which served alcoholic drinks and offered gambling services.

(2) The employer’s employee handbook included policies regarding cash handling and interactions with coworkers and guests. The employer distributed this handbook to employees upon hire, and explained the policies within during an employee’s initial training. Claimant was generally aware of the employer’s policies.

(3) Over the course of her employment, the employer issued claimant “multiple” warnings regarding violations of their cash-handling policies. Transcript at 22.

(4) In or around late October 2023, the employer directed claimant to begin training a new lottery attendant, which claimant did over the course of several shifts. The employee handbook did not contain policies regarding the training of new employees. Claimant had previously trained several other new employees.

(5) On October 27, 2023, and continuing through October 28, 2023, claimant was working a closing shift with the new trainee. This was to be claimant’s final shift training the trainee, after which the latter would be sufficiently trained to work on her own. Accordingly, claimant told the trainee that evening that the trainee was meant to be “pretty much all on her own” that shift, and expected the trainee to perform the majority of the work. Transcript at 33.

(6) During the shift, several conflicts arose between claimant and the trainee. One of these involved the trainee sitting down next to a regular customer at one of the establishment’s lottery machines and conversing with her, ignoring customers at the counter as a result. Claimant was in the back office attending to other matters at the time. Once claimant realized that customers at the counter were being ignored, she directed the trainee to attend to them. The trainee responded uncooperatively.

(7) A few hours later, claimant informed the trainee that the trainee’s “cigarette count was all off and that she had to redo the cigarette counts.” Transcript at 38. The trainee responded by complaining that claimant had not helped the trainee with cleaning duties, to which claimant replied that the trainee needed to become confident in performing duties by herself.

(8) Sometime later, the trainee was experiencing issues with taking money out of the establishment’s safe to cash out customers’ tickets. Claimant heard the trainee frustratedly swear, went over to the trainee to help, and saw that a line of customers waiting to cash out had formed. While claimant was helping with the safe, another customer approached the counter and asked to use the establishment’s phone because he had lost his. Claimant told the customer that the employer did not allow customers to use the house phone, but that she would call his phone from her personal phone once she was finished solving the issue with the safe. The customer persisted, however, and claimant again told him that he would have to wait until she was finished. The trainee became upset with claimant’s response to the customer, and “started screaming” at claimant. Transcript at 40. In response, claimant told the trainee to go home. The trainee called the employer’s regional manager, who also told her to go home. The trainee left without performing any of her closing duties.

(9) After the trainee left, claimant finished the shift and closed the establishment by herself.

(10) On the morning of October 28, 2023, an employee working the establishment's opening shift complained to the regional manager that the previous shift's closing duties had not been performed. The regional manager reviewed the security footage from that shift, and determined that claimant had failed to perform the expected cleaning duties, and that "money was left unattended with the register open all night." Transcript at 16–17.

(11) After reviewing the video footage, the regional manager set a meeting with claimant for October 30, 2023. During that meeting, the regional manager reviewed her findings from the video footage with claimant. As a result of the regional manager's belief that claimant had left the register unattended with cash in it, which she believed was a violation of the employer's cash handling policy, as well as claimant's failure to perform the expected cleaning duties, the regional manager discharged claimant that day.

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, good faith errors, unavoidable accidents, absences due to illness or other physical or mental disabilities, or mere inefficiency resulting from lack of job skills or experience are not misconduct. OAR 471-030-0038(3)(b).

The employer discharged claimant due to claimant's allegedly having left a register unattended, with cash in it, and having failed to perform other closing duties, during a closing shift on October 27 and 28, 2023. The order under review concluded that this constituted misconduct because claimant was aware of the employer's policies and had previously been warned about violations of these policies, including the cash-handling policy. Order No. 24-UI-252625 at 5. The record does not support this conclusion.

The parties' accounts of the relevant events differed significantly. In particular, the employer's regional manager testified at hearing that the opening employee on the morning of October 28, 2023, notified her that, "...the store was a mess. Nothing had been done. Money was left out. The till was open." Transcript at 17. The manager also testified that she viewed the establishment's video footage and "witnessed the same[.]" Transcript at 17. By contrast, claimant testified that she did not leave the till open during her shift. Transcript at 49. Additionally, claimant testified that the closing duties "were

pretty much done,” with the exception of some unwashed coffee mugs, of which claimant was unaware. Transcript at 47–48. The employer did not offer the video footage into evidence.

Based on the above accounts, and the lack of corroborating evidence, the evidence as to whether claimant left the cash register open is, at best, equally balanced. As such, the employer has not met their burden of proof to show that claimant actually left the cash register open. To the extent that the employer discharged claimant for this reason, claimant was not discharged for misconduct because she did not actually engage in the alleged conduct which led the employer to discharge her.

Claimant partially rebutted the employer’s testimony that none of the cleaning duties had been done during the end of her shift. However, to the extent that some of that testimony was un rebutted (for instance, claimant’s lack of knowledge on the matter of unwashed coffee mugs), the employer still has not met their burden to show that claimant’s failure to complete these duties constituted misconduct. The record shows that the employee manual did not contain policies regarding the training of new employees. Further, the record shows that claimant had expected, and told, the trainee that the trainee was largely responsible for completing those duties over the course of the shift, and that claimant was primarily on shift that evening to assist as needed. The employer did not rebut these assertions. Thus, it is reasonable to infer that claimant expected the trainee to complete these duties, and did not believe herself responsible for completing them.

To the extent that claimant failed to complete these duties, then, her failure to do so stemmed from a good faith, if erroneous, belief that she was not required to complete them. Therefore, claimant’s failure to complete these duties was, at worst, a good faith error, which is not misconduct.

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

DECISION: Order No. 24-UI-252625 is modified, as outlined above.

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

DATE of Service: June 20, 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.

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.

Please help us improve our service by completing an online customer service survey. To complete the survey, please go to <https://www.surveymzmo.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 الاستئناف 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.

Employment Appeals Board - 875 Union Street NE | Salem, OR 97311
 Phone: (503) 378-2077 | 1-800-734-6949 | Fax: (503) 378-2129 | TDD: 711
www.Oregon.gov/Employ/eab

The Oregon Employment Department is an equal opportunity employer/program. Auxiliary aids and services are available upon request to individuals with disabilities. Language assistance is available to persons with limited English proficiency at no cost.

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.