EO: Intrastate
BYE: 14-Dec-2024

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

469
DS 005.00

# EMPLOYMENT APPEALS BOARD DECISION
# 2024-EAB-0458

*Reversed*
*No Disqualification*

**PROCEDURAL HISTORY:** On February 9, 2024, 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 # 74639). The employer filed a timely request for hearing. On April 29, 2024, ALJ Christon conducted a hearing, and on May 6, 2024, issued Order No. 24-UI-253601, reversing decision # 74639 by concluding that claimant was discharged for misconduct and therefore was disqualified from receiving benefits effective December 24, 2023. On May 24, 2024, claimant filed an application for review with the Employment Appeals Board (EAB).

**EVIDENTIARY MATTER:** At hearing, claimant offered a group of documents into evidence. *See* Audio Record at 4:19 to 12:16. The ALJ marked the documents as Exhibit 1 for identification purposes, and ruled that the documents were not to be admitted into evidence. Audio Record at 11:57. Exhibit 1 primarily consisted of documents outlining the events that transpired while the employer was investigating the final incident and after the employer discharged claimant. This included documents showing that the employer suspended claimant pending the investigation, that claimant met briefly with a Human Resources (H.R.) manager to discuss the incident but the meeting ended after claimant requested consent to record the meeting, that the employer discharged claimant on December 29, 2023 pursuant to a disciplinary write-up that claimant did not immediately receive, that after making inquiries claimant learned of the discharge and received the disciplinary write-up in January 2024, and that claimant continued to exchange emails with the employer seeking an opportunity to discuss the employer's decision to discharge him into early February 2024. *See* Exhibit 1 at 4-5, 8-9, 27-33, 35-48, 51-65. Exhibit 1 also contained a disciplinary write-up the employer prepared in connection with the final incident, documents suggesting that claimant was considered a manager or had assumed responsibilities of a manager, and the employer's code of ethics. *See* Exhibit 1 at 6-7, 49-50, 12-26.

Claimant explained that on Friday April 26, 2024, he conveyed the documents marked as Exhibit 1 to the Office of Administrative Hearings (OAH) and, the same day, separately served the documents on the

employer's H.R. manager by email. Audio Record at 4:55 to 5:54, 8:58 to 9:30, 10:27. The ALJ stated that she had received the documents from OAH staff only within an hour and a half of the Monday April 29, 2024, hearing's 1:30 p.m. start time. Audio Record at 4:22. The employer's witness, who was claimant's direct manager and was not the H.R. manager, stated that she had not received the documents from the H.R. manager and that the employer's H.R. department was located in the eastern time zone. Audio Record at 4:45, 10:44. The ALJ ruled that she would not admit the documents into evidence because she had not "actually had a chance to review them, they just came into [the ALJ's] email box at 12:49 today." Audio Record at 11:39. The ALJ stated that given that she had not had an opportunity to review the documents and "that [the employer's witness] has not received them, I'm going to rule them not admitted into evidence at this time." Audio Record at 11:57.

The ALJ erred in failing to admit Exhibit 1 into evidence. OAR 471-040-0023(4) (August 1, 2004), states that "each party . . . shall provide to all other parties . . . copies of documentary evidence that it will seek to introduce into the record" and requires merely that service occur "[p]rior to commencement of [the] evidentiary hearing that is held by telephone[.]" By serving the employer with the documents on April 26, 2024, which was in advance of the April 29, 2024, hearing, claimant satisfied the administrative rule. It is immaterial that the employer's witness herself had not received the documents from the employer's H.R. manager because the fact that claimant served the H.R. manager was sufficient to effectuate service on the employer. That the ALJ's opportunity to review the documents prior to the start of the hearing was limited is not an appropriate basis to exclude the documents from evidence. If the ALJ needed more time to review the documents, the ALJ had discretion to pause the proceedings and review the documents after the start of the hearing, or, if necessary, to continue the hearing to a later date pursuant to OAR 471-040-0026(1) (August 1, 2004). Therefore, because claimant met the requirements of OAR 471-040-0023(4) and because a review of Exhibit 1 shows, per OAR 471-040-0025(5), that it is relevant and evidence of a type commonly relied upon by reasonably prudent persons in conduct of serious affairs, Exhibit 1 is hereby deemed admitted into evidence and part of the hearing record.

Because ALJ uploaded Exhibit 1 as two separate files, one file reflecting a one-page email showing service on the employer on April 26, 2024, and the other file containing all the rest of the documents, EAB has, as a clerical matter, merged the two files and uploaded Exhibit 1 as one file in the hearing record. The one-page service email constitutes the first page of Exhibit 1 and the remaining documents constitute pages 2 through 67 of Exhibit 1.

**WRITTEN ARGUMENT:** EAB did not consider claimant's written argument when reaching this decision because he did not include a statement declaring 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).

Claimant's written argument consisted of the following: (1) an explanatory letter; (2) a disciplinary write-up the employer prepared in connection with the incident that led to claimant's discharge; (3) the order under review in this case; (4) an April 26, 2024 email to the OAH attaching the documents claimant offered but which were not admitted into evidence at the April 29, 2024 hearing; (5) a group of documents, not offered at the April 29, 2024 hearing, that are intended to show that claimant was considered a manager; and (6) a narrative explanation and group of documents that were offered at the April 29, 2024 hearing that are intended to show the events that transpired after claimant was discharged. Only the disciplinary write-up and the narrative explanation and group of documents

intended to show the events that transpired after claimant was discharged are included in Exhibit 1. In accordance with the ruling set forth in the "Evidentiary Matter" section above, these documents are considered part of the hearing record. The other information was not part of the hearing record, and claimant did not show that factors or circumstances beyond his 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, including the contents of Exhibit 1, as explained above. *See* ORS 657.275(2).

**FINDINGS OF FACT:** (1) Towne Park, LLC employed claimant from May 15, 2018, until December 29, 2023. Claimant worked as a valet for the employer at a hotel in downtown Portland, Oregon.

(2) The employer expected their valets not to misrepresent themselves as managers when approached by potential hotel guests. The employer expected their valets to allow their managers or hotel security to address situations where a potential hotel guest is angry or hostile. Based on a verbal policy, the employer expected valets to refrain from going to the hotel's eighth floor lobby "unless there's a specific reason for them to do that." Transcript at 7.

(3) Although he had not received an increase in pay or a formal promotion, over the course of claimant's tenure with the employer, claimant assumed many responsibilities beyond those required of valets. As of 2022, claimant was regarded as "unofficially" part of the employer's management team. Transcript at 28. Based on discussions with his managers, claimant understood that if a potential hotel guest, particularly a "transient" or unhoused person, posed a security threat to the hotel either hotel security or a member of the management team, which claimant believed included himself, was to address the situation with the individual. Transcript at 49. Claimant was not aware of any limitation on his ability to go the hotel's eighth floor lobby.

(4) On December 15, 2023, an unhoused man approached claimant and his manager, complaining about a valet driver the man believed had driven through a red light. The man, who was not a guest, asked for the valet driver's name and stated that he wanted to talk to the valet driver. The valet manager responded that for privacy reasons, the valet driver's name could not be disclosed. The man then insisted on speaking with the hotel manager. The valet manager told the man that the hotel manager was not present. The man ignored the valet manager and became angry. Claimant then also told the man that he was a valet manager, that the valet driver's name could not be disclosed, and that the hotel manager was not present. The man ignored claimant as well.

(5) The man then took the elevator to the hotel's eighth floor lobby, seeking to speak with the hotel manager. The valet manager went to her own office. Claimant thought the man posed a security risk to the hotel. After the man took the elevator up to the lobby, claimant radioed for security multiple times but did not receive a response. After a few minutes without a response, claimant "had a bad feeling." Transcript at 37. At the time, there had been "a lot of stabbings and shootings happening within the hotel vicinity" and because the man appeared hostile and there was no security present, claimant made the decision "to go up to the eighth floor and then stay with the front desk associates because [he] didn't want anything bad to happen[.]" Transcript at 30.

(6) Upon reaching the eighth-floor lobby, the man spoke with the hotel's assistant manager. Claimant was present in the lobby while the two were speaking. Afterward, the man took the elevator back to the

ground floor and left the hotel. Claimant rode the elevator down with the man. After the man left, security arrived and discussed the situation with claimant's manager.

(7) Following the December 15, 2023, incident, the employer suspended claimant pending an investigation of claimant's conduct. On December 20, 2023, claimant and the employer's H.R. manager briefly met to discuss the incident but the meeting ended when claimant asked for consent to record the conversation.

(8) On December 29, 2023, the employer discharged claimant for allegedly misrepresenting himself as a valet manager during the December 15, 2023, interaction with the man, and for failing to allow his manager or hotel security to address the situation with the man, by following the man to the eighth-floor lobby and escorting him back down the elevator.

**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 was discharged for misconduct. Order No. 24-UI-253601 at 3-4. The record does not support this conclusion.

At hearing, claimant and his manager testified. Claimant was present for the entire interaction with the man on December 15, 2023, while the manager was present for the interaction from the point it began until the man went to the eighth-floor lobby. The witnesses' accounts of what occurred differed significantly. First, as to the man, the employer's witness described the man as an "older gentleman who kept stating that he was a war vet," and who did not make her feel threatened at all. Transcript at 6, 7, 9, 62-63. Claimant, in contrast, described the man as a "transient" who was not a guest of the hotel and "gave off signs of . . . being belligerent, and extremely difficult, and possibly hostile[.]" Transcript at 30, 44. These two accounts of the man's status and whether he may have posed a security risk to the hotel are no more than equally balanced and, given that the burden of proof is on the employer in this context, on this issue the facts were found in accordance with claimant's account.

Similarly, the accounts of the witnesses differed as to what occurred during the December 15, 2023, interaction with the man. Generally, the two agreed that the man was upset about a valet's driving and asked for the valet's name. Transcript at 9, 18. However, the employer's witness testified that claimant approached the man first, volunteered himself as a valet manager, and talked over the valet manager when she came over to talk to the man. Transcript at 6-7. The employer's witness further testified that

claimant yelled at the man, never called hotel security, disregarded the manager's order to stay in the office, and followed the man to the eighth-floor lobby. Transcript at 9-10, 62-63. Claimant testified that the man approached claimant and the manager while they were standing together, that claimant did not interfere with the manager informing the man that they could not disclose the valet's name, and that claimant only started engaging with the man after the man ignored the manager, repeating what the manager had told the man already that they could not disclose the valet's identity. Transcript at 24, 33. Claimant denied yelling at the man, stated that he called hotel security multiple times with no response, and stated that the manager left the area when the man took the elevator to the lobby, and so did not order him to stay in the office. Transcript at 20, 31, 37-38. Claimant further testified that there had been "a lot of stabbings and shootings happening within the hotel vicinity during that time" and because the man appeared hostile and there was no security present, claimant made the decision "to go up to the eighth floor and then stay with the front desk associates because [he] didn't want anything bad to happen[.]" Transcript at 30. Here again, because the accounts of the witnesses are equally balanced and the employer has the burden of proof in a discharge case, the facts have been found in accordance with claimant's account as to these issues.

The testimony of the parties also diverged regarding the expectations governing claimant's employment. Claimant conceded that he identified himself as a valet manager to the man on December 15, 2023, and did not deny that it would have been prohibited for a valet to falsely claim to be a manager. Transcript at 19. However, claimant credibly testified that that over the course of his tenure, he assumed managerial responsibilities, that he was essentially regarded as a manager, and that as of 2022 claimant was told by his manager at the time that he was "unofficially" part of the management team. Transcript at 17, 19, 24, 28, 59. Documents included in Exhibit 1 show that claimant was included in emails circulated to the employer's management team. Exhibit 1 at 49-50. Further, the employer's witness testified that claimant had declined a formal promotion to manager but conceded that claimant "did a lot of extra duties," that "people went to [claimant] because he had . . . a lot of knowledge," that claimant attended some manager meetings, and that he had an email address that typically only managers received. Transcript at 62, 65.

Based on this evidence, the record supports that claimant had, over time, assumed responsibilities that were managerial in nature; and that he reasonably believed that he was part of the management team or had the latitude of a manager, such that telling the man that he was a valet manager was not a misrepresentation. Accordingly, the employer failed to meet their burden to prove that claimant willfully or with wanton negligence violated the employer's policies by falsely stating that he was a valet manager during the December 15, 2023, incident.

The witnesses' testimony also differed as to the employer's expectations that their valets allow their managers or hotel security to address situations where a potential hotel guest is angry or hostile and refrain from going to the hotel's eighth-floor lobby absent a reason for doing so. The employer's witness testified that the employer had verbally informed the valets that were not to go to the hotel's eighth floor lobby "unless there's a specific reason for them to do that." Transcript at 7, 65, 67. The employer's witness also testified that claimant received a write-up for a prior incident in which he was coached that either security or one of the employer's managers are to handle interactions with potential guests who pose a security risk. Transcript at 15, 62.

Claimant testified that the "unwritten policy" was that if the valets were "dealing with . . . any transient that might be a security issue," either security, if available, or the management team was to deal with the situation. Transcript at 49-50. When asked about the employer witness's assertion that valets were generally prohibited from going to the eighth-floor lobby, claimant maintained that he did not "know where that's coming from" and "that was never disclosed in writing at all, to any of us." Transcript at 30. Claimant acknowledged that a prior incident had occurred involving a person who became hostile and had pushed claimant, but stated that his manager at the time had spoken to him about it, stating merely that claimant "need[ed] to protect [him]self" in such situations. Transcript at 43. Claimant denied ever receiving any write-up in connection with the incident that may have clarified whether he could follow someone he thought was hostile to the hotel's lobby. Transcript at 41-42.

Based on the foregoing evidence, the employer did not meet their burden to show that claimant knew or should have known that a violation of the employer's expectations would probably result by engaging with the man in the lobby while the man met with the hotel's assistant manager, if he followed the man to the eighth-floor lobby as he did, and escorted the man back down the elevator. Given claimant's reasonable belief that he was an unofficial member of the management team, his unrebutted assertion that the employer permitted members of the management team to deal with persons who might pose a security risk, and his view that the man was "giving off signs . . . of hostility," the employer did not prove that claimant's conduct violated a known employer expectation. Transcript at 18. As such, even if claimant's actions in engaging with the man, following him to the lobby, or escorting him down the elevator violated the employer's expectations, claimant neither knew nor had reason to know of those expectations, and any such violation therefore was not willful or wantonly negligent.

For these reasons, the employer failed to meet their burden to show that claimant was discharged for misconduct. Accordingly, the employer discharged claimant, but not for misconduct, and claimant is not disqualified from receiving unemployment insurance benefits based on the work separation.

**DECISION:** Order No. 24-UI-253601 is set aside, as outlined above.

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

**DATE of Service: <u>July 10, 2024</u>**

**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.

**<u>Please help us improve our service by completing an online customer service survey</u>**. To complete the survey, please go to <u>https://www.surveygizmo.com/s3/5552642/EAB-Customer-Service-Survey</u>.

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.

**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