

EMPLOYMENT APPEALS BOARD DECISION
2024-EAB-0578

Late Application for Review Allowed
Reversed
No Disqualification

PROCEDURAL HISTORY: On May 9, 2024, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant was discharged due to a disqualifying act under the Department’s drug, cannabis, and alcohol adjudication policy, and therefore was disqualified from receiving unemployment insurance benefits effective March 31, 2024 (decision # L0003961841). Claimant filed a timely request for hearing. On June 27, 2024, ALJ Janzen conducted a hearing, and on June 28, 2024, issued Order No. 24-UI-257691, modifying¹ decision # L0003961841 by concluding that claimant was discharged for a disqualifying act, and therefore disqualified from receiving benefits effective March 24, 2024. On July 18, 2024, Order No. 24-UI-257691 became final without claimant having filed an application for review with the Employment Appeals Board (EAB). On July 21, 2024, claimant filed a late application for review of Order No. 24-UI-257691 with EAB.

EVIDENTIARY MATTER: EAB has considered additional evidence when reaching this decision under OAR 471-041-0090(1) (May 13, 2019). The additional evidence consists of claimant’s written statement enclosed with the late application for review;² and a copy of decision # L0004957388, which the Department issued on July 3, 2024, as an amendment to decision # L0003961841.³ This evidence

¹ Although Order No. 24-UI-257691 stated that it affirmed decision # L0003961841, it modified that decision by changing the effective date of the disqualification from March 31, 2024, to March 24, 2024. Order No. 24-UI-257691 at 4.

² This written statement also included an argument on the merits of Order No. 24-UI-257691. EAB did not consider this part of claimant’s written statement when reaching this decision because claimant did not include a statement declaring that she provided a copy of her argument to the opposing party or parties as required by OAR 471-041-0080(2)(a) (May 13, 2019).

³ EAB has taken notice of decision # L0004957388, which is contained in Employment Department records. OAR 471-041-0090(1). Any party that objects to our taking notice of this information must send such objection to this office in writing, setting forth the basis of the objection in writing, within ten days of our mailing this decision. OAR 471-041-0090(2). Unless such objection is received and sustained, the noticed fact will remain in the record.

has been marked as EAB Exhibit 1, and a copy provided to the parties with this decision. Any party that objects to our admitting EAB Exhibit 1 must send such objection to this office in writing, setting forth the basis of the objection in writing, within ten days of our mailing this decision. OAR 471-041-0090(2). Unless such objection is received and sustained, EAB Exhibit 1 will remain in the record.

FINDINGS OF FACT: (1) Fred Meyer Stores, Inc. employed claimant as a cashier at one of their retail stores from April 13, 2009, until March 28, 2024.

(2) The employer had a written policy which governed employees' responsibilities when selling alcoholic beverages to customers. This policy, in pertinent part, required employees to "request and scan the ID or enter the Customer's birthdate into the Point of Sale every time ID is prompted for by the [point of sale]" when a customer was buying alcohol. Exhibit 2 at 3. The policy did not consider an ID card to be "valid" if it was not "current." Exhibit 2 at 5. The employer provided claimant with training on this policy, which she believed she understood.

(3) On several occasions throughout her employment, claimant encountered customers purchasing alcohol who, although of apparent legal age, had forgotten their ID card. In such instances, where the customer was accompanied by a partner who was also of legal age but had a valid ID with them, claimant had allowed the customer's partner to supply their ID to complete the purchase. The employer's policy was silent as to whether this practice was allowed, and the employer never disciplined claimant for this practice or told her that it was not allowed. Similarly, the employer allowed claimant to accept the valid ID of an Instacart shopper or similar shopper when they were purchasing alcohol on behalf of their delivery customer, although the customer was not present to present their ID. Claimant had engaged in this practice on several occasions.

(4) On March 9, 2024, a customer came to claimant's register with a "large order of alcohol." Transcript at 6. The customer appeared to claimant to be over 30 years of age. Claimant requested the customer's ID card, which was expired but showed that the customer was of legal age to purchase alcohol. Claimant told the customer that she could not accept her expired ID, but then another customer approached the register and offered his ID to claimant. Claimant assumed that the second customer was the first customer's partner, and neither customer said anything to the contrary to claimant. Claimant accepted the second customer's ID, which was valid and showed that he was of legal age. At the time, the second customer was standing at the point of sale's PIN pad, while the first customer bagged groceries. Claimant did not see either of the customers enter their payment information for the order. Nevertheless, after accepting the second customer's ID, the transaction completed. Once the first customer finished bagging her groceries, she left the store with her order while the second customer stayed behind. Claimant then asked the second customer if he and the first customer were "together," and the second customer told claimant that they were not. Transcript at 20.

(5) A third customer witnessed claimant's actions and, believing them to be a violation of Oregon Liquor and Cannabis Commission (OLCC) rules,⁴ reported claimant to the employer. The employer then investigated the matter. Claimant worked her last shift for the employer on March 13, 2024. On March

⁴ Despite this fact, neither party has asserted that claimant's actions violated the law.

28, 2024, the employer discharged claimant for her actions on March 9, 2024, which they believed violated their policy governing sales of alcoholic beverages.

(6) Order No. 24-UI-257691, mailed to claimant on June 28, 2024, stated, “You may appeal this decision by filing the attached form Application for Review with the Employment Appeals Board within 20 days of the date that this decision is mailed.” Order No. 24-UI-257691 at 4. Order No. 24-UI-257691 also stated on its Certificate of Mailing, “Any appeal from this Order must be filed on or before July 18, 2024, to be timely.”

(7) On July 3, 2024, the Department issued decision # L0004957388, amending decision # L0003961841 by concluding that claimant was disqualified from receiving benefits effective March 24, 2024. Decision # L0004957388 stated, “We made this decision on July 3, 2024, and it becomes final unless we receive a request for a hearing by July 23, 2024.” EAB Exhibit 1 at 2.

(8) On July 18, 2024, Order No. 24-UI-257691 became final without claimant having filed an application for review with EAB. On July 21, 2024, claimant filed a late application for review of Order No. 24-UI-257691 with EAB.

CONCLUSIONS AND REASONS: Claimant’s late application for review of Order No. 24-UI-257691 is allowed. Claimant was discharged, but not for misconduct.

Late application for review. An application for review is timely if it is filed within 20 days of the date that the Office of Administrative Hearings (OAH) mailed the order for which review is sought. ORS 657.270(6); OAR 471-041-0070(1) (May 13, 2019). The 20-day filing period may be extended a “reasonable time” upon a showing of “good cause.” ORS 657.875; OAR 471-041-0070(2). “Good cause” means that factors or circumstances beyond the applicant’s reasonable control prevented timely filing. OAR 471-041-0070(2)(a). A “reasonable time” is seven days after the circumstances that prevented the timely filing ceased to exist. OAR 471-041-0070(2)(b). A late application for review will be dismissed unless it includes a written statement describing the circumstances that prevented a timely filing. OAR 471-041-0070(3).

The application for review of Order No. 24-UI-257691 was due by July 18, 2024. Because claimant did not file her application for review until July 21, 2024, the application for review was late. However, the record shows that claimant filed the application for review late due to circumstances beyond her reasonable control.

On July 3, 2024, following the issuance of the order under review, the Department issued decision # L0004957388, which amended decision # L0003961841 by changing the date of disqualification to March 24, 2024. On her statement enclosed with the application for review, claimant stated, “I dispute the decision and have until July 23rd to appeal as your denial letter from week ending [J]une 22 stated.” EAB Exhibit 1 at 2. Although it is not clear what claimant was referring to regarding the week ending June 22, decision # L0004957388, which was issued on July 3, 2024, indicated that it became final unless a request for hearing was filed by July 23, 2024.

Claimant’s explanation, and the close timing between when the order under review was issued and when decision # L0004957388 was issued, suggests that claimant misconstrued the timely filing deadline in

decision # L0004957388 as applicable to the order under review. Given the inherent ambiguity that would likely be caused by issuing these two documents so close in time, claimant's confusion is understandable. Further, decision # L0004957388 did not explain that the two documents had distinct and separate timely appeal deadlines. As such, the confusion caused by the issuance of the two documents constituted circumstances beyond claimant's reasonable control which prevented her from filing a timely application for review.

Additionally, claimant filed the late application for review within a reasonable time. Because decision # L0004957388 did not explain the distinction between appealing it and appealing the order under review, the circumstances which prevented claimant's timely filing did not cease until she filed her application for review. Therefore, claimant filed the late application for review within the seven-day "reasonable time" period required under OAR 471-041-0070(2)(b), and the late application for review is allowed.

Discharge. 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 prove 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).

ORS 657.176(2)(h) requires a disqualification from unemployment insurance benefits if the individual has committed a disqualifying act as described in ORS 657.176(9) or (10). ORS 657.176(9)(a)(A) provides that an individual is considered to have committed a disqualifying act when the individual fails to comply with the terms and conditions of a reasonable written policy established by the employer or through collective bargaining, which may include blanket, random, periodic and probable cause testing, that governs the use, sale, possession or effects of drugs, cannabis or alcohol in the workplace.

The employer discharged claimant because she accepted an ID from a customer other than the customer purchasing alcohol. The customer buying the alcohol had tried to purchase it with an expired ID. The employer believed claimant's conduct to be a violation of their policy. The order under review analyzed the discharge under the Department's drug, alcohol, and cannabis adjudication policy, reasoning that claimant committed a disqualifying act by violating the employer's "reasonable written policy . . . that governs the use, sale, possession or effects of drugs, cannabis or alcohol in the workplace." Order No. 24-UI-257691 at 3. This was error, as the Department's drug, alcohol, and cannabis adjudication policy is not applicable to circumstances such as claimant's circumstances. Although ORS 657.176(9)(a)(A)

does mention policies governing the “sale” of alcohol in the workplace, the statute as a whole⁵ makes no mention of situations in which the potentially disqualifying act is a retail sale of alcohol. Instead, disqualifying acts under the statute and related administrative rules focus on matters such as testing for drugs, alcohol, or cannabis, intoxication in the workplace, and similar circumstances. In other words, neither the statute nor administrative rules contemplate circumstances in which it is an individual’s job to legally sell alcohol to customers. Therefore, it is more appropriate to analyze claimant’s discharge from work under ORS 657.176(2)(a) and OAR 471-030-0038, to determine whether claimant was discharged for misconduct.

The employer has not met their burden to prove that claimant’s conduct was a willful or wantonly negligent violation of their standards of behavior. Importantly, the employer’s policy, as offered into evidence, does not actually appear to prohibit a cashier from accepting an ID where there are two people at the register, and one person provides an ID, and the other person pays for the alcohol. The employer’s witness admitted as much at hearing, explaining that the policy was “about as clear as mud” on that point. Transcript at 30. Furthermore, claimant had engaged in similar practices on multiple occasions over several years, and the employer never raised a concern with her or notified her that she had been violating their policy. Likewise, claimant had completed transactions for Instacart shoppers using the shoppers’ IDs for alcohol purchases, even though the shoppers’ delivery customers would be the ones to ultimately receive the alcohol. Considering the ambiguity of the policy, and claimant’s having previously engaged in analogous practices without reprimand or repercussion, the employer has not shown, by a preponderance of the evidence, that claimant actually violated their policy regarding alcohol sales.

Even if claimant’s conduct did violate the employer’s policy it was, at worst, a good faith error. As noted above, claimant had regularly engaged in practices like the conduct for which she was discharged: essentially, accepting another person’s ID in lieu of the ID of the customer who sought to purchase alcohol. Because the employer never told her that she could not do this, and because the employer’s policy did not explicitly prohibit it, claimant had good reason to believe, even if she was mistaken, that her actions on March 9, 2024, were permitted under the employer’s policy.

Because claimant was discharged for conduct that was, at worst, a good faith error, claimant was discharged, but not for misconduct, and therefore is not disqualified from receiving unemployment insurance benefits based on the work separation.

DECISION: The application for review filed July 21, 2024, is allowed. Order No. 24-UI-257691 is set aside, as outlined above.

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

DATE of Service: September 3, 2024

⁵ The full requirements of the Department’s drug, alcohol, and cannabis adjudication policy can be found at ORS 657.176(9), (10), and (13), OAR 471-030-0125 (January 11, 2018), and OAR 471-030-0126 (January 11, 2018).

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.

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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 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.

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