

EMPLOYMENT APPEALS BOARD DECISION
2024-EAB-0631

Affirmed
No Disqualification

PROCEDURAL HISTORY: On May 24, 2024, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant was discharged for misconduct and was therefore disqualified from receiving unemployment insurance benefits effective April 14, 2024 (decision # L0004199553). Claimant filed a timely request for hearing. On August 20, 2024, ALJ Wardlow conducted a hearing, and on August 21, 2024, issued Order No. 24-UI-263302, reversing decision # L0004199553 by concluding that claimant was discharged, but not for misconduct, and was not disqualified from receiving benefits based on the work separation. On August 31, 2024, the employer filed an application for review with the Employment Appeals Board (EAB).

WRITTEN ARGUMENT: EAB did not consider the employer's written argument when reaching this decision because they did not include a statement declaring that they provided a copy of their argument to the opposing party or parties as required by OAR 471-041-0080(2)(a) (May 13, 2019).

FINDINGS OF FACT: (1) Bolo Corp. employed claimant as a bartender at their restaurant and bar from May 14, 2022, until April 13, 2024.

(2) The employer expected that their employees who received tips would deposit the tips in a central location to be accounted for and divided among all employees entitled to a share of them. Claimant understood this expectation. Claimant always deposited her tips according to this requirement, except for one or two occasions where the coworkers entitled to a share of the tips allowed her to keep a specific tip for a specific reason. Claimant would sometimes put tips in her pocket at the insistence of a customer giving the tip, before depositing the tip at the central location later, out of the customer's view.

(3) On March 24, 2024, the employer suspended claimant from work for two weeks for "multiple performance issues" which included "not showing up on time, not being in uniform, [and] badmouthing new employees." Transcript at 9-10.

(4) Prior to claimant's suspension, the employer noticed what they believed were "inconsistencies with tip amounts being shared with [claimant's] coworkers, based off of the sales. . . that were below average,

consistently below average during claimant's shifts." Transcript at 10. During the suspension, a regular customer who wished to remain anonymous reported to the employer that they had observed claimant pocketing tip money. Transcript at 10. Additionally, "a couple employees" told the employer that "when [they] worked with [claimant], [they] make less [in tips]." Transcript at 10. These circumstances led the employer to believe that claimant had been keeping tip money for herself rather than depositing it as required. The employer decided to discharge claimant for that reason.

(5) Once claimant's suspension was over the employer did not schedule claimant to work any hours. For approximately a week, claimant attempted to return to work but was not allowed to by the employer or given an explanation. On April 13, 2024, the employer told claimant that she was discharged for "violation of company policy." Transcript at 11.

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 employer discharged claimant because they believed she had been misappropriating tips. The employer reasonably expected that their employees would deposit tips in a central location and not keep them for themselves, and claimant understood this expectation. Claimant was serving a two-week suspension from work for other alleged violations of the employer's policies when the employer came to believe that claimant had been misappropriating tips and decided to discharge her for that reason. The discharge analysis focuses on the proximate cause of a discharge, which is the incident without which the discharge would not have occurred when it did. *Appeals Board Decision 09-AB-1767*, June 29, 2009. Therefore, the alleged misappropriation of tips, rather than the factors leading to her earlier suspension, is the focus of the discharge analysis.

The employer came to believe that claimant had misappropriated tips based on complaints from claimant's coworkers that they made less in tips when working with claimant than when she was not working, and a report from an anonymous regular customer that they witnessed claimant pocketing "some tips." Transcript at 8. The employer believed that their accounting data supported these reports, but the owner testified that he "didn't have exact dollar amounts" and "didn't pursue the ultimate details" regarding the amounts of sales and tips at issue. Transcript at 11.

In rebuttal, claimant denied keeping tips for herself except for "one or two" occasions when the coworkers entitled to a share of the tips insisted that she keep a particular tip for having done extra work toward earning it. Transcript at 16. The employer has not shown that these one or two occasions violated

their policy, as it can be inferred that the primary intent of the policy was to ensure that tips were distributed as the employees entitled to them collectively desired. Claimant further explained that customers would sometimes insist that she keep a tip for herself and, to humor them, she would temporarily put the money in her pocket in front of them before later depositing it as required. Transcript at 15-16. Claimant also disputed the employer's assertion that fewer tips were deposited during claimant's shifts than others, testifying that her coworkers told her, "[T]hey made a lot more money when they worked with me." Transcript at 17.

To the extent the hearsay accounts provided by the employer conflicted with claimant's first-hand account, claimant's account is entitled to greater weight, and the facts have been found accordingly. Evidence of whether the amount of deposited tips when claimant worked was greater or less than other shifts is no more than equally balanced, particularly in the absence of specific sales and tip figures in the record. Therefore, the employer has not met their burden of showing that a statistically significant variance in tips existed. Moreover, even if the employer had made such a showing, they did not demonstrate that any variance could not be explained by factors other than claimant misappropriating tips, such as decreased overall tipping or misappropriation by another employee. Further, claimant's testimony suggests that the anonymous customer may have seen claimant pocket tip money, but failed to see claimant later deposit the money as required. The employer has therefore not shown by a preponderance of the evidence that claimant misappropriated tips in violation of their policy. Accordingly, they have not met their burden of showing that claimant was discharged for misconduct.

For these 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-263302 is affirmed.

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

DATE of Service: September 24, 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.

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