EO: Intrastate
BYE: 22-Mar-2025

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

219
DS 005.00

EMPLOYMENT APPEALS BOARD DECISION
2024-EAB-0789

Affirmed
No Disqualification

PROCEDURAL HISTORY: On June 4, 2024, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant voluntarily left work without good cause and was disqualified from receiving unemployment insurance benefits effective March 17, 2024 (decision # L0004511404).[1] Claimant filed a timely request for hearing. On October 9, 2024, ALJ Monroe conducted a hearing, and on October 30, 2024, issued Order No. 24-UI-271447, reversing decision # L0004511404 by concluding that the employer discharged claimant, but not for misconduct, and claimant was not disqualified from receiving benefits based on the work separation. On November 11, 2024, the employer filed an application for review with the Employment Appeals Board (EAB).

WRITTEN ARGUMENT: EAB considered the employer's written argument in reaching this decision.

FINDINGS OF FACT: (1) Motel 6 Grants Pass employed claimant as a front desk clerk at their motel from August 31, 2022, until March 20, 2024. Claimant typically worked 2:00 p.m. to 10:00 p.m. shifts.

(2) On or shortly before March 16, 2024, two guests, a husband and wife, checked into the employer's motel while claimant was working. That evening, the guests had a loud argument, and claimant told them to keep their voices down.

(3) On March 16 or 17, 2024, someone posted a Google review of the motel that referenced claimant by name and made a comment to the effect of "the front desk girl . . . offered me sexual favors if I would pay cash for the room." Transcript at 13. The review was posted under a name that matched the name of the husband whom claimant had told to keep his voice down.

[1] Decision # L0004511404 stated that claimant was denied benefits from March 24, 2024, to March 22, 2025. However, as decision # L0004511404 stated that the work separation occurred on March 19, 2024, it should have stated that claimant was disqualified from receiving benefits beginning Sunday, March 17, 2024, and until she earned four times her weekly benefit amount. *See* ORS 657.176.

(4) On March 17, 2024, claimant reported for her shift and learned of the Google review. Claimant believed the review was left by the guest whom claimant had told to keep his voice down and whose name matched that of the poster. The disparaging comment made in the review was false, and it upset claimant. Claimant thought the employer should remove the guest and his wife from the motel. Claimant texted the general manager of the motel and requested that the guest and his wife be removed. The general manager replied that she would address the issue.

(5) During the day on March 18, 2024, the general manager investigated the matter. She coordinated with the employer's corporate office to work with Google to have the review taken down. On or about that day, Google took down the review. The general manager advised the corporate office that claimant wanted the guests to be removed from the motel. The corporate office told the general manager that before the guests could be removed, the manager needed to speak with the guest and "make sure that it was the same person" who had posted the review. Transcript at 32. The manager tried the guest's room, but the guest was gone all day and did not answer his phone when the manager called. The manager suspected that the guest was the person who posted the review, but the guest had already paid for a multiple day stay, and the manager felt she needed to "follow [her] corporate . . . decision of telling me how to handle him and how to get him off property." Transcript at 33.

(6) On March 18, 2024, claimant reported for her 2:00 p.m. to 10:00 p.m. shift and learned that the guests had not been removed from the property. After the general manager left for the day, claimant would be the only worker at the front desk and the general manager told claimant that "she was concerned about [claimant] having to deal with" the guests' removal. Transcript at 17. Claimant understood that the general manager did not want her to "have to interact with" the guests. Transcript at 18. At the time she left for the day, the general manager told claimant that she "did not lock out [the guests'] room" because she knew the guests would inevitably have to interact with claimant to get a new room key and the general manager did not "think [claimant and the guests] should be talking to each other." Transcript at 33.

(7) Claimant was upset that the employer had not removed the guests from the hotel and considered walking off the job. Claimant called her boyfriend and asked him to come to the motel to pick her up. Claimant then decided not to walk off the job. However, her boyfriend came to the motel the evening of March 18, 2024, and remained in his parked vehicle in the motel's parking lot.

(8) At about 9:00 p.m. on March 18, 2024, the guests returned to the motel. Claimant did not feel comfortable with the guests there, so she decided to make the guests leave the hotel.

(9) Without calling or texting the general manager first to ask for permission or give the manager warning, claimant re-keyed the guests' room. This caused the guest claimant suspected of having posted the disparaging review to go to the front desk where claimant was working. Claimant stated to the guest, "do you think that was fucking funny to put something . . . on the internet[?]" Transcript at 14. The guest denied posting the review. Claimant made a new key for the guest, and tossed it at him. Claimant refunded claimant's money for the remainder of his stay and told the guest he had 15 minutes to vacate the motel or she would call the police. The guest stated that he did not do anything wrong and did not have to leave and then departed for his room. He did not leave the motel.

(10) After a few minutes, claimant called the guest, again threatening to call the police if he did not leave. The guest then exited the room for a moment, but was approached by claimant's boyfriend, who had been waiting in his vehicle parked near the door of the guest's room. The boyfriend wanted to ask the guest why he posted the disparaging review and ask the guest to take it down. Upon being approached by the boyfriend, the guest turned around and ran back into the room. Shortly thereafter, claimant called the police complaining that the guest was trespassing. The police arrived at the motel and the guest informed them that claimant's boyfriend had approached him with a knife. The police asked claimant to review the motel's camera footage, which showed that the boyfriend had approached the guest, but not that he had a knife.

(11) After claimant's interaction with the guest unfolded and the police arrived, claimant texted the general manager and explained what had occurred. The manager told claimant to come in 15 minutes early for work the next day to discuss. Thereafter, claimant's shift ended and claimant departed the motel.

(12) On March 19, 2024, claimant reported to work early to meet with the general manager as agreed. In the meeting, the general manager advised that the employer was placing claimant on administrative leave while the employer investigated the March 18, 2024, incident between claimant and the guest.

(13) On March 20, 2024, the employer decided to terminate claimant's employment because of her interactions with the guest on March 18, 2024. On that date, the general manager formally keyed the termination of claimant's employment in the employer's records.

(14) On March 21, 2024, claimant decided to quit working for the employer because of the March 18, 2024, incident with the guest and because she was dissatisfied with not having received a pay raise the employer had promised to give her. On March 21, 2024, at 8:21 p.m., claimant sent the employer an email giving notice of her resignation effective on that date. When she sent the email, claimant was not aware that the employer had already terminated her employment.

(15) During her time working for the employer, claimant had not received any write-ups or other discipline and generally had a "very clean record." Transcript at 38.

CONCLUSIONS AND REASONS: The employer discharged claimant, but not for misconduct.

Nature of the Work Separation. If the employee could have continued to work for the same employer for an additional period of time, the work separation is a voluntary leaving. OAR 471-030-0038(2)(a) (September 22, 2020). If the employee is willing to continue to work for the same employer for an additional period of time but is not allowed to do so by the employer, the separation is a discharge. OAR 471-030-0038(2)(b). "Work" means "the continuing relationship between an employer and an employee." OAR 471-030-0038(1)(a).

The work separation was a discharge. The first act by either party evincing a desire to discontinue the employment relationship was the general manager's act of "put[ing] the termination in", which she initially testified happened on March 21, 2024, but then stated occurred on March 20, 2024. Transcript at 28-29. The general manager further testified that the employer's act of terminating claimant's employment occurred "the night before" claimant sent her resignation email on March 21, 2024, at 8:21

p.m. Transcript at 29. Therefore, the weight of the evidence favors the conclusion that as of March 20, 2024, the employer was no longer willing to allow claimant to work for an additional period of time. By tendering her resignation on March 21, 2024, claimant demonstrated that she was no longer willing to continue working for the employer. However, by that time, although claimant was not aware of it, the employer had already severed the employment relationship by terminating claimant's employment. Thus, the employer severed the employment relationship by "put[ing] the termination in", and that act occurred first in time to claimant's sending of a resignation email. For these reasons, the work separation was a discharge that occurred on March 20, 2024.

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). "'[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 are not misconduct. OAR 471-030-0038(3)(b). The following standards apply to determine whether an "isolated instance of poor judgment" occurred:

> (A) The act must be isolated. The exercise of poor judgment must be a single or infrequent occurrence rather than a repeated act or pattern of other willful or wantonly negligent behavior.
>
> (B) The act must involve judgment. A judgment is an evaluation resulting from discernment and comparison. Every conscious decision to take an action (to act or not to act) in the context of an employment relationship is a judgment for purposes of OAR 471-030-0038(3).
>
> (C) The act must involve poor judgment. A decision to willfully violate an employer's reasonable standard of behavior is poor judgment. A conscious decision to take action that results in a wantonly negligent violation of an employer's reasonable standard of behavior is poor judgment. A conscious decision not to comply with an unreasonable employer policy is not misconduct.
>
> (D) Acts that violate the law, acts that are tantamount to unlawful conduct, acts that create irreparable breaches of trust in the employment relationship or otherwise make a continued employment relationship impossible exceed mere poor judgment and do not fall within the exculpatory provisions of OAR 471-030-0038(3).

OAR 471-030-0038(1)(d).

The employer discharged claimant on March 20, 2024, because of her interactions with the guest on March 18, 2024. The record shows that by instigating the interactions with the guest she believed had posted the disparaging review and attempting to make him leave the motel, claimant violated the employer's expectations with wanton negligence.

At hearing, claimant testified that she "thought it was [her] right to . . . have the guests leave" referencing a workplace policy in which guests that are rude, violent, or in possession of drugs may be required to leave the motel. Transcript at 14. However, it is not evident that the guest claimant confronted on March 18, 2024, was ever verified to have been the person who posted the review. During the interaction with claimant, the guest denied posting the review and the general manager was never able to contact the guest and question him about the matter.

Moreover, claimant conceded at hearing that on March 18, 2024, the general manager "communicated to [claimant] that she was concerned about [claimant] having to deal with" removing the guests, and that she "didn't want [claimant] to have to interact with them[.]" Transcript at 17-18. Further, claimant stated that she "didn't consider" whether her interactions with the guest would violate the employer's expectations because she was "really upset" and "wasn't even thinking about it at that time." Transcript at 42-43. For her part, the general manager testified consistently that claimant had "ignored [her] direction not to come in contact with this guest[;]" that she "asked [claimant] not to have any contact with [the guest] because [she] knew that [claimant] was livid[;]" and that she "told [claimant] . . . I did not lock out his room because I don't think you guys should be talking to each other." Transcript at 30, 32, 33.

Considering the totality of the evidence, while claimant may have thought she was morally justified in attempting to unilaterally remove the guest she believed had disparaged her in the review, claimant should have known that confronting the guest would probably result in a violation of the employer's reasonable expectations. Claimant was conscious of her conduct in re-keying the guest's room, using foul language, tossing the key at him, insisting that he leave, and calling the police on him. Claimant was indifferent to the consequences of her actions, as the record shows that she "wasn't even thinking about" whether her interactions with the guest would violate the employer's expectations. Transcript at 43. Claimant was also indifferent to the consequences of her actions in that it was foreseeable that the involvement of her boyfriend could escalate the confrontation. Claimant described the boyfriend as present at the motel to give her a ride home in case she decided to resign that night but nevertheless conceded that the boyfriend approached the guest to "ask him why he did that and if he could take [the review] down." Transcript at 41. An interaction between one's romantic partner and a person blamed for posting a disparaging review could foreseeably have become hostile or violent, and claimant demonstrated indifference to the consequences of her actions by not telling her boyfriend to leave the motel once she decided she would not resign and would not need a ride home from him. For these reasons, claimant's conduct on the evening of March 18, 2024, violated the employer's expectations with wanton negligence.

Nevertheless, claimant's wantonly negligent conduct was not misconduct because it was an isolated instance of poor judgment. Claimant's violation of the employer's expectations was isolated as the record shows that, during her time working for the employer, claimant had not received any write-ups or other discipline and generally had a "very clean record." Transcript at 38. Claimant's conduct on March 18, 2024, did not amount to a repeated act or pattern of wantonly negligent behavior. Although

claimant's breach of the employer's expectations occurred via multiple acts such as re-keying the guest's door, using foul language, tossing a new key at him, insisting that he leave, and then calling the police on him, for purposes of OAR 471-030-0038(1)(d)(A), claimant's wantonly negligent conduct on March 18, 2024, constituted a single occurrence in the employment relationship. *See Perez v. Employment Dep't*, 164 Or. App. 356, 992 P.2d 460, 467 (1999) ("'[The] isolated instance of poor judgment' analysis focuses on whether the incident was 'a single occurrence in the employment relationship,' . . . and not whether the incident involved more than one component 'act' by the employee.") (quoting *Waters v. Employment Div.*, 125 Or. App. 61, 865 P.2d 368, 369 (1993)).

In *Waters*, the employer discharged the claimant after he left three angry messages on his supervisor's answering machine over the course of an evening. 865 P.2d at 369. EAB concluded that the conduct was not an isolated instance of poor judgment because the claimant's messages were "repeated" in nature. *Waters*, 865 P.2d at 369. The Court of Appeals reversed, holding that the multiple messages occurring over the course of one evening were a single occurrence in the employment relationship. *Waters*, 865 P.2d at 369. Just as the multiple answering machine messages constituted a single occurrence in *Waters*, in this case, claimant's component acts of re-keying the door, using foul language and the like, which occurred over the course of about 15 minutes, constituted a single occurrence in the employment relationship, rather than a repeated act or pattern of willful or wantonly negligent behavior.

Claimant engaged in poor judgment by confronting the guest, which amounted to a wantonly negligent violation of the employer's expectations. Claimant's conduct in confronting the guest, including the use of foul language and tossing of a key at him, while a wantonly negligent violation, did not violate the law or constitute unlawful conduct. While claimant ultimately called the police on the guest on the night of March 18, 2024, and the guest asserted that claimant's boyfriend had approached him with a knife, the employer's camera footage, which claimant showed to the police that night, confirmed that the boyfriend did not have a knife. Thus, nothing tantamount to unlawful conduct arose from the confrontation. Similarly, the record does not show that claimant's conduct created an irreparable breach of trust as it did not involve an act of dishonesty, cheating, or abuse of official position. Nor does the record show that claimant's conduct made a continued employment relationship impossible.

Accordingly, claimant's conduct on March 18, 2024, was an isolated instance of poor judgment and, therefore, not misconduct. 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-271447 is affirmed.

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

DATE of Service: <u>December 19, 2024</u>

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 stated above**. *See* ORS 657.282. For forms and information, visit https://www.courts.oregon.gov/courts/appellate/forms/Pages/appeal.aspx and choose the appropriate form under "File a Petition for Judicial Review." You may also contact the Court of

Appeals by telephone at (503) 986-5555, by fax at (503) 986-5560, or by mail at 1163 State Street, Salem, Oregon 97301.

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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.

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