EO: Intrastate
BYE: 06-Sep-2025

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

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DS 005.00

EMPLOYMENT APPEALS BOARD DECISION
2024-EAB-0810

Reversed & Remanded

PROCEDURAL HISTORY: On October 3, 2024, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that the employer discharged claimant for misconduct, disqualifying claimant from receiving benefits effective September 1, 2024 (decision # L0006383269).[1] Claimant filed a timely request for hearing. On October 30, 2024, ALJ Lucas conducted a hearing, and on November 1, 2024, issued Order No. 24-UI-271696, reversing decision # L0006383269 by concluding that claimant was discharged for an isolated instance of poor judgment, and not for misconduct, and therefore was not disqualified from receiving benefits based on the work separation. On November 18, 2024, the employer filed an application for review with the Employment Appeals Board (EAB).

WRITTEN ARGUMENT: The employer submitted written arguments on November 18, 2024, and November 22, 2024. EAB considered the employer's November 22, 2024, argument in reaching this decision. The employer did not declare that they provided a copy of their November 18, 2024, argument to the opposing party or parties as required by OAR 471-041-0080(2)(a) (May 13, 2019). The argument also contained information that was not part of the hearing record, and did not show that factors or circumstances beyond the employer's reasonable control prevented them from offering the information during the hearing as required by OAR 471-041-0090 (May 13, 2019). EAB therefore did not consider the employer's November 18, 2024, argument in reaching this decision. *See* ORS 657.275(2).

The parties may offer new information, such as the documentary information contained in their November 18, 2024, argument, into evidence at the remand hearing. At that time, it will be determined if the new information will be admitted into the record. The parties must follow the instructions on the notice of the remand hearing regarding documents they wish to have considered at the hearing. These instructions will direct the parties to provide copies of such documents to the ALJ and the other parties in advance of the hearing at their addresses as shown on the certificate of mailing for the notice of hearing.

[1] Decision # L0006383269 stated that claimant was denied benefits from September 1, 2024 to September 6, 2025. However, decision # L0006383269 should have stated that claimant was disqualified from receiving benefits beginning Sunday, September 1, 2024 and until he earned four times his weekly benefit amount. *See* ORS 657.176.

FINDINGS OF FACT: (1) Purlieu LLC employed claimant as a server in their restaurant from July 2021 until September 5, 2024. The employer was co-owned by a married couple.

(2) The employer expected employees in claimant's position to treat other employees and the employer's owners with respect. Claimant understood this expectation.

(3) In June 2022, one of the employer's owners seated a large party at a table claimant was serving without providing them with glasses of water. In response, claimant yelled at the owner, "[D]on't you ever fucking seat my table without water again." Transcript at 32-33. The owner took claimant to the back of the restaurant and told him to never talk to her like that again if he wanted to continue working there.

(4) The employer's owners perceived claimant as having a bad attitude and talking poorly about them. The owners drafted an "ethics code" that was to be binding on all employees but was meant specifically to address claimant's attitude. Transcript at 22. The employer scheduled a meeting for servers and other front of house staff for July 20, 2024, to discuss the ethics code and have employees sign it.

(5) Claimant missed the July 20, 2024, meeting and did not immediately sign the ethics code. On July 24, 2024, one of the employer's owners had a meeting with claimant and gave him a copy of the code, which claimant signed on July 30, 2024. Among other things, the code stated that workers were to adhere to high standards of business integrity, including treating fellow teammates with respect.

(6) During claimant's employment, the employer believed claimant would refuse to attempt to sell certain kind of drinks to customers that the employer wanted their staff to sell. The employer also believed that claimant refused to meet with one of the owners about wine glassware, possibly during the July 24, 2024, meeting in which claimant received a copy of the ethics code. The employer also believed that on an occasion in the summer of 2024, while the owners were out of town at the Oregon Country Fair, claimant spoke badly of the owners and complained that they should have been at the restaurant.

(7) On September 3, 2024, claimant and one of the owners had an argument via text about the amount of hours the employer had scheduled for claimant. In the text exchange, claimant stated to the owner, "This is infuriating. Please just fire me." And "How many people are you willing to lose before you stop doing this kind of shit[?]" Transcript at 9-10.

(8) On September 5, 2024, claimant had a meeting with the owner who was not involved in the exchange of text messages on September 3, 2024. In the meeting, the owner discharged claimant because of his September 3, 2024, text messages.

CONCLUSIONS AND REASONS: Order No. 24-UI-271696 is set aside, and this matter remanded for further proceedings consistent with this order.

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 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 order under review concluded that claimant's September 3, 2024, text messages were a wantonly negligent violation of the employer's expectations. Order No. 24-UI-271696 at 3. However, considering only the June 2022 prior incident in which claimant directed foul language at the owner regarding glasses of water, the order concluded that claimant's wantonly negligent violation was an isolated instance of poor judgment because the water glasses incident had occurred more than two years before the final incident. Order No. 24-UI-271696 at 3. The record as developed does not support the conclusion that claimant was discharged for an isolated instance of poor judgment, and not misconduct. The employer raised a number of other potential violations that may have occurred after the water glasses incident and before claimant's September 3, 2024, text messages. Remand is warranted to develop the record as to whether these incidents were willful or wantonly negligent violations of the employer's expectations such that the September 3, 2024, text messages may have been part of a pattern of other willful or wantonly negligent behavior, and not an isolated instance of poor judgment.

The employer discharged claimant because of his September 3, 2024, text messages. The employer's owner who was present in the September 5, 2024, meeting in which claimant was discharged testified that the "textual argument" was "the final issue," and that if the text message exchange had not occurred on September 3, 2024, claimant would not have been discharged. Transcript at 11, 12. Near the end of the hearing, the owner present in the discharge meeting again stated that claimant's text messages on September 3, 2024, were what caused a continuing employment relationship to no longer be possible, and that "the ton[e]" of claimant's "texts made [him] realize that there was no point where we were just going to agree and be a viable working relationship any longer." Transcript at 36. The record therefore shows that claimant's September 3, 2024, text messages were the proximate cause of the discharge, and therefore is the initial focus of the discharge analysis. *See e.g. Appeals Board Decision* 12-AB-0434, March 16, 2012 (discharge analysis focuses on proximate cause of the discharge, which is generally the last incident of misconduct before the discharge); *Appeals Board Decision* 09-AB-1767, June 29, 2009 (discharge analysis focuses on proximate cause of discharge, which is the incident without which the discharge would not have occurred when it did).

The September 3, 2024, text messages were a wantonly negligent violation of the employer's expectations. Claimant understood that the employer expected employees in claimant's position to treat other employees and the owners with respect. This expectation was reiterated on July 30, 2024, when claimant signed the ethics code stating that workers were to adhere to high standards of business integrity including treating fellow teammates with respect. Claimant consciously violated the employer's expectations and acted with indifference to the consequences of this actions when he texted one of the owners, "This is infuriating. Please just fire me," and, "How many people are you willing to lose before you stop doing this kind of shit[?]" Transcript at 9-10. Claimant therefore violated the employer's expectations with at least wanton negligence when he sent those text messages on September 3, 2024.

The analysis therefore turns to whether the September 3, 2024, violation was an isolated instance of poor judgment, which requires an evaluation of whether claimant's conduct prior to the September 3, 2024, text messages were willful or wantonly negligent violations of the employer's expectations. A number of such incidents were discussed at hearing. Some of these incidents were developed sufficiently to determine their bearing on whether claimant engaged in pattern of other willful or wantonly negligent behavior.

First, the employer alleged that claimant had missed a "mandatory front of house meeting" in July 2024, and that they did not know that claimant was not going to attend until he was absent from the meeting. Transcript at 12. However, the employer did not meet their burden to prove that claimant breached a known duty to attend the meeting. The employer stated that the expectation that claimant be present at the meeting was communicated in the work schedule, which was published four weeks before the meeting on an app the restaurant used. Transcript at 13. However, in his testimony, claimant stated that he was out of town at the time of the meeting, the employer "acknowledged" that he would not be present, and "[n]ot everyone attended the meetings . . . It was never a big deal either way." Transcript at 25. The employer's other co-owner further asserted that claimant had not told them he would be out of town for the meeting, which was held at noon, and that she had heard that claimant's flight did not leave until 5:00 p.m. that day. Transcript at 34. Nevertheless, in light of the conflicting testimony, the evidence is no more than equally balanced regarding whether claimant violated an expectation to attend the meeting.

However, the record evidence is sufficient to conclude that claimant violated the employer's expectations with at least wanton negligence regarding the June 2022 water glasses incident. At hearing, the owners testified with conviction regarding the details of the incident, including claimant's use of foul language and the owner's act of taking claimant to the back of the restaurant and advising him never to talk to her in that manner. Transcript at 19-20, 32-33. Claimant, in contrast, stated merely that he did not think he had said that and that he did not remember the water incident. Transcript at 27, 31. Given that the employer's account of the water incident is supported by the testimony of more than one witness, and their testimony is more detailed and persuasive, the weight of the evidence favors the employer's account.

Accordingly, claimant's conduct in yelling at the owner, "[D]on't you ever fucking seat my table without water again" violated the employer's expectation of respectful treatment of others with at least wanton negligence. Transcript at 32-33. As the order under review found, however, because this incident occurred more than two years before the September 3, 2024, final incident, it alone is insufficient to establish that the September 3, 2024, text messages were part of a pattern of other willful or wantonly negligent behavior, and not an isolated instance of poor judgment.

Remand is necessary to develop the record as to some additional potential violations that the ALJ did not sufficiently inquire about at hearing. If the employer meets their burden to prove these to be willful or wantonly negligent violations, they could, in combination with the June 2022 water glasses incident, be sufficient to deem the September 3, 2024, text messages as being part of a pattern of other willful or wantonly negligent behavior, and not an isolated instance of poor judgment

Specifically, at hearing, the employer testified that claimant would "not push[] . . . specific drinks for sale" that the employer wanted claimant to sell. Transcript at 19. They also alleged that claimant had "flat out refus[ed] to meet with" one of the owners "to talk about glassware for wine." Transcript at 19, 33-34. The employer alleged that the topic had been raised during a meeting, possibly the July 24, 2024, meeting in which claimant was given the ethics code, but that in the meeting, claimant stated that he did not need to know about the glassware and walked away. Transcript at 19. The employer also mentioned an occasion in the summer of 2024, in which the employer's owners were out of town at the Oregon Country Fair and the restaurant was busy while they were away. The employer alleged that staff members told the owners that while they were away, claimant had "talk[ed] badly" about them and complained that they should have been there. Transcript at 20.

On remand, the ALJ should make inquiries to determine whether claimant knew or should have known of a duty to sell the particular kind of drinks in question, and whether claimant was made aware of an expectation to meet with one the co-owners about wine glassware. If so, the ALJ should ask questions to determine whether claimant violated those expectations, and when any such violations occurred. The ALJ should also make inquiries to determine whether and how exactly claimant "talk[ed] badly" about the co-owners while they were away and whether such conduct was a violation of the employer's expectations. If the record on remand shows that one or more of these potential incidents were willful or wantonly negligent violations, the ALJ should assess whether, when considering them in combination with the June 2022 water glasses incident, the final incident in this case was an isolated instance of poor judgement, and not a repeated act or pattern of other willful or wantonly negligent behavior.

ORS 657.270 requires the ALJ to give all parties a reasonable opportunity for a fair hearing. That obligation necessarily requires the ALJ to ensure that the record developed at the hearing shows a full and fair inquiry into the facts necessary for consideration of all issues properly before the ALJ in a case. ORS 657.270(3); *see accord Dennis v. Employment Division,* 302 Or 160, 728 P2d 12 (1986). Because further development of the record is necessary for a determination of whether claimant was discharged for misconduct or an isolated instance of poor judgment, Order No. 24-UI-271696 is reversed, and this matter is remanded.

DECISION: Order No. 24-UI-271696 is set aside, and this matter remanded for further proceedings consistent with this order.

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

DATE of Service: December 26, 2024

NOTE: The failure of any party to appear at the hearing on remand will not reinstate Order No. 24-UI-271696 or return this matter to EAB. Only a timely application for review of the subsequent order will cause this matter to return to EAB.

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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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