EO: Intrastate
BYE: 20-Sep-2025

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

414
DS 005.00

EMPLOYMENT APPEALS BOARD DECISION
2025-EAB-0004

Reversed and Remanded

PROCEDURAL HISTORY: On October 29, 2024, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant was discharged by the employer, but not for misconduct, and was not disqualified from receiving benefits because of the work separation (decision # L0006879222). The employer filed a timely request for hearing. On December 17, 2024, ALJ Griffith conducted a hearing, and on December 24, 2024, issued Order No. 24-UI-277891, affirming decision # L0006879222. On December 30, 2024, the employer filed an application for review with the Employment Appeals Board (EAB).

EVIDENTIARY MATTER: Exhibits 1 and 2 were each received by EAB in four separate files. To facilitate citation of the exhibits by page number, EAB consolidated each exhibit into a single document. The files of Exhibit 1 were consolidated and marked as EAB Exhibit 1, and the files of Exhibit 2 were consolidated and marked as EAB Exhibit 2, and a copy of each EAB Exhibit is included with this decision.

WRITTEN ARGUMENT: The employer's arguments 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. Under ORS 657.275(2) and OAR 471-041-0090 (May 13, 2019), EAB considered only information received into evidence at the hearing when reaching this decision. EAB considered the employer's arguments to the extent they were based on the record.

The parties may offer new information such as that included with the employer's written arguments 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.

FINDINGS OF FACT: (1) Quantum Light West Annex, LLC employed claimant as a store manager from July 15, 2023, until September 25, 2024.

(2) The employer operated two stores, one in Salem, Oregon and one in Lincoln City, Oregon. The employer's owner and family lived in Salem and primarily managed that store. Claimant was hired to manage the Lincoln City store, and was permitted to live on-premises as part of her compensation.

(3) The employer expected that a store manager would treat others respectfully. Claimant understood this expectation. The employer also expected that a store manager would obtain approval from the owner to make business purchases with cash deposits. Claimant believed that pre-approval was not needed for necessary purchases as long as she submitted receipts for the purchases to the employer's bookkeeper. The employer also expected that claimant would not state or imply to others that she had an ownership interest in the business.[1]

(4) In early 2024, claimant and the owner's daughter, who at times assisted at the Lincoln City store, had some contentious encounters. This led the owner to speak with claimant about allegations that claimant was misusing or distributing a prescription drug and abusing alcohol. Claimant denied the allegations.

(5) On July 5, 2024, claimant had an angry outburst toward a subordinate employee who requested to leave work early due to illness, requiring claimant to cover for her. This outburst upset the employee. The owner witnessed part of the outburst and spoke to claimant about it.

(6) On approximately August 12, 2024, the employer discovered that a cash deposit of the store's funds that claimant was supposed to make was approximately $1,000 short of what was expected. Claimant explained that the money had been used for necessary business purchases, and on August 16, 2024, provided an itemized list of these purchases to the employer. In September 2024, claimant provided receipts for these purchases to the employer's bookkeeper.

(7) Also on or around August 12, 2024, the employer heard from "like a third" of the employees from both stores that they were devoting some of their time with a professional counselor to discussing "how to deal with [claimant]" due to the way claimant treated them. Transcript at 8.

(8) At some point, the employer heard from customers that claimant was representing herself as "the new owner" of the business, which upset the owner. Transcript at 39. Claimant did not believe that she misrepresented her role in the business.

(9) On September 3, 2024, the employer notified claimant that she would be discharged, effective September 30, 2024. The employer decided to issue the notice based on the cash deposit discrepancy, the report of claimant's mistreatment of others, and reports that claimant had been representing herself as an owner of the business.

(10) The employer believed that on or around September 22, 2024, they advised all employees, including claimant, not to purchase any more inventory, and that "a couple days" later, they discovered

[1] As discussed below, the record is unclear as to whether claimant knew or should have known the specifics of this expectation and, if so, when that occurred.

that claimant "ordered a bunch of inventory to be delivered[.]" EAB Exhibit 1 at 17. The employer did not allow claimant to continue working after September 23, 2024, for this reason. The employer continued to pay claimant through November 2, 2024.

CONCLUSIONS AND REASONS: Order No. 24-UI-277891 is set aside and the matter remanded for further proceedings.

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).

On September 3, 2024, the employer gave notice to claimant that she would be discharged on September 30, 2024. However, the employer did not allow claimant to work after September 23, 2024, and the

discharge therefore occurred on that date.[2] The discharge analysis focuses on the proximate cause of 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. Though the employer cited instances of alleged misconduct that occurred prior to August 2024, the employer allowed claimant to continue working following those incidents without discharging her, and they were therefore not the proximate cause of discharge.

The record shows that on or around August 12, 2024, the employer learned of a discrepancy in a cash deposit attributable to claimant, and received complaints from other employees about claimant's behavior, of which the employer had previously been unaware. In the absence of these developments, the employer would not have notified claimant of her impending discharge on September 3, 2024. Therefore, they were proximate cause of claimant's discharge. Additionally, the employer alleged that claimant ordered a significant amount of inventory after being told not to, which the employer discovered on or about September 23, 2024, and the employer therefore did not allow claimant to work after that date. This also constituted a proximate cause of discharge. Therefore, these causes are appropriately considered in the discharge analysis.

When notifying claimant of the impending discharge, the employer also told claimant that her leading customers to believe that she was an owner of the business was a reason for the discharge. Transcript at 23, 34. The record is ambiguous as to when claimant allegedly did this, and when the owner learned of it. On remand, inquiry should be made into whether this allegation was also a proximate cause of discharge or relevant to the "isolated instance of poor judgment" analysis. Such inquiry should include whether and, if so, when, the employer informed claimant that they expected her not to state or imply that she had an ownership in the business, and whether claimant thereafter violated that expectation willfully or with wanton negligence.

The order under review concluded, "The employer did not present any evidence that claimant ever consciously acted or failed to act in a way she knew or should have known would probably violate standards of behavior the employer has the right to expect of an employee." Order No. 24-UI-277891 at 5. The record as presently developed is insufficient to support this conclusion, and further development of the record on this issue is warranted.

The employer reasonably expected that a store manager would treat others respectfully, and claimant understood this expectation as one that every employer has the right to expect of their employees. The owner testified at hearing that, in August 2024, she learned that other employees of both stores utilized counseling services to, at least in part, "work[] on. . . how to deal with [claimant]." Transcript at 8. The owner had witnessed claimant's "attitude" toward another employee during a July 5, 2024, incident, and was aware of previous conflicts between the owner's daughter and claimant. Transcript at 7. The record suggests that in mid-July 2024, claimant was compelled to address the staff on this issue by admitting to them that she had an "anger management issue" following a "tantrum" in front of customers. EAB Exhibit 1 at 16. The owner testified that upon learning of the employees' feelings regarding claimant in August 2024 she felt she had to do something "if [claimant] was causing that kind of environment."

[2] If an 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). The record shows that claimant would have continued working for the employer after September 23, 2024 had she been allowed to do so.

Transcript at 8. In contrast, claimant denied having "outbursts with employees" except for a March 2024 incident with the owner's daughter and the July 5, 2024, incident. Transcript at 19-20.

The record as presently constituted does not show by a preponderance of the evidence that claimant violated the employer's expectation regarding respectful treatment of others on occasions that the employer first became aware of in mid-August 2024, and which were therefore a proximate cause of the employer's decision to discharge claimant. However, the owner testified that two witnesses, ready to testify at the hearing, "could probably talk in more detail [about claimant's outbursts and treatment toward other employees because]. . . they witnessed more than I did." Transcript at 8. The ALJ concluded the hearing without allowing the employer to call these witnesses. On remand, the parties should be allowed to offer evidence, including witness testimony, to support or rebut claimant's assertion that there were no other outbursts or instances of mistreatment of others. Further, if the record shows that such other instances occurred and constituted willful or wantonly negligent policy violations, additional inquiry should be made to determine whether they were part of the proximate cause of the discharge, or are relevant to an "isolated instance of poor judgment" analysis, if one is required.

The employer also expected that a store manager would not spend cash proceeds of the business without prior authorization. The owner was asked at hearing if she ever told claimant "that she needed verbal authorization immediately prior to making a purchase. . . no matter how small," and she answered affirmatively. Transcript at 35-36. In contrast, claimant testified that she would "reach out" to the owner early in her employment to seek approval before using cash to make purchases, but only for "larger amounts." Transcript at 29. Claimant further asserted that after losing the ability to use a debit card for such purchases, claimant had a "verbal" understanding with the owner that she could "use cash to buy supplies." Transcript at 23. Evidence of what claimant was told regarding the need to seek permission for all cash purchases is no more than equally balanced, and because the employer bears the burden of proof, claimant's account is entitled to greater weight. Therefore, the weight of the evidence shows that claimant's understanding of the employer's expectation was that she was allowed to make cash purchases without prior approval from the owner.

Claimant testified that the cash missing from the deposit was used on necessary business purchases for which she submitted receipts to the employer's bookkeeper in accordance with the employer's policies, as she understood them. Transcript at 22-23. In rebuttal, the owner testified that she searched for, but did not find, the products claimant asserted she had purchased, and that the owner did not verify with the bookkeeper whether any receipts had been received from claimant to support that she had made the purchases. Transcript at 10. As the employer bears the burden of proof, this evidence fails to establish that, more likely than not, claimant willfully or with wanton negligence violated the employer's policy regarding cash purchases, as claimant reasonably understood it.

Additionally, the employer asserted that on or around September 22, 2024, they notified claimant and other employees that they expected them not to order additional product for the stores. EAB Exhibit 1 at 17. The employer further alleged that they discovered that claimant had ordered approximately $800 in product "two days later" in violation of that expectation, and therefore did not allow her to work through the date of her previously planned discharge. Transcript at 35. As presently developed, the record suggests that claimant may have willfully or with wanton negligence violated this reasonable employer expectation, and that the violation was a proximate cause of her September 23, 2024, discharge.

However, the parties were not given a full opportunity to present evidence to support or rebut the employer's assertion, and further development of the record on this issue is therefore warranted.

Moreover, if the record on remand supports a finding that claimant willfully or with wanton negligence violated a reasonable employer expectation, and such violation was a proximate cause of claimant's discharge, additional inquiry should be made, as mentioned above, to determine whether such a violation constituted an isolated instance of poor judgment. Such inquiry should explore other alleged willful or wantonly negligent behavior, regardless of whether it was a proximate cause of claimant's discharge.

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, Order No. 24-UI-277891 is reversed, and this matter is remanded.

DECISION: Order No. 24-UI-277891 is set aside and the matter remanded for further proceedings.

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

DATE of Service: <u>February 4, 2025</u>

NOTE: The failure of any party to appear at the hearing on remand will not reinstate Order No. 24-UI-277891 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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