EO: Intrastate
BYE: 03-Jan-2026

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

813
DS 005.00

EMPLOYMENT APPEALS BOARD DECISION
2025-EAB-0255

Reversed
No Disqualification

PROCEDURAL HISTORY: On February 4, 2025, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant was discharged for misconduct and therefore was disqualified from receiving unemployment insurance benefits effective January 5, 2025, through January 3, 2026 (decision # L0009064925).[1] Claimant filed a timely request for hearing. On March 7, 2025, and continued to March 27, 2025, ALJ Nyberg conducted a hearing, and on April 18, 2025, issued Order No. 25-UI-290063, modifying decision # L0009064925 by concluding that claimant was discharged for misconduct and therefore disqualified from receiving benefits effective December 29, 2024, and until requalified under Department law.[2] On April 25, 2025, claimant filed an application for review with the Employment Appeals Board (EAB).

WRITTEN ARGUMENT: Claimant's argument contained information that was not part of the hearing record and did not show that factors or circumstances beyond claimant's reasonable control prevented her 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. EAB considered any parts of claimant's argument that were based on the hearing record.

FINDINGS OF FACT: (1) The 4M Group, LLC employed claimant until January 6, 2025. The employer operated a drive-through coffee shop, and claimant worked as the shop's manager.

(2) Prior to January 5, 2025, the employer had concerns about claimant's conduct on several different occasions. The last of these involved a Facebook post that claimant made on December 16, 2024, which was critical of law enforcement, and which the employer found to be offensive.

[1] Decision # L0009064925 stated that claimant was denied benefits from January 5, 2025, through January 3, 2026. However, decision # L0009064925 should have stated that claimant was disqualified from receiving benefits beginning Sunday, January 5, 2025, and until she earned four times her weekly benefit amount. *See* ORS 657.176.
[2] Although Order No. 25-UI-290063 stated it affirmed decision # L0009064925, it modified that decision by changing the effective date of disqualification. Order No. 25-UI-290063 at 3.

(3) On January 5, 2025, the employer held a holiday party at a restaurant. The employer did not require their employees to attend the party, and alcohol was served. Although the employer did not have written rules or policies covering employee conduct at the party, they broadly expected employees "to have respect for each other." March 7, 2025, Transcript at 11.

(4) Claimant arrived to the party late, as she had been "rushing to get from one city to another city" after attending her child's volleyball practice. March 27, 2025, Transcript at 6–7. Claimant was not intoxicated when she arrived.

(5) At one point during the party, claimant asked employees at the table to stand up and show off their outfits. Claimant did so "to make sure everybody felt good and showed off what they were wearing." March 7, 2025, Transcript at 26.

(6) At one point during the party, claimant asked to hold the nine-month-old baby of one of the employees who was present at the party. Claimant had previously held the same baby at a party about two months prior, and she had fallen asleep in claimant's arms on that occasion. Claimant did so because she wanted the employee and her spouse "to eat and… enjoy their meal." March 7, 2025, Transcript at 26. Claimant later rose and started to "play around and run a couple feet while the dad came and got the baby." March 7, 2025, Transcript at 26. The baby's parents did not express to claimant that she had made them uncomfortable, and claimant did not believe them to be uncomfortable with the situation.

(7) At one point during the party, claimant was speaking to an employee, "J," who was seated next to claimant. J was under 21 and therefore not legally permitted to consume alcohol. During the course of the conversation, claimant told J that she was "a beautiful person" and advised her to break up with her boyfriend because he had cheated on her. March 7, 2025, Transcript at 27. J's sister, who was sitting on J's other side, had advised J similarly. Around the time of that interaction, claimant pushed an alcoholic beverage near J "away… onto the table," but did not intend to push the beverage towards J or induce her to drink it. March 7, 2025, Transcript at 27.

(8) At one point during the party, claimant approached another employee, "S," and expressed to her that claimant was "grateful for the things that she does." March 7, 2025, Transcript at 27. Claimant then kissed her on the cheek and "booped" S's nose. March 7, 2025, Audio Record at 48:08. S did not tell claimant that she was uncomfortable with the interaction. Instead, she "cried and said the same thing to [claimant]." March 7, 2025, Transcript at 28.

(9) The employer came to believe that claimant had behaved at the party in ways that caused other employees to be uncomfortable or were otherwise inappropriate. On January 6, 2025, the employer discharged claimant because of claimant's conduct at the party the previous day.

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 on January 6, 2025, because they believed that claimant engaged in inappropriate conduct, some of which allegedly made other employees uncomfortable, at the employer's holiday party the previous day. As a preliminary matter, the order under review found that the employer discharged claimant because on December 16, 2024, claimant made a Facebook post which was critical of law enforcement, which the employer found to be offensive. Order No. 25-UI-290063 at 1–3. While this incident did occur, the record shows that this was not the proximate cause of the employer's decision to discharge claimant.

At hearing, the owner of the business testified to several instances in which claimant's conduct concerned her, other than the January 5, 2025 party. However, the employer also specifically testified that claimant's conduct at the January 5, 2025 party was the reason she discharged claimant, explaining "So based off of those situations [at the party] specifically I felt it was not the best presence for her to be with us anymore. And that is not including the multiple warnings before this situation has – before January 5th." March 7, 2025 Transcript at 8. Furthermore, the Facebook post, which was the most recent concern with claimant's conduct prior to the holiday party, occurred about three weeks before the party, but the employer did not discharge claimant at that time. Given the employer's testimony, the close proximity in time between the party and claimant's discharge, and the fact that the employer had not discharged claimant after the Facebook post a few weeks prior, the record shows that claimant's conduct at the party was the proximate cause of the employer's decision to discharge claimant. *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). This conduct is therefore the proper focus of the misconduct analysis, and it is not necessary to consider any of the employer's prior concerns with claimant's conduct unless the record shows that claimant's conduct during the party was misconduct. The record shows that it was not.

As to that conduct, the parties offered differing accounts of the varying concerns that the employer testified to. In particular, the employer testified that she believed that claimant was intoxicated when she arrived for the party; that claimant used sexually-explicit language when speaking to an employee who refused to stand up and show off her outfit;[3] that claimant made the baby she was holding uncomfortable, and that the baby's father had to run after claimant to retrieve the baby; that claimant "tried to pass her alcoholic beverage to" J, and made J uncomfortable by "hugging her neck and trying to drag her out to the parking lot" while J "was pressing off against her"; and that after expressing

[3] The employer testified that claimant had said to the employee, "So you can show your tits to everyone, but you can't stand up and show your ass for us." March 7, 2025, Transcript at 7.

gratitude towards S and kissing her on the cheek, claimant kissed her on the mouth, which made S uncomfortable. March 7, 2025, Transcript at 6–8.

While claimant acknowledged that some version of all of these incidents occurred, she rebutted the portions of each of the employer's allegations that suggested that claimant had offended other employees or otherwise violated the employer's expectations. In particular, claimant explained that she was not intoxicated when she arrived at the party; that she did not tell "anybody to show [claimant] their chest or their ass or anything like that"; that she got up from the table to "play around and run a couple feet while the dad came and got the baby," but did not believe that doing so had made anyone uncomfortable; that she did not try to give J alcohol, and, while she gave J a hug around the neck, "wasn't violent towards her at all"; and that while she did kiss S on the cheek, she did not kiss her on the mouth, and S reciprocated claimant's expression of gratitude. March 27, 2025, Transcript at 6–7; March 7, 2025, Transcript at 26–28.

Because neither of the parties offered evidence to corroborate their respective testimony, the evidence on the above points is equally balanced. Therefore, the employer has not met their burden to show that the incidents described occurred as the employer alleged. Thus, where the parties' testimony differed on these incidents, the facts have been found in accordance with claimant's version of events.

The record shows that the employer had no written policy regarding the behavior of employees at an optional off-site function like the January 5, 2025, party, and that their only expectation in that regard was for employees "to have respect for each other." The record does not show that the employer ever conveyed this expectation to claimant. Even assuming that claimant understood this expectation, however, the record does not show that claimant's conduct during the party violated it. In each incident, claimant acted in a manner that was apparently intended to be friendly, and her testimony shows that she was not aware of any offense taken by any of the other involved employees or their guests.

It is possible that some of the other attendees actually did take offense to, or were uncomfortable with, claimant's actions but did not tell claimant as much. Nevertheless, claimant's actions as described were not objectively disrespectful towards those attendees. Furthermore, because nobody told claimant that they were bothered by her actions at the time, claimant had no reason to know that she might have been behaving in a disrespectful manner. As such, the employer has not met their burden to show that claimant violated their expectation that she behave in a respectful manner towards other employees. Claimant therefore was discharged, but not for misconduct, and is not disqualified from receiving unemployment insurance benefits based on the work separation.

DECISION: Order No. 25-UI-290063 is set aside, as outlined above.

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

DATE of Service: <u>May 28, 2025</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.

NOTE: This decision reverses the ALJ's order denying claimant benefits. Please note that in most cases, payment of benefits owed will take about a week for the Department to complete.

Please help us improve our service by completing an online customer service survey. To complete the survey, please go to https://www.surveygizmo.com/s3/5552642/EAB-Customer-Service-Survey. If you are unable to complete the survey online and wish to have a paper copy of the survey, please contact our office.

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.

Employment Appeals Board - 875 Union Street NE | Salem, OR 97311
Phone: (503) 378-2077 | 1-800-734-6949 | Fax: (503) 378-2129 | TDD: 711
Email: *appealsboard@employ.oregon.gov*
Website: *www.Oregon.gov/employ/pages/employment-appeals-board.aspx*