EO: Intrastate
BYE: 25-Jan-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
2025-EAB-0294

Order No. 25-UI-290569 – Application for Review Dismissed as Non-Justiciable
Order No. 25-UI-290595 – Reversed - No Disqualification

PROCEDURAL HISTORY: On November 22, 2024, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that the employer reported discharging claimant for committing theft but that claimant had not admitted to or been convicted of theft and therefore claimant's benefit credits based on wages earned prior to the date of her discharge would not be canceled (decision # L0007395734). On November 27, 2024, the Department served notice of an administrative decision concluding that the employer discharged claimant, but not for misconduct, and claimant therefore was not disqualified from receiving unemployment insurance benefits based on the work separation (decision # L0007410756). The employer filed timely requests for hearing on decisions # L0007395734 and L0007410756.

On April 9, 2025, ALJ Frank convened a consolidated hearing but did not take evidence and granted the employer's motion to postpone. On April 23, 2025, ALJ Frank conducted a consolidated hearing, and on April 25, 2025, issued Order No. 25-UI-290569, affirming decision # L0007395734, and Order No. 25-UI-290595, reversing decision # L0007410756 by concluding that claimant was discharged for misconduct and therefore was disqualified from receiving benefits effective October 27, 2024. On May 12, 2025, claimant filed applications for review of Orders No. 25-UI-290569 and 25-UI-290595 with the Employment Appeals Board (EAB).

EAB combined its review of Orders No. 25-UI-290569 and 25-UI-290595 under OAR 471-041-0095 (October 29, 2006). For case-tracking purposes, this decision is being issued in duplicate (EAB Decisions 2025-EAB-0287 and 2025-EAB-0294).

WRITTEN ARGUMENT: Claimant submitted two written arguments on May 12, 2025, one at 10:15 a.m. and another at 11:41 a.m. EAB did not consider claimant's written argument from May 12, 2025, at 10:15 a.m. because she did not state that she provided a copy of the argument to the employer as required by OAR 471-041-0080(2)(a) (May 13, 2019).

Claimant's argument from May 12, 2025, at 11:41 a.m. 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 from May 12, 2025, at 11:41 a.m. that were based on the hearing record.

FINDINGS OF FACT: (1) Tides Rental Pool, Inc. employed claimant at their condominium rental operation, most recently as a head housekeeper, from December 2023 until October 29, 2024.

(2) The employer encouraged their guests to leave tips for the housekeepers who cleaned the rooms the guests had rented. As reminders to the guests to consider leaving a tip, the employer left courtesy envelopes in the rooms that could be used to hold tips. The individual housekeeper who cleaned the room after a guest left was entitled to any tip a guest left behind in the room. The employer expected housekeepers not assigned to the room in question to refrain from taking such tips. Claimant understood this expectation.

(3) In September 2024, the employer's managers began to hear complaints from housekeepers that they were not receiving tips as often as they expected. One of the managers decided to review room entry data. The employer used keypad locks in which each housekeeper and other employees had a unique entry code enabling them to enter a room, and room entry data specific to each housekeeper was maintained on a mobile app. In reviewing the room entry logs on the app, the manager noticed claimant would at times enter rooms not assigned to her, before the assigned housekeeper did so. The manager suspected claimant entered the rooms to take the assigned housekeeper's tips.

(4) In September 2024, the managers discussed the matter with claimant, asking her why she entered the rooms before the assigned housekeepers. Claimant responded that she did so to check that the guests had left the rooms, and to "strip" the rooms for the other housekeepers to streamline the cleaning process. Transcript at 12. The managers advised that they did not want her entering rooms going forward unless directed to do so. Claimant stated that she understood.

(5) On October 28, 2024, one of the managers talked with two housekeepers and learned one had received some tips but fewer than expected, and the other had not received any tips. The manager suspected claimant had taken tips intended for the housekeepers.

(6) That day, three rooms, rooms 126, 145, and 164, had guests who had checked out late meaning the rooms would not be cleaned by a housekeeper, and any tip left behind would not be discovered by the housekeeper, until the next day. On October 28, 2024, one of the managers went into each of the three rooms and saw that the departing guests had left tips in each of the rooms. The manager took pictures of each of the tips. The managers then assigned a particular housekeeper, "P," to clean rooms 126, 145, and 164 on October 29, 2024. P did not speak English and the managers communicated with her via a "talk-to-text" translation app. Transcript at 28.

(7) On October 29, 2024, at 11:06 a.m., one of the managers sent claimant a text stating, "I think the lady is running a few minutes late. Have you checked their assigned rooms? I believe everyone is gone." Transcript at 22. The purpose of the text was to prompt claimant to enter rooms 126, 145, and 164, before P, so that the manager could assess whether claimant would take the tips he knew were in the rooms.

(8) Claimant then entered room 145 at 11:08 a.m. and stayed for one minute. Exhibit 1 at 23. Claimant entered room 164 at 11:11 a.m. and stayed for one minute. Exhibit 1 at 24.

(9) For room 126, claimant did not enter the room right away. At 11:16 a.m., one of the managers went into the room with a glass technician to check a sliding glass door. Exhibit 1 at 17. The tip left in that room was contained in the courtesy envelope and placed on a counter. Upon entering the room with the technician, the manager called claimant to the room via two-way radio, and claimant joined the two in the room. The three then left the room at 11:22 a.m. Exhibit 1 at 17. The envelope holding the tip was on the counter when the three left.

(10) P entered room 164 at 11:22 a.m. and cleaned the room. She entered room 145 at 12:35 p.m. and cleaned the room. The tips that the manager had confirmed had been left in rooms 145 and 164 on October 28, 2024, were not present in the rooms when P cleaned them.

(11) Claimant returned to room 126 at 11:59 a.m. for one minute. During that time, claimant moved the envelope containing the tip for that room from the counter to the inside of a guest information book. P entered room 126 at 1:28 p.m. and cleaned the room but did not see the tip.

(12) One of the managers saw, via the room entry app, that claimant had entered room 126 at 11:59 a.m. He walked by the room and noticed, looking through the window, that the tip envelope was no longer on the counter. The manager, using the talk-to-text translation app, asked P if she had received tips from rooms 126, 145, or 164, and she replied, "[N]o tips at all today." Exhibit 1 at 17.

(13) The managers drew the conclusion that claimant had taken the tips from rooms 126, 145, and 164 and that terminating claimant's employment was necessary. In mid-afternoon on October 29, 2024, the managers held a meeting with claimant. One of the managers asked claimant where the tips for the rooms were, and claimant replied, "I don't know, I don't have it." Exhibit 1 at 19. Claimant showed the managers an empty compartment of her cellphone billfold and said, "I don't have any money." Exhibit 1 at 19. The manager asked claimant why she had entered room 126 at 11:59 a.m. Claimant responded, "out of sight, out of mind," meaning to convey that with contractors present on the property, like the glass technician who had been in the room, she had moved the tip out of sight so that it would not be taken by a contractor. Transcript at 24. The manager then "interjected" and claimant was unable to "get a word edgewise" to explain further. Transcript at 24. The manager asked where the tip for room 126 was, and claimant explained that she had placed it inside the guest information book in the room.

(14) The managers then stated that they were going to terminate claimant's employment because they believed she had taken the tips in rooms 145 and 164, and had hidden the tip in room 126 with the intent to "collect it the next day." Transcript at 17. The meeting concluded and, on October 29, 2024, the employer discharged claimant.

(15) After claimant left the property, one of the managers went with P to room 126 and discovered the envelope containing the tip in the guest information book. The manager also went with P to rooms 145 and 164 to look for the tips but did not find them.

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

Order No. 25-UI-290595 – 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) (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).

Order No. 25-UI-290595 concluded that a preponderance of the evidence showed that claimant had taken the tips from the rooms, and that claimant therefore was discharged for misconduct. Order No. 25-UI-290595 at 4. The record does not support this conclusion.

The employer discharged claimant because they believed she had taken the tips in rooms 145 and 164, and had hidden the tip in room 126 with the intent to "collect it the next day." Transcript at 17. The employer did not meet their burden to prove that claimant took the tips from rooms 145 and 164. The employer also did not meet their burden to prove that claimant hid the tip in room 126 with the intent to take it, rather than with the intent, as claimant asserted at hearing, to move the tip out of sight so that it would not be taken by a contractor. Transcript at 23-24.

First, although the employer suspected claimant of taking tips beginning in September 2024, and established an opportunity for claimant to take tips because room entry data showed that claimant sometimes entered rooms not assigned to her before the assigned housekeeper did, claimant provided an explanation for entering the rooms. Claimant explained, when asked about the practice in September 2024, that she entered the rooms before the assigned housekeepers to check that the guests had left the rooms, and to "strip" the rooms for the other housekeepers to streamline the cleaning process. Transcript at 12. This explanation is plausible, particularly given the fact that claimant was head housekeeper. Because there was a plausible explanation for claimant's conduct that had raised the employer's suspicions in September 2024, claimant's conduct during that timeframe is of limited value in considering whether she took the tips from rooms 145 and 164 on October 29, 2024.

Next, the employer proved that rooms 145 and 164 had contained tips intended for the assigned housekeeper on October 28, 2024, when the manager checked the rooms and took pictures of the tips. The employer also proved that claimant had, for the duration of one minute each, entered the two rooms before P, and that when P cleaned the rooms, there were no tips. However, claimant's conduct of entering those rooms was induced by the manager's text, which specifically asked claimant to check the rooms to see if the guests had departed. The one-minute duration of claimant's visits to each of those rooms, though consistent with the amount of time needed to take a tip, was equally consistent with the amount of time needed to check whether guests had left. Therefore, though claimant's visits to the rooms before P did present an opportunity to potentially take the tips, it is equally plausible that claimant's entry of those rooms before P was for the purpose of checking them as directed by the manager.

Claimant denied taking the tips from rooms 145 and 164, and purported to prove that she had not done so by displaying an empty compartment of her cellphone billfold. While that display is of limited weight, since it was possible for claimant to have taken the tips and stored them somewhere besides the compartment, claimant's denial and the fact that the employer directed her to check the rooms (meaning that it is plausible that she entered the rooms before P merely to check them as directed) are points that weigh against a conclusion that claimant took the tips. Claimant did not offer a persuasive explanation for why tips were not there when P cleaned the rooms.[1] However, the employer did not produce evidence at hearing that excluded the possibility that someone else had access to the rooms between when the manager took the photos of the tips on November 28, 2024, and when P cleaned the rooms on November 29, 2024.[2] The employer bears the burden to prove by a preponderance of the evidence that claimant took the tips. Because claimant denied taking the tips, and there is an innocent explanation for why she entered the room before P that is plausible, the employer did not meet their burden. Accordingly, the record does not show that claimant took the tips from rooms 145 and 164.

With respect to the tip in room 126, the employer similarly did not meet their burden to prove by a preponderance of the evidence that claimant hid the tip in room 126 with the intent to take it. The record shows that it is just as likely that claimant hid the tip in room 126 intending to move it out of sight so that it would not be taken by a contractor. At hearing, claimant testified that the managers "had contractors walking around on property, and it wasn't uncommon for me to move tips for the girls to get them out of the eyesight of anybody else who may or may not be entering the rooms." Transcript at 23. Claimant's testimony that contractors were present on the property is confirmed by the record evidence that a glass technician was in room 126, along with a manager and claimant, to check a sliding glass door from 11:16 to 11:22 a.m. that day. At hearing, the employer's witness, one of the managers, testified that contractors only enter rooms after checking in with management. Transcript at 26. Nevertheless, given that there had been a glass technician in room 126, and it was possible he might return to the room unaccompanied after checking in with management, it was plausible that claimant's purpose in returning to the room at 11:59 a.m. and moving the tip into the book was to move the tip out of sight so that it would not be taken by a contractor.

The employer's witness, one of the managers, asserted that claimant had not mentioned that she moved the tip to keep it out of sight from a contractor during her October 29, 2024, termination meeting. Transcript at 25-26. However, claimant testified that she had stated at that time, "[O]ut of sight, out of mind," meaning to convey the idea that she had moved the tip out of sight so that it would not be taken by a contractor, but could not explain further because one of the managers "interjected" and she was

[1] At hearing, claimant implied that it was possible that P had received tips from rooms 145 and 164, and misunderstood the manager when he asked her whether she had received tips, because P did not speak English and the manager communicated with her via the talk-to-text translation app. Transcript at 24-25. It is implausible that P misunderstood and erroneously stated she had not received tips when she actually had received them, however, because P and the manager later went to the rooms to look for the tips and they were not there. The acts of going together, looking for the tips, and not finding them would have disabused P of any misunderstanding, had there initially been one because of the talk-to-text translation app.

[2] The employer included room entry logs among their documentary evidence. Exhibit 1 at 23-25. However, review of the logs suggests that they are not a complete account of room entries as they lack, at minimum, evidence of when management accessed the rooms. Accordingly, the record supports claimant's assertion at hearing that the logs contain "incomplete and missing information" and therefore, though they have some evidentiary value, they do not rule out the possibility that someone else had access to rooms between when the manager took the photos of the tips on November 28, 2024, and when P cleaned the rooms on November 29, 2024. Transcript at 21.

unable to "get a word edgewise." Transcript at 24. The employer's witness asserted that claimant did not say during the meeting that claimant had "moved it to make it out of sight, out of mind." Transcript at 28. However, the disputed facts on these points are no more than equally balanced, and because the employer bears the burden of proof, the facts are found in accordance with claimant's account. Because claimant denied hiding the tip in room 126 with the intent to take it, and there is a plausible explanation that she moved it intending to keep it out of sight so that it would not be taken by a contractor, the employer did not meet their burden of proof. Accordingly, the record does not show that claimant hid the tip in room 126 with the intent to take it.

For these reasons, the employer did not prove by a preponderance of the evidence that they discharged claimant for a willful or wantonly negligent violation of their standards of behavior. As such, the employer discharged claimant, but not for misconduct. Claimant is not disqualified from receiving unemployment insurance benefits based on the work separation.

Order No. 25-UI-290569 – Cancellation of wages.

Order No. 25-UI-290569 affirmed decision # L0007395734. It therefore was in claimant's favor because the order concluded, as decision # L0007395734 had, that claimant's benefit credits based on wages earned prior to the date of her discharge were not subject to being cancelled. Order No. 25-UI-290569 at 4. Accordingly, claimant's application for review of Order No. 25-UI-290569 presents no justiciable controversy and is dismissed.

On May 12, 2025, claimant filed with EAB an application for review of Order No. 25-UI-290569. That order was fully favorable to claimant. Oregon courts follow the principle that a review on appeal may only be provided for justiciable controversies. *See, e.g., Gortmaker v. Seaton*, 252 Or. 440, 442, 450 P.2d 547 (1969). A justiciable controversy exists when the interests of the parties to the action conflict with each other, and the appeal will have some practical effect on the rights of the parties to the controversy. *Barcik v. Kubiacyk*, 321 Or 174, 895 P2d 765 (1995). To show a practical effect on their rights, an appellant must seek "substantive relief" through their appeal. *Krisor v. Henry*, 256 Or. App. 56, 300 P.3d 199 (Or. Ct. App. 2013).

Claimant did not assign error to any portion of Order No. 25-UI-290569, did not request reversal of any portion of the order, and alleged no facts entitling claimant to further relief in the matter. Because EAB's review of the matter could not provide substantive relief to claimant, such review would have no practical effect on claimant's rights. Accordingly, there is no justiciable controversy before EAB based upon claimant's application for review of Order No. 25-UI-290569. Because the case presents no justiciable controversy, the application for review of Order No. 25-UI-290569 is dismissed and Order No. 25-UI-290569 remains undisturbed.

DECISION: The application for review of Order No. 25-UI-290569, filed May 12, 2025, is dismissed. Order No. 25-UI-290569 remains undisturbed. Order No. 25-UI-290595 is set aside, as outlined above.

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

DATE of Service: <u>June 13, 2025</u>

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.

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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