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

EMPLOYMENT APPEALS BOARD DECISION
2015-EAB-1207-R

Request for Reconsideration Allowed
Appeal Board Decision 2015-EAB-1207 Adhered to on Reconsideration

PROCEDURAL HISTORY: On September 10, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 117924). Claimant filed a timely request for hearing. On September 24, 2015, ALJ Halpert conducted a hearing, and on September 25, 2015 issued Hearing Decision 15-UI-43918, affirming the Department's decision. On October 12, 2015, claimant filed an application for review with the Employment Appeals Board (EAB). On November 6, 2015, EAB issued Appeals Board Decision 2015-EAB-1207, reversing the ALJ's decision and concluding the employer discharged claimant but not for misconduct. On November 19, 2015, the employer filed a request for EAB to reconsider Appeals Board Decision 2015-EAB-1207.

CONCLUSIONS AND REASONS: The employer's request for reconsideration is allowed. Appeals Board Decision 2015-EAB-1207 is adhered to on reconsideration.

OAR 471-041-0145(1) (October 29, 2006) allows EAB to reconsider a prior decision to correct an error of material fact or law or to explain inconsistency with Employment Department rule, or officially stated Employment Department position or prior Employment Department practice. The employer sought reconsideration of Appeals Board Decision 2015-EAB-1207, contending that its result conflicted with the decisions of "two prior Unemployment Board fact finders," it incorrectly considered an ongoing federal investigation when reaching its decision and erred in concluding that the behavior for which the employer discharged claimant was properly excused from constituting misconduct as an isolated instance of poor judgment under OAR 471-030-0038(3)(b). Employer's Request for Reconsideration at 1, 2. Comparing Appeals Board Decision 2015-EAB-1207 against the hearing record and relevant law, we do not find that it contained material errors of fact or law, impermissibly conflicted with prior decisions of Department fact finders or improperly considered any matters.

While Appeals Board Decision 2015-EAB-1207 may conflict with aspects of prior determinations made Department fact-finders, this does not establish that EAB's decision was in error. Those fact-finders did

not hold a hearing, and did not have the benefit of a developed record on which to base their determinations, as EAB did in this matter. The purpose of the hearing in this case was to inquire fully into the facts underlying claimant's discharge, and to make a decision about whether claimant was or was not disqualified from benefits "on the basis of the evidence adduced at the hearing." OAR 471-040-0025(1) (August 1, 2004); *see also* ORS 657.275(2) (EAB performs de novo review of hearing record). Prior determinations by fact-finders who did not have a fully developed record are not of evidentiary weight in EAB's review of the record. Those determinations, even if they conflict with EAB's, do not undercut the correctness of EAB's decision.

The majority of the employer's request for reconsideration centered on EAB's finding that that claimant's admitted use of foul language in a conversation with the employer's dispatcher on July 9, 2015 was excused from constituting misconduct as an isolated instance of poor judgment. Although the employer contended that "as confirmed by the Appeals Board" claimant "has a [prior] history of such behavior and was warned" and his wantonly negligent use of foul language was "not an isolated instance of poor judgment but a consistent pattern," this misstates EAB's decision. Employer's Request for Reconsideration at 1. While Hearing Decision 2015-EAB-1207 found as fact that the employer had issued prior warnings to claimant, the decision also found that the employer did not by the evidence it presented meet its burden to establish that claimant's behavior underlying those warnings involved willful or wantonly negligent behavior. Appeals Board Decision 2015-EAB 1207 at 2, 4, 5; Transcript at 18, 24. 25, 37, 45, 52. Absent such evidence, as Appeals Board Decision 2105-EAB-1207 correctly found, the employer did not show that claimant's prior acts formed a pattern willful or wantonly negligent behavior sufficient to support a finding that claimant's behavior on July 9, 2015 was not isolated and was not excused from constituting misconduct as an isolated instance of poor judgment. In its reconsideration request, the employer also asserted that claimant "had no intention to work that day [July 10, 2015]," apparently to suggest that claimant's misbehavior was compounded. Employer's Request for Reconsideration at 2. However, claimant reported for work on July 10, 2015, and the employer did not discharge failing to attend work on July 10, 2015. Transcript at 28, 32. What claimant did not or did not plan to do when he spoke to the dispatcher is, at best, of only marginal relevance to this matter.

The employer also contended in its request for reconsideration that claimant's use of foul language to the dispatcher on July 9, 2015 was so egregious that it could not be excused as an isolated instance of poor judgment because claimant "humiliated his dispatcher in front of two other employees." Employer's Request for Reconsideration at 1, 2. However, as pointed out in Appeals Board Decision 2015-EAB-1207, there was no evidence in the record from which it could be inferred that claimant knew or should have known that he was speaking to the dispatcher on a speaker phone or that other employees might overhear what he said to the dispatcher. Appeals Board Decision 15-EAB-1207 at 4; Transcript at 9. Without some showing that claimant was aware or reasonably aware that his use of foul language would be overheard by others, EAB cannot conclude that the claimant intended to publicly humiliate the dispatcher or otherwise to make his comment known to anyone other than the dispatcher. Moreover, no evidence in the record suggests or tends to suggest that the dispatcher was, in fact, humiliated by the foul language, as the employer now contends.

On the facts as they exist in the record for this matter, claimant used foul language once when he spoke to the dispatcher on July 9, 2015. His use of foul language on that date was not preceded by any other incident that the employer demonstrated, with evidence and not mere assertions, in which claimant

engaged in insubordinate behavior, or behavior that willfully or wantonly violated the employer's standards. Since EAB is limited to the facts as proved in the record when in reaching its decisions, this record supports only a conclusion that on a single occasion, claimant used foul language in speaking with the dispatcher on July 9, 2015. Since this is the conclusion supported by the evidence in this record, claimant's statement was excused as an isolated instance of poor judgment for the reasons stated in Appeals Board Decision 2015-EAB-1207.

Finally, EAB did not improperly consider the ongoing investigations of the employer based on claimant's complaints about the employer's alleged FMLA or OSHA violations and its alleged violations of federal motor carrier violations. EAB made no comment on the legitimacy or the illegitimacy of the employer's actions that gave rise to those investigations. EAB only mentioned these authorities to give context to why claimant might have argued with the dispatcher and resisted the dispatcher's instructions on two prior occasions. EAB also noted that the employer did not rule out that claimant's failure to follow the instructions was due to his stated belief that the employer was violating these standards, and not due to insubordination. Appeals Board Decision 2015-EAB-1207 at 5; Transcript at 18, 24, 25, 37, 45. That claimant perceived his complaints were well-founded was corroborated by the fact that he complained to the employer's safety director about them at or about the time they occurred. Transcript at 24, 25. Even if the employer, in fact, was not in violation of either standard, claimant's good faith belief that a violation had occurred was sufficient to make his refusal to comply with the dispatcher's instructions not a willful or wantonly negligent disregard of the dispatcher's instructions. Regardless of the employer's contention, EAB did not "render any decision in connection to an ongoing federal investigation." Employer's Request for Reconsideration at 1-2.

EAB has reviewed Appeals Board Decision 2015-EAB0-1207 and again reviewed the entirety of the record. EAB finds no errors of fact or law in its decision. Appeals Board Decision 2014-EAB-1207 is adhered to on reconsideration.

DECISION: Reconsideration is allowed. Appeals Board Decision 2015-EAB-1207 is adhered to on reconsideration.

DATE of Service: December 29, 2015

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 listed above. *See* ORS 657.282. For forms and information, you may write to the Oregon Court of Appeals, Records Section, 1163 State Street, Salem, Oregon 97310 or visit the Court of Appeals website at courts.oregon.gov. Once on the website, use the 'search' function to search for 'petition for judicial review employment appeals board'. A link to the forms and information will be among the search results.

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