

EMPLOYMENT APPEALS BOARD DECISION
2018-EAB-1041

Affirmed
No Disqualification

PROCEDURAL HISTORY: On September 27, 2018, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant but not for misconduct (decision # 62841). The employer filed a timely request for hearing. On October 23, 2018, ALJ Frank conducted a hearing, and on October 31, 2018 issued Order No. 18-UI-119003, affirming the Department's decision. On November 5, 2018, the employer filed an application for review with the Employment Appeals Board (EAB).

EAB considered claimant's written argument when reaching this decision.

FINDINGS OF FACT: (1) Marion County employed claimant from August 2015 until August 10, 2018, last as a public health nurse program manager.

(2) The employer expected that all managers, including claimant, would comply with Marion County Administrative Policy 602 Non Discrimination. The policy required elected officials, department heads, supervisors and managers:

[To take] immediate action if they observe or became aware of any form of discrimination, harassment, retaliation or whistleblower retaliation. Immediate action includes intervening to stop the discrimination, harassment, retaliation, or whistleblower retaliation, filing an incident report with Human Resources, and contacting Human Resources for review and consultation.

Exhibit 1 at 5. Although claimant received an employee handbook that included Policy 602 and signed acknowledgments at hire and annually when she signed her job performance agreement stating that she would follow all employer policies, she had not read those policies. The acknowledgements referred claimant to the employer's intranet if she wanted to access the employer's policies. Despite having not read Administrative Policy 602, claimant generally understood that if a subordinate employee informed her of facts that indicated discrimination, harassment or retaliation had occurred in the workplace, the employer's human resources department should be notified.

(3) Sometime after late 2017, while at a conference in Atlanta, claimant received an email from a newly hired supervisor, WZ, informing claimant that, in her absence, WZ had needed to speak with a newly hired subordinate, JD, about what WZ thought was JD's distracting practice of "humming" in the workplace. Audio at ~45:12. JD identified as a gay man. Upon returning to the workplace, claimant met with JD to have a regularly scheduled "one-on-one" meeting, of the type claimant routinely had with subordinate employees. Audio at ~46:22. Among the topics discussed at the one-on-one was WZ's request that JD stop his workplace humming. JD told claimant that he told WZ that he had not been humming, to which WZ replied, "Oh good. I don't want show tunes in my department." Audio at ~29:50. JD did not appear to claimant to be upset about WZ's "show tunes" comment or mention or suggest that he thought or suspected that the comment about "show tunes" was a reference to his sexual orientation, or was biased, discriminatory, harassing or demeaning. Rather, JD "laughed off" WZ's comment about show tunes as an "off comment." Audio at ~46:01. It did not occur to claimant that WZ's "show tunes" comment was, or might have been an allusion to JD's sexual orientation.

(4) After the one-on-one in late 2017, claimant and JD had approximately five more regularly scheduled one-on-ones before June 22, 2018. At those meetings, JD increasingly complained to claimant that WZ was not a good manager. Although claimant perceived that JD was "upset" at WZ's management style, claimant did not infer from JD's complaints that WZ was discriminating against or harassing JD based on his sexual orientation or that JD thought or suspected that WZ was doing so. Audio at ~47:20. Claimant interpreted JD's complaints about WZ to be only that she was "generally a bad manager." Audio at ~47:42.

(5) On June 22, 2018, JD told claimant that he intended to file a complaint against WZ for "discrimination based upon sexual orientation" with human resources. Audio at ~15:21. This was the first time that JD mentioned "discrimination" in connection with WZ's treatment of him. JD did not tell claimant what he meant when he stated, "discrimination based on sexual orientation." Claimant did not know what she should do in this situation and took claimant to meet with another supervisor. Both claimant and the other supervisor told JD to go directly to the human resources department to file a complaint. Claimant did not inquire of JD about the basis for his complaint because she thought he would provide first-hand information about it to human resources and she would not be able to add any relevant information of her own. Claimant did not herself contact the human resources department about JD's stated intention to file a complaint because she had not inquired into the basis for the complaint and thought the human resources department would obtain all needed information from JD when he filed his complaint. In the complaint that he filed with human resources, JD recounted the "show tunes" comment made in late 2017 by WZ, stated that he thought the comment had been discriminatory and indicated that he had told claimant about the comment in late 2017. JD also stated that he had spoken with claimant about WZ on several occasions sometime after late 2017.

(6) After June 22, the employer investigated claimant's actions in connection with JD's complaint of discrimination based on sexual orientation filed with human resources. Claimant agreed that she had met several times with JD between late 2017 and June 22, 2018. Claimant stated that during those meetings, JD had told her he felt "picked on" by WZ. Audio at ~28:50. In the course of an interview with an employer representative, claimant also mentioned that another employee, CB, had told her that WZ had supposedly commented to CB that her menstrual cycle appeared to be affecting her behavior. It was later determined that WZ had not made that comment to CB.

(7) As a result of its investigation, the employer concluded claimant violated Administrative Policy 602 by failing to report JD's complaint of discrimination on the basis of sexual orientation to human resources or failing to follow up with human resources to ensure that JD had actually filed with human resources the complaint he had referred to on June 22, 2018. As a result, the employer discharged claimant on August 10, 2018.

CONCLUSIONS AND REASONS: The employer discharged claimant 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. OAR 471-030-0038(3)(a) (January 11, 2018) defines misconduct, in relevant part, as a willful or wantonly negligent violation of the standards of behavior which an employer has the right to expect of an employee, or an act or series of actions that amount to a willful or wantonly negligent disregard of an employer's interest. OAR 471-030-0038(1)(c) defines wanton negligence, in relevant part, as 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. Good faith errors are not misconduct. OAR 471-030-0038(3)(b). The employer carries the burden to show claimant's misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

At hearing, it was difficult to determine what alleged discrimination reports claimant failed to take appropriate action on. While the employer's documentary evidence referred to claimant's "failure to report potential discrimination and harassment several times over the course of two (2) months," none were specifically described in those documents. Exhibit 1 at 5. At hearing, the only specific incidents that the employer's witness alluded to as ones in which claimant failed to take appropriate action when allegedly told of potentially discriminatory behavior in the workplace were the "show tunes" comment made to JD and the "menstrual cycle" comment made to CB. Of those, the employer's witness referred to the "menstrual cycle" comment only in passing and as an apparent after-thought. Audio at ~30:39, ~31:18, ~37:27. It was not clear who supposedly made the "menstrual cycle" comment since while the employer's witness stated claimant allegedly told her that WZ made it, the witness stated at another point that an employee other than WZ had actually made it. Audio at ~31:18. Because the testimony about the "menstrual cycle" comment was abbreviated and confusing, while the preponderant focus of the testimony of the employer's witness was about claimant's alleged violation of Policy 602 by not reporting the "show tunes" comment that JD recounted to her, the misconduct analysis centers on the alleged comment made to JD.

With respect to the substance and number of times that JD discussed the “show tunes” comment with claimant, claimant’s testimony was based on first-hand information since she was a party to those conversations. The testimony of the employer’s witness about the same issues was based on hearsay, presumably from JD’s complaint and, possibly, from JD himself. According to well established evidentiary principles, claimant’s first-hand information is entitled to greater evidentiary weight than the employer’s hearsay information. In addition, while the employer’s witness testified that claimant stated to her in interviews that JD had made several “reports” to claimant, the witness never specifically stated what those “reports” were, whether they involved more information about the “show tunes” comment, whether JD ever supposedly told claimant at any time that he considered WZ’s comment about “show tunes” to have been discriminatory, or whether claimant was merely agreeing that in the regularly scheduled one-on-ones that JD “reported” that he disliked WZ and her management style in general without making any specific reference to the “show tunes” comment or any other allegedly discriminatory behavior by WZ. Audio at ~26:15. The testimony of the employer’s witness about her conversations with claimant was not sufficiently specific to undercut the persuasive force of claimant’s testimony as to the substance of her conversations with JD. Our findings of fact as to those conversations are based on claimant’s testimony.

It does not appear when JD initially told claimant about the “show tunes” comment, that he expressed to claimant that he considered or suspected it to constitute discrimination against him on the basis of his sexual orientation, or that he considered it demeaning to him. As well, that it did not occur to claimant that the comment WZ made about show tunes was a reference to JD’s sexual orientation was reasonable since the comment was facially neutral and there was no context from which to infer that it referred to JD’s sexual orientation. Since, by its terms, Administrative Policy 602 became applicable only when a supervisor became aware of a form of “discrimination,” based on these facts it does not appear to have establish a reporting duty on claimant’s part, at least until JD told claimant that he believed WZ had discriminated against him based on his sexual orientation or JD provided sufficient context from which discrimination might reasonably be inferred.

Assuming claimant was on notice as of June 22 that JD had a discrimination claimant against WZ based on JD having told claimant he was going to file a complaint against WZ with human resources, Administrative Policy 602 would be potentially applicable. However, while the employer’s witness testified that claimant was reasonably aware of the reporting requirements of Policy 602, the witness did not describe any specific trainings that the employer provided to claimant, and relied on the fact that claimant had received a handbook and had been referred to the employer’s intranet, from which claimant’s knowledge and her specific duties under Policy 602 were imputed. However, claimant’s contention that she did not know she needed to report to human resources a discrimination claim that a subordinate made to her if the subordinate was going to report it to human resources himself or herself was plausible, particularly since she thought it was the responsibility of human resources, and not her, to determine if the complaint was well-founded. Audio at ~17:32, ~19:56. The sincerity of claimant’s claim that she did not know what, if anything, she needed to do was supported by her consultation with the other supervisor about how to proceed in connection with JD’s statement on June 22 that he was going to file a complaint that day against WZ for discrimination based on sexual orientation. The employer did not dispute that claimant sought such advice from another supervisor, nor did the employer suggest that the other supervisor told claimant that, despite JD’s stated intent to file a complaint with human resources, Policy 602 still required claimant to make a report to and contact human resources about potential discrimination against JD. In light of her lack of knowledge, claimant made reasonable efforts to learn of and comply with the employer’s expectations by consulting with the other supervisor

as to her duties. On these facts, claimant's failure to report JD's complaint of discrimination to human resources was, at worst, a good faith error, good faith errors do not constitute misconduct. *See* OAR 471-030-0038(3)(b).

Although the employer discharged claimant, it did not show that the discharge was for unexcused misconduct. Claimant is not disqualified from receiving unemployment insurance benefits.

DECISION: Order No. 18-UI-119003 is affirmed.

D. P. Hettle and S. Alba;
J. S. Cromwell, not participating.

DATE of Service: December 12, 2018

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.

Please help us improve our service by completing an online customer service survey. To complete the survey, please go to <https://www.surveymonkey.com/s/5WQXNJH>. 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。

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 desisyong ito.

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 Asuntos Laborales. Si no está de acuerdo con esta decisión, puede presentar una Petición 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 ໄດ້ໂດຍປະຕິບັດຕາມຄໍາແນະນຳທີ່ບອກໄວ້ຢູ່ຕອນທ້າຍຂອງຄໍາຕັດສິນນີ້.

Arabic

هذا القرار قد يؤثر على منحة البطالة الخاصة بك، إذا لم تفهم هذا القرار، إتصل بمجلس منازعات العمل فوراً، و إذا كنت لا توافق على هذا القرار، يمكنك رفع شكوى للمراجعة القانونية محكمة الاستئناف 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 دستور العمل 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
www.Oregon.gov/Employ/eab

The Oregon Employment Department is an equal opportunity employer/program. Auxiliary aids and services are available upon request to individuals with disabilities. Language assistance is available to persons with limited English proficiency at no cost.

El Departamento de Empleo de Oregon es un programa que respeta la igualdad de oportunidades. Disponemos de servicios o ayudas auxiliares, formatos alternos y asistencia de idiomas para personas con discapacidades o conocimiento limitado del inglés, a pedido y sin costo.