

EMPLOYMENT APPEALS BOARD DECISION
2018-EAB-1062

Affirmed
No Disqualification

PROCEDURAL HISTORY: On September 19, 2018, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 74113). Claimant filed a timely request for hearing. On October 31, 2018, ALJ Murdock conducted a hearing, and on November 7, 2018 issued Order No. 18-UI-119345, reversing the Department's decision. On November 13, 2018, the employer filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Thabet Management Inc. employed claimant from April 6, 2016 until August 1, 2018, last as assistant manager at a combined store and fuel station operation.

(2) The employer expected claimant not to yell at employees he managed or to behave in ways that created a hostile work environment. Claimant understood the employer's expectations as a matter of common sense and as he reasonably interpreted them.

(3) On the days immediately before July 28, 2018, many employees who were scheduled for work unexpectedly did not show up and claimant was required to contact other employees to cover on short notice. Claimant sometimes had to provide the coverage himself. Claimant experienced stress on those days.

(4) On July 28, 2018, the store was again short staffed. That day, an employee who was not adequately trained was assigned to operate the cash register. When claimant arrived at work, the employee informed him she thought her till was going to be short by almost \$100. The employee's shift was going to end approximately 20 minutes after claimant's arrival, and claimant told the employee to log out so that he could count the till. The employee resisted logging out, stating that she did not want to clock out because she still had scheduled time left to work. Claimant tried to tell the employee that he was not asking her to clock out, but only log out of the computer, and that she could work for the remainder of the shift as a fuel attendant. The employee still resisted turning over the till to claimant and became upset. Claimant became irritated and frustrated, and left the cash register area for the employee break room. As he walked toward the break room, claimant muttered in a low voice under his breath, "Fucking great" and "You're fucking kidding me." Transcript at 32. Claimant's comments were a general expression of

exasperation and not directed at the employee. No customers were present when claimant made the muttered comments. However, the employee operating the cash register overheard the muttered comments.

(5) Sometime after claimant made the comments on July 28, 2018, the employee who had been operating the cash register reported the comments to the employer's management. The regional manager reviewed surveillance audios of the July 28, 2018 interaction between claimant and the employee.

(6) On August 1, 2018, the employer discharged claimant for allegedly creating a hostile work environment by his behavior on July 28, 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. 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).

Although the employer's witness testified at hearing about an incident on June 16, 2018 allegedly involving claimant yelling at an employee and behaving with hostility in addition to the incident occurring on July 28, the employer did not discharge claimant for the June 16 incident. EAB customarily confines its misconduct analysis to the final incident of a claimant's alleged violation of the employer's standards most immediately preceding the discharge. EAB does so for the reason that if the employer knew of a prior incident and did not discharge claimant at the time it occurred, it presumably did not consider that incident sufficiently serious to merit discharge. The proximate cause of claimant's discharge was the incident on July 28 and it is the proper focus of the misconduct analysis.

With respect to the incident on July 28, the employer's witness testified that claimant angrily yelled foul language at the employee who was operating the cash register and did so in front of customers. Transcript at 6-8. However, the testifying witness was not present during the incident and relied on the statements of others. Claimant disputed the accuracy of the witness's account of the July 28 incident and testified that, while he muttered some foul language under his breath, the comments were not directed at the employee or intended to have been overheard by her. Transcript at 29-34. Claimant denied that customers were present during the incident and denied having yelled. Transcript at 32, 37. No testimony about the July 28 incident was presented at hearing other than that of claimant and the employer's witness, and there was no reason to doubt the accuracy of either's testimony. Applying well-established evidentiary principles under these circumstances, claimant's first-hand evidence is entitled to greater weight than the employer's hearsay. Resolving the conflicts in the evidence in claimant's favor, the employer did not meet its burden to show that claimant shouted foul language at the employee in front of customers or was reasonably aware that muttering foul language under his breath while he walked away from the employee would constitute creating a hostile work environment. The employer did not show that claimant engaged in misconduct by his behavior on July 28.

Although the employer discharged claimant, it did not do so for misconduct. Claimant is not disqualified from receiving unemployment insurance benefits.

DECISION: Order No. 18-UI-119345 is affirmed.

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

DATE of Service: December 18, 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.

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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

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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.

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