

EMPLOYMENT APPEALS BOARD DECISION
2019-EAB-0042

Reversed
No Disqualification

PROCEDURAL HISTORY: On October 15, 2018, the Oregon Employment Department (the Department) served two notices of two administrative decisions, one concluding that the employer discharged claimant for misconduct (decision # 72411) and the other concluding that the employer suspended claimant for misconduct (decision # 75109). Claimant filed a timely request for hearing. On December 18, 2018, ALJ M. Davis conducted a consolidated hearing, and on December 21, 2018 issued Order No. 18-UI-121708, affirming decision # 72411, and Order No. 18-UI-121712, affirming decision # 75109. On December 26, 2018, claimant filed written objections to the ALJ's evidentiary rulings. On January 2, 2019, the ALJ overruled claimant's objections. On January 10, 2019, claimant filed an application for review with the Employment Appeals Board (EAB).

Pursuant to OAR 471-041-0095 (October 29, 2006), EAB consolidated its review of Order Nos. 18-UI-121708 and 18-UI-121712. For case-tracking purposes, this decision is being issued in duplicate (EAB Decisions 2019-EAB-0042 and 2019-EAB-0043).

EAB considered claimant's written arguments to the extent they were based upon the hearing record. Claimant's ongoing objections to the ALJ's evidentiary rulings are noted. However, given that the evidence was necessary to complete the record and the outcome of these cases is in claimant's favor we decline to address the rulings further at this time.

FINDINGS OF FACT: (1) Smith Frozen Foods, Inc. employed claimant as a quality assurance technician from May 6, 2016 to August 16, 2018.

(2) The employer had a policy that prohibited employees from being disrespectful and threatening towards coworkers or individuals with authority over them. Claimant knew or should have known about that policy.

(3) The employer had concerns that claimant had been engaging in erratic and paranoid behavior at work. Claimant's coworkers were concerned about what appeared to be abrupt changes in his mood.

(4) On July 7, 2018, claimant's supervisor gave him a work assignment. Claimant disagreed with the assignment and felt that the supervisor's supervisor had ordered the assignment be given to him as a form of harassment. Claimant voiced his objection and his belief that the supervisor knew he should not have been given that assignment. The supervisor ignored much of what claimant said and confirmed that she would not change claimant's assignment that day. He left the area then returned "all worked up," and told the supervisor that harassment was against the law, and that in the military when someone had a problem with him "they would get in his face and you should do that rather than play these meaningless games." See Exhibit 2, "super's end of shift briefing for the night."

(5) The supervisor did not think that claimant should talk to a supervisor or anybody the way he had, and reported claimant's conduct. On July 26, 2018, the employer issued a personnel action to suspend claimant from one day of work for "acting in an intimidating and confrontational manner" toward the supervisor on July 7, 2018. Exhibit 1, "Personnel Action Form."

(6) On August 3, 2018, claimant served the one-day suspension. On August 4, 2018, claimant returned to work. That day claimant encountered two employees. Claimant was initially "kind" and "joking" when he interacted with them, but his mood changed suddenly and he appeared mad about the employer's company. Exhibit 2, statements dated August 8, 2018 and August 14, 2018.

(7) Claimant's coworkers reported claimant to the employer. On August 16, 2018, claimant was called into an investigatory meeting but was not cooperative with the employer, and the employer discharged him because of his August 4th behavior.

CONCLUSIONS AND REASONS: We disagree with the ALJ and conclude that claimant's suspension and discharge were not for misconduct.

ORS 657.176(2)(a) requires a disqualification from unemployment insurance benefits if the employer discharged or suspended 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.

The employer suspended and discharged claimant for violating its policy prohibiting employees from being disrespectful and threatening towards coworkers or individuals with authority over them. Transcript at 7-8. Claimant knew or should have known about that policy, or at least the expectation underlying it, as a matter of common sense.

The ALJ concluded in Orders No. 18-UI-121708 and 18-UI-121712 that claimant's suspension and discharge were for misconduct. With respect to the suspension, the ALJ found that although claimant denied raising his voice on July 7th, he admitted saying the employer was harassing him and that harassment was illegal, and the ALJ found the employer's allegation that claimant also "raised his voice and was confrontational" "persuasive." Order No. 18-UI-121712 at 3. With respect to the discharge, the ALJ reasoned that claimant appeared angry and used profanity toward two coworkers when informing

them that he was going to sue the employer for being “liars,” and although claimant denied using profanity he “had just served a one-day suspension a week prior and should have understood that this conduct would not be acceptable to the employer.” Order No. 18-UI-121708 at 4. We disagree.

With respect to the suspension, the employer’s evidence about claimant’s July 7th conduct does not establish that he more likely than not was threatening or disrespectful. The employer’s primary witness at the hearing alleged that claimant “tried to grab a [] clipboard out of her hand [] and yelled at” the supervisor during that incident. Transcript at 9. The supervisor’s statement about the incident did not describe that either of those things happened, nor did it characterize claimant’s behavior as threatening or disrespectful or identify what it was about claimant’s behavior or words that was either disrespectful or threatening towards her. *See* Exhibit 2, “super’s end of shift briefing for night.”

The remainder of the employer’s evidence about claimant’s July 7th conduct does not substantiate the allegation that claimant was disrespectful or threatening toward the supervisor. Some employees said claimant appeared “upset” or had a “fit,” and others described feeling generally uncomfortable with claimant because of his mood swings. *See generally* Exhibit 2. While most of the statements generally described claimant making the same statements while appearing upset, most did not describe claimant as having yelled; in fact, some statements described the way claimant “talked” and what he “said.” *See* Exhibit 2, undated statement; Exhibit 2, July 7, 2018 statement; Exhibit 2, July 11, 2018 statement. The two statements that did describe claimant as having yelled were either vague as to what happened and on what date, or alleged he said things that the other employees omitted from their statements, like repeatedly yelling “do you have a beef with me” and “rant[ing]” at the supervisor. *See e.g.* Exhibit 2, July 18, 2018 statement; Exhibit 2, July 20, 2018 statement.

The employer’s evidence therefore did not establish that it is more likely than not that claimant yelled at the supervisor on July 7th. Nor did any statement establish that claimant grabbed someone’s clipboard. Although it appears more likely than not that claimant objected to his work assignment, alleged the supervisor’s supervisor was harassing claimant, and stated that harassment is illegal, there is nothing about those statements that is innately confrontational, and the employer’s evidence did not establish the likelihood that claimant spoke the words in a confrontational manner. On this record, the evidence does not show that it is more likely than not that claimant was disrespectful to the supervisor or that he threatened her on July 7th in violation of the employer’s policy. Claimant’s suspension therefore was not for misconduct.

With respect to the discharge, the employer again alleged that claimant violated its policy by being disrespectful and threatening, this time on August 4th toward two coworkers. The employer’s witness testified that claimant “confronted two co-workers,” one of whom was a minor, and “spoke to them [] using profanity.” Transcript at 11. The employer’s evidence again does not substantiate the allegation. The two individuals involved in that incident thought claimant’s behavior was “kind” or “jokeful” until he “suddenly” or “out of nowhere” underwent a brief mood change. *See* Exhibit 2, August 8, 2018 and August 14, 2018 statements. One witness said claimant said “he was going to sue the fuchn [*sic*] company for being liars,” and the other said “he start cussing to us saying quote I’m so ~~##~~ fucking tired of this plant full of stupid liars thank goodness I’m off tomorrow.” *Id.* (double strikethrough in original August 8, 2018 statement). Both said that claimant then walked away “like nothing happened.” *Id.*

It does not appear based upon either witness’s description that claimant “confronted” the coworkers; rather, he was talking to them in a kind and “jokeful” way. They both described that he said one

sentence that they considered neither “kind” nor “jokeful,” as though he had a sudden mood change, then immediately resumed being “kind” again. Both witnesses were disturbed by claimant’s apparent mood swing, but neither characterized claimant’s actual behavior as disrespectful or threatening.

Although an individual’s use of foul language might, in some contexts, be innately disrespectful or threatening, it does not appear that it was in this case. First, assuming claimant used profanity, neither witness reported that claimant directed the profanity at them, engaged in name-calling, or made a threat against them. His use of profanity therefore was not threatening. Second, on this record neither witness complained that claimant’s alleged use of profanity was personally offensive such that it was disrespectful. Both appeared more concerned with claimant’s erratic mood than his use of any foul language, and one of the statements even indicated that after claimant’s mood shift the two witnesses were “saying what the hell” to each other, suggesting that claimant’s alleged use of foul language was not, in and of itself, offensive.

Finally, the record is not clear that claimant actually used foul language. One witness said claimant used the term “fuchn,” which might or might be a variation of the word “fuck,” but the written statement does not conclusively establish that claimant used foul language. The other witness ultimately alleged claimant did say “fucking,” but in her statement she began to write “quote I’m so fr . . .” before she crossed the “fr” out and wrote “fucking.” Claimant admitted at the hearing that he said “freaking” to the two coworkers on August 4th. *See* Transcript at 20. The written statement in which one of those coworkers began to write that claimant had said “fr . . .” as though writing “freaking” before crossing it out suggests the possibility that she was not certain what claimant said and thought he might have said freaking. The employer did not call that individual as a witness during the hearing, and we decline to conclude on the basis of an inconclusive hearsay statement that claimant did, in fact, use foul language on August 4th. The record does not show that it is more likely than not that claimant violated the employer’s policy prohibiting disrespectful behavior because he used foul language.

Although the preponderance of the evidence shows that the employer and claimant’s coworkers shared concern that claimant was engaging in erratic behavior and had sudden mood shifts at work, the record does not show that he consciously engaged in disrespectful or threatening behavior as alleged. In the absence of evidence that claimant did so, his suspension and discharge were not for misconduct. Claimant is not disqualified from receiving unemployment insurance benefits because of his suspension and discharge.

DECISION: Order Nos. 18-UI-121708 and 18-UI-121712 are set aside, as outlined above.

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

DATE of Service: February 8, 2019

NOTE: This decision reverses an order that denied benefits. Please note that payment of any benefits owed may take from several days to two weeks 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 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 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 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 ໄດ້ ໂດຍປະຕິບັດຕາມຄໍາແນະນໍາທີ່ບອກໄວ້ຢູ່ຕອນທ້າຍຂອງຄໍາຕັດສິນນີ້.

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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