EO: 200
BYE: 201943

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

275
DS 005.00

EMPLOYMENT APPEALS BOARD DECISION
2019-EAB-0052

Reversed
No Disqualification

PROCEDURAL HISTORY: On November 19, 2018, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant, but not for misconduct (decision # 153621). The employer filed a timely request for hearing. On December 31, 2018, ALJ Snyder conducted a hearing, and on January 9, 2019 issued Order No. 19-UI-122335, concluding claimant's discharge was for misconduct. On January 14, 2019, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant's argument contained information that was not part of the hearing record, and failed to show that factors or circumstances beyond claimant's reasonable control prevented claimant from offering the information during the hearing. Under ORS 657.275(2) and OAR 471-041-0090 (October 29, 2006), we considered only information received into evidence at the hearing when reaching this decision, and considered claimant's argument only to the extent it was based upon such evidence.

FINDINGS OF FACT: (1) Lowe's Home Centers, Inc. employed claimant from May 2013 to October 19, 2018, last as a customer service representative in the pro services department.

(2) The employer expected claimant to, among other things, efficiently multi-task to meet customer needs, operate with a sense of urgency to serve customers expediently and efficiently, and to greet and handle incoming customers and triage them appropriately. On January 10, 2018, the employer gave claimant a final written warning that required him to improve his performance and behavior to meet expected service levels. On August 19, 2018, the employer held a pro services desk group meeting to lay out a plan of action for claimant to be able to meet those and other of the employer's expectations, and establish that claimant knew what he needed to do to meet them.

(3) On September 22, 2018, claimant was handling a pro services customer's order. The order was large and complicated, and the customer kept adding items to the order. Claimant thought he handled the customer in a "calm and collect" way. Transcript at 17. Claimant had repeatedly worked with the

customer over a three-year period and thought he had established a friendly rapport with the customer, and at one point asked if the customer was on drugs. Claimant intended the comment as a joke.

(4) The customer did not share claimant's feelings of rapport. He considered claimant's behavior toward him consistently inappropriate, thought claimant was often visibly frustrated and flustered when dealing with him, and felt agitated and uncomfortable dealing with claimant. The customer did not consider claimant's drugs comment a joke, and felt offended. The customer told the employer that he could not see himself continuing to shop at the employer's business because of claimant.

(5) On October 19, 2018, the employer discharged claimant because of his behavior with the customer.

CONCLUSIONS AND REASONS: We disagree with the ALJ and conclude that claimant's discharge was 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. The employer has the burden to prove misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

Although the employer had a number of concerns about claimant's behavior and work performance that developed over time, the employer did not choose to discharge claimant until after his September 22, 2018 interaction with the customer. That incident is therefore the proximate cause of the discharge, and the proper focus of the initial misconduct analysis.

The ALJ concluded that claimant's behavior during the September 22nd incident was wantonly negligent, finding that claimant became "visibly frustrated with" the customer and "made an unprofessional joke" about the customer being on drugs.[1] The ALJ concluded that claimant "knew or should have known that his conduct in helping a customer on September 22, 2018 would violate his Employer's reasonable expectations," and the behavior was therefore wantonly negligent.[2] We disagree.

There is no dispute that the customer thought claimant was visibly frustrated, or that the customer thought claimant's joke was unprofessional or offensive. Likewise there is no dispute that the employer considered claimant's conduct to be in violation of its expectations, as set forth at the time of claimant's final written warning in January 2018 and the group meeting held in August 2018. However, for conduct to be misconduct, it must at a minimum be wantonly negligent, which requires that claimant be conscious of his conduct, and that claimant knew or should have known that his conduct would probably

[1] Order No. 19-UI-122335 at 3.
[2] Order No. 19-UI-122335 at 3.

violate the employer's expectations. In this case, the record fails to support a conclusion that claimant was.

The employer showed that the customer thought claimant was visibly frustrated and flustered on September 22, 2018. However, claimant testified that he was "calm and collect" throughout.[3] The employer showed that the customer thought claimant made an offensive comment about the customer being on drugs. Claimant intended the comment as a joke and was not aware he was causing offense. The customer also considered claimant so unpleasant to deal with that he told the customer he could not see himself continuing to shop at the employer's store if he had to continue working with claimant. Claimant thought he and the customer had a friendly rapport developed after three years of professional interactions and was not aware that the customer did not care to deal with him.

Thus, the record shows that the customer and claimant had very different perceptions of claimant's behavior on September 22nd. However, the record does not suggest it is more likely than not that claimant was actually conscious that he was behaving in a way the customer perceived as unprofessional or inappropriate. Rather, it appears that claimant did not understand that his behavior was being perceived in a negative light. Nor does the record suggest that claimant more likely than not knew or should have known that his conduct – which he thought was calm, and included joking with an individual with whom he had a rapport – would probably violate the standards of behavior the employer had the right to expect of him. In the absence of evidence proving it is more likely than not that claimant knew or should have known that the behavior he thought he was demonstrating would probably violate the employer's expectations, the employer has not proven that claimant's September 22nd conduct was wantonly negligent.

The employer therefore discharged claimant, but not for misconduct. Claimant is not disqualified from receiving unemployment insurance benefits because of this work separation.

DECISION: Order No. 19-UI-122335 is set aside, as outlined above.

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

DATE of Service: <u>February 14, 2019</u>

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.

[3] Transcript at 17.

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 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

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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