

EMPLOYMENT APPEALS BOARD DECISION
2019-EAB-0093

Affirmed
No Disqualification

PROCEDURAL HISTORY: On November 21, 2018, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 100027). Claimant filed a timely request for hearing. On January 10, 2019, ALJ Meerdink conducted a hearing and issued Order No. 19-UI-122479, concluding the employer discharged claimant, but not for misconduct. On January 28, 2019, the employer filed an application for review with the Employment Appeals Board (EAB).

The employer submitted written argument to EAB. The employer's argument contained information that was not part of the hearing record, and failed to show that factors or circumstances beyond its reasonable control prevented it from offering the information during the hearing. Under ORS 657.275(2) and OAR 471-041-0090 we considered only information received into evidence at the hearing and the employer's argument, to the extent it was based thereon, when reaching this decision.

FINDINGS OF FACT: (1) Wright Tree Service Inc. employed claimant as a journeyman tree trimmer from December 19, 2017 to November 5, 2018.

(2) The employer had a written policy that prohibited "provoking a fight or fighting during working hours or on premises owned or occupied by the company." Transcript at 9. Claimant was aware of the employer's policy.

(3) During the last week of October, claimant was bored and drew a symbol on the dirt that was on the side of an employer work truck. The symbol was a circle with three diagonal arrows pointing from the top right to the bottom left of the circle. Claimant was familiar with the symbol because it was on a beanie he often had worn at work. He believed it was an antiracial symbol from the 1930's. The symbol reportedly was also used by a left-leaning political group known as "antifa." Transcript at 22. Claimant had no specific intent in drawing the symbol on the side of the employer's vehicle and did not intend to provoke a fight. He did not consider it a violation of any employer policy because other employer

vehicles had symbols on them such as flags and bumper stickers without any complaint from the employer.

(4) On November 1, 2018, a coworker of claimant was working with him and another coworker at a jobsite and noticed the symbol on the truck. He became incensed and told claimant to remove the symbol. Claimant refused because he was busy working but told the coworker to remove it if he wanted. The coworker did not remove it and when they returned to the employer's yard the coworker exited the vehicle, grabbed claimant's hard hat and threw it in the mud. Claimant retrieved his hard hat and told the coworker "you don't have to be such a baby." Transcript at 21. The coworker approached claimant and threatened "to kick [his] ass" but the two of them never fought. Transcript at 21. Claimant reported the incident to the shop steward.

(5) After the employer learned of the incident, it conducted a limited investigation which did not include an interview of claimant. On November 5, 2018 the employer discharged claimant for violating its policy against "provoking a fight or fighting during working hours" by drawing the symbol on a work truck.

CONCLUSIONS AND REASONS: We agree with the ALJ. 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.

The employer discharged claimant for provoking a fight during working hours by drawing the symbol in question on one of its work trucks. However, the employer failed to show that there was an actual fight or that claimant intended to provoke one by drawing the symbol the prior week knowing that a coworker would be offended by it. To the extent claimant violated an unwritten employer policy against drawing political symbols on employer trucks, there was no evidence that claimant was aware or should have been aware of it. To the contrary, the employer did not dispute that other employer vehicles previously had political symbols, such as flags, bumper stickers and even a Trump doll on them, without any complaint from the employer.

In a discharge case, the employer has the burden to establish misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976). Part of that burden includes a showing that an expectation or policy allegedly violated was reasonable and fairly communicated to claimant. Here, the employer failed to show that it ever communicated its expectation that drawing what was arguably a political symbol on an employer vehicle would be considered a violation of the employer's policy against fighting or provoking a fight if a coworker was offended by

the symbol in question. The employer also did not show that claimant reasonably should have known of its expectation as a matter of common sense. Claimant cannot be found to have willfully or with wanton negligence violated an employer expectation which was neither communicated nor consistently enforced. At most, claimant's drawing of the symbol was the result of a good faith error in his understanding of the employer's policy because, based on his prior experience, he sincerely believed and had a factual basis for believing that the employer tolerated the display of symbols on employer vehicles. A good faith error is not misconduct. OAR 471-030-0038(3)(b). Claimant's conduct in drawing the symbol on an employer vehicle may have been a valid basis for the employer's discharge, but it was not sufficient to constitute misconduct under OAR 471-030-0038(1)(c) or (3)(a).

The employer discharged claimant, not for misconduct under ORS 657.176(2)(a) and claimant is not disqualified from receiving unemployment insurance benefits on the basis of his work separation.

DECISION: Order No. 19-UI-122479 is affirmed.

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

DATE of Service: February 22, 2019

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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