

EMPLOYMENT APPEALS BOARD DECISION
2019-EAB-0164

Reversed
No Disqualification

PROCEDURAL HISTORY: On December 4, 2018, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant but not for misconduct (decision # 151811). The employer filed a timely request for hearing. On January 16, 2019, ALJ Seideman conducted a hearing, and on January 23, 2019 issued Order No. 19-UI-123249, concluding that claimant's discharge was for misconduct. On February 12, 2019, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant failed to certify that he provided a copy of his written argument to the other parties as required by OAR 471-041-0080(2)(a) (October 29, 2006). Therefore, EAB did not consider the argument when reaching this decision.

FINDINGS OF FACT: (1) Goodwill Industries employed claimant as a donation attendant at one of its stores from May 24, 2018 until November 12, 2018.

(2) The employer expected claimant to refrain from insubordinate behavior toward supervisors. Claimant understood the employer's expectation as a matter of common sense and as he reasonably interpreted it.

(3) Claimant's ability to communicate in English was limited.

(4) On November 12, 2018 upon reporting for work, claimant was assigned to load and unload two trucks. That day, while working waiting for the trucks to arrive, a supervisor asked claimant to help another employee by moving some donations to a workstation. Although claimant thought this was not something he should be doing because one of the trucks he was waiting for was on the way to the workplace, would arrive very shortly and have to wait for him to finish with the donations, he nevertheless began moving the donations. Thereafter, a coworker who was not performing tasks told claimant that he would move the donations for claimant. Claimant agreed. The supervisor observed the

coworker moving donations and thought that claimant had told the coworker to move the donations for him.

(5) The supervisor approached claimant, told him that she wanted him and not the coworker to move the donations, and that he should continue moving them. The supervisor also told claimant that the workstation where the donations had been moved was disorganized and messy and he needed to clean it up. Claimant tried to explain to the supervisor that the coworker had volunteered to move the donations and that claimant had not told the coworker to do so. Claimant also tried to explain that he had been assigned that day to load and off-load trucks, and did not think he should not be moving the donations to the workstation instead of loading and off-loading trucks, and that the workstation was not disorganized. Because claimant's English was limited and the supervisor did not seem to understand him, claimant began to try to communicate with the supervisor through hand gestures. The supervisor insisted that claimant and not the coworker move the donations. Claimant told the supervisor that she had the "power," meaning that she had the authority to instruct him to move donations even if he thought it would be a better use of time for him to be loading and off-loading the trucks. Transcript at 18.

(6) The supervisor did not understand what claimant was trying to communicate to her. She thought claimant's hand gestures were acts of aggression and not attempts at non-verbal communication. She was confused by claimant's reference to "power" and did not understand his meaning, but thought he was challenging her authority. The supervisor also thought claimant was not listening to her and that claimant had turned away from her, deliberately ignoring her instructions. The supervisor intended to suspend claimant, and escorted him to the time system to clock out. As claimant and the supervisor were walking, claimant dropped his work badge, which he had taken out because he needed to insert it into the time clock. The badge fell on the supervisor's foot. The supervisor thought claimant had deliberately thrown the work badge at her as an act of further insubordination.

(7) On November 12, 2018, the employer discharged claimant for his allegedly insubordinate behavior that day.

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. 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).

In Order No. 123244, the ALJ concluded that the employer discharged claimant for misconduct and that claimant was disqualified from benefits. The ALJ reasoned that claimant willfully disregarded the

employer's interest because he was "very mean and condescending" toward the supervisor on November 12, 2018. Order No. 19-UI-123244 at 3. We disagree.

On this record, the employer failed to demonstrate that claimant's behavior on November 12 was insubordinate or amounted to a willful or wantonly negligent violation of the employer's standards. While the supervisor may have interpreted claimant's behavior as being disrespectful and challenging of her workplace authority, it was equally likely that claimant's behavior, and the supervisor's interpretation of it, was the result of a misunderstanding of claimant's attempts at communication, possibly compounded by language barriers due to claimant's limited English. Because the employer failed to show by a preponderance of evidence that claimant's behavior on November 12 was not based on an innocent miscommunication, the employer did not meet its burden to show that claimant violated its standards with willfully or with wanton negligence.

The employer failed to establish that it discharged claimant for misconduct. Claimant is not disqualified from receiving unemployment insurance benefits.

DECISION: Order No. 19-UI-123249 is set aside, as outlined above.

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

DATE of Service: March 19, 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

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 بمحكمة 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.

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