

EMPLOYMENT APPEALS BOARD DECISION
2019-EAB-0199

Reversed
No Disqualification

PROCEDURAL HISTORY: On January 4, 2019, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 81501). Claimant filed a timely request for hearing. On January 29, 2019, ALJ Seideman conducted a hearing, and on February 7, 2019 issued Order No. 19-UI-124160, affirming the Department's decision. On February 22, 2019, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Josephine County employed claimant from approximately December 2017 to December 6, 2018. Claimant worked as a group life counselor in the employer's youth detention and residential facility.

(2) Each youth's probation officer compiled a list of approved and disapproved visitors for the youths they supervised. The employer's policy prohibited group life counselors from scheduling unapproved visitors. The employer's electronic Juvenile Justice Information System (JJIS) had one page that listed visitors and whether they were approved or not approved for in-person visits, or were approved or not approved for telephone visits. The employer trained claimant about its policy prohibiting unapproved visitors, and trained claimant how to use JJIS.

(3) On November 28, 2018, a youth's father called to ask for an in-person visitation. Claimant checked JJIS and did not see that the father was unapproved for in-person visitation with his son. Claimant scheduled the visit. Claimant was subsequently told by the youth's probation officer that the father was not allowed in-person visitation, and called the father to cancel the in-person visitation.

(4) The employer watched surveillance video and spoke with claimant's coworker, and concluded claimant's coworker had observed claimant making the unapproved visitor appointment and tried to stop him. The employer concluded that claimant had made the appointment even though he knew from the JJIS screen and his coworker that the youth's father was not approved for in-person visits.

(5) The employer believed claimant had previously committed child abuse, and had a variety of other concerns about claimant's job performance, adherence to policies, and defiance. On December 6, 2018, the employer discharged claimant for intentionally scheduling an unapproved father for an in-person visitation with a youth in the employer's custody.

CONCLUSIONS AND REASONS: 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. 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).

In reaching Order No. 19-UI-124160, the ALJ found facts in accordance with the employer's evidence. In so doing, he entirely disregarded claimant's evidence and resolved the case against claimant, implicitly finding that claimant was not credible. Order No. 19-UI-124160 at 3. The record does not support that conclusion, however. Therefore, the ALJ erred reached a decision in this case based only upon consideration of the employer's evidence.

There was reason to question the reliability of both parties' evidence. Upon initial examination, instead of responding to the employer's witness's testimony or describing from his own perspective what happened on November 28th, claimant made accusatory statements about the employer's acts and motivations to taint the investigation against him and coerce his coworker into lying about him. Transcript at 13-14, 18; *see also* Exhibit 1-2. At the same time, claimant painted his own character and conduct in an implausibly positive light, describing himself as having "wonderful, gleaming references," being a "meticulous" rule-follower, and being "very professional in everything I've done in my world and my life." Transcript at 13-14, 28-29. Claimant's testimony displayed bias toward his own version of events at the expense of factual assertions or objectivity; it was therefore lacking in objective reliability.

Neither was the employer's evidence reliable, as it was internally and externally inconsistent in several respects. For instance, in the employer's initial statement to the Department about claimant's work separation the employer stated that although claimant offered to correct his mistake in the final incident, "the visit with the youth and father still took place." Exhibit 5, December 17, 2018 submission. In another conversation with the Department and testimony, however, the employer stated that the visit did not take place. Exhibit 5, interview notes; Transcript at 9. The employer alleged that "[t]here was an extensive investigation" against claimant for child abuse, and the employer "did find he was committing child abuse." Exhibit 5, interview notes. During the hearing, however, the employer's witness testified that claimant was investigated and that the child abuse allegations were only "partially substantiated." Transcript at 25. Neither the employer's report to the Department nor the witness's testimony is reliable in light of the letter from the Department of Human Services (DHS) in evidence stating that while claimant was in fact investigated for child abuse, the allegation was unsubstantiated. Exhibit 6.

For those reasons, the employer's evidence was inconsistent, and is of questionable reliability. Likewise, claimant's evidence was largely biased, and is of questionable reliability. As such, we have no particular

reason to believe one witness over the other where the evidence was in dispute based upon the inherent credibility or plausibility of their testimony. The parties' relative credibility was, therefore, roughly equal. Where neither party is more credible than the other, and evidence was in dispute, the party with the burden of proof has failed to make its case.

The proximate cause of the employer's decision to discharge claimant was his November 28th conduct in scheduling an unapproved visitor for one of the youths in the employer's custody. That incident is therefore the initial focus of the misconduct analysis. The employer had the burden to prove it was more likely than not that claimant either acted intentionally when he scheduled a youth's father for an unapproved in-person visit, or that claimant was aware of what he was doing and acting in conscious disregard for the employer's expectations. The employer did not provide any eyewitness testimony to substantiate its allegations about claimant's conduct, intent, or consciousness of conduct at the time of the November 28th events, and based its allegations on hearsay about what claimant and his coworker said or did at that time. Claimant was the only party present on November 28th, and testified that he did not intentionally or knowingly schedule the youth's father for an unapproved in-person visit. In the absence of reliable firsthand evidence suggesting it is more likely than not that claimant intended or was conscious that he had scheduled the unapproved visit, the employer has not met its burden to prove misconduct.

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-124160 is set aside, as outlined above.

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

DATE of Service: March 25, 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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