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

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EMPLOYMENT APPEALS BOARD DECISION
2019-EAB-0215

Modified
Request to Reopen Allowed
No Disqualification

PROCEDURAL HISTORY: On November 7, 2018, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 65106). Claimant filed a timely request for hearing. On December 7, 2018, the Office of Administrative Hearings (OAH) mailed notice of a hearing scheduled for December 21, 2018. On December 21, 2018, ALJ M. Davis issued Order No. 18-UI-121685, dismissing claimant's request for hearing because he failed to appear at the hearing. Claimant filed a timely request to reopen the December 21st hearing. On January 24, 2019, OAH mailed notice of a hearing scheduled for February 7, 2019. On February 7, 2019, ALJ M. Davis conducted a hearing, and on February 8, 2019 issued Order No. 19-UI-124366. Due to a clerical error, that decision erroneously dismissed claimant's request for hearing again for failing to appear. On February 15, 2019, claimant filed an application for review of Order No. 19-UI-124366 with the Employment Appeals Board (EAB). On February 26, 2019, the ALJ issued a corrected decision, Order No. 19-UI-125354, which allowed claimant's request to reopen and affirmed decision # 65106. On February 28, 2019, claimant renewed his application for review in this matter. This matter is before EAB on claimant's application for review of Order No. 19-UI-125354.

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

Based on a *de novo* review of the entire record in this case, and pursuant to ORS 657.275(2), the ALJ's findings and analysis with respect to allowing claimant's request to reopen are **adopted.**[1] Because we

[1] The reopen analysis contained an error, in that the ALJ found both that claimant had good cause to reopen the hearing and that claimant filed his timely request to reopen within a "reasonable time." The "reasonable time" element is only at issue in cases involving a late request to reopen under OAR 471-040-0041. However, claimant's request to reopen was filed timely. Under OAR 471-040-0040(1), the "reasonable time" element is not at issue in cases involving a timely request to reopen. While the analysis contained that error, it was a harmless one because it did not affect or change the outcome.

have adopted the ALJ's findings and analysis, as modified herein (*see* fn1), the remainder of this decision will focus solely on claimant's work separation.

FINDINGS OF FACT: (1) Preferred Northwest Property employed claimant as property manager from September 19, 2017 to September 24, 2018.

(2) Prior to July 27, 2018, the employer instructed claimant to have electricity turned on to one unit. Claimant believed he had been instructed to turn the electricity on to three units, and did so. On July 27, 2018, the employer issued claimant an employee discipline report for turning electricity on in three units when he had not been instructed to do so.

(3) Prior to August 1, 2018, claimant made a social media post in which he wrote, "Neither my Employer nor my supervisor did a thing about the racist who continued to use the 'n' word on me." Transcript at 26. The employer had a policy that prohibited employees from posting information about the employer on social media sites. Claimant understood the employer's policy, and posted the information anyway because he was upset with how the employer was handling his interactions with a racist former tenant. On August 1, 2018, the employer issued claimant an employee discipline report for making a social media post referencing the employer.

(4) On approximately September 14, 2018, claimant issued an exclusion notice to a non-tenant who had engaged in violence on the employer's property. He did not consult with the owner or management about issuing the notice prior to doing so. On September 21, 2018, the employer learned that claimant had issued the exclusion notice. The employer intended such notices only to be issued to tenants who had been evicted, and thought that claimant had exceeded his authority and violated policy by issuing it.

(5) On September 24, 2018, the employer discharged claimant for issuing the exclusion notice.

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. 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. Good faith errors are not misconduct. OAR 471-030-0038(3)(c).

The ALJ concluded that claimant's discharge was for misconduct, finding that "[t]he employer discharged claimant because he had violated its policies on three separate occasions."[2] While the employer identified three incidents involving claimant in its testimony, however, the record shows that the employer only issued disciplinary warnings to claimant after the first two incidents. Had the

[2] Order No. 19-UI-125354 at 5.

employer considered those incidents to warrant discharge, the employer likely would have discharged claimant after either of those incidents were discovered, but chose instead to discipline claimant while allowing him to remain employed. Accordingly, neither of those incidents was the proximate cause of the employer's decision to discharge claimant.

The employer did not decide to discharge claimant until after the September 14th incident, which is therefore the proximate cause of claimant's discharge. Accordingly, that incident must be examined to determine whether or not claimant's discharge was for misconduct. Only if claimant's issuance of an exclusion notice was willful or wantonly negligent would it then be appropriate to analyze the prior conduct the employer described. 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).

The ALJ concluded that claimant engaged in wantonly negligent behavior by issuing the exclusion notice to a non-tenant on or about September 14th. The ALJ found as fact that such a notice "should only be issued to tenants that have already been evicted," and that "the employer's policy provides that property managers can only issue notices after they have received approval from a manager."[3] The ALJ reasoned, without making any findings that claimant understood the employer's policy on exclusion or other types of notices, that claimant "should have understood that issuing any type of notice to anyone required approval from the employer."[4] The ALJ then concluded that claimant "[a]t the very least . . . demonstrated an indifference to the standards of behavior the employer had a right to expect of him."[5]

The record does not show that claimant necessarily knew or should have known how the employer expected the exclusion notice to be used. At the time claimant issued the exclusion notice, it was "a relatively new notice" that "just came out last year."[6] While the employer intended it to be used with tenants that had been evicted, it was not a legal notice and had no legal effect.[7] The record also does not contain facts that substantiate the conclusion that claimant should have understood that issuing any type of notice to anyone required approval.

By September 14th, claimant had been receiving complaints from tenants about a non-tenant who had been violent on the property and had threatened a tenant with a knife.[8] Claimant repeatedly tried to reach management about the situation, but was unable to do so.[9] Claimant knew the individual was not a tenant, and knew the employer had a policy that required non-tenant guests to stay a maximum of 14 days before signing onto a tenant's lease, or "get off the property."[10] In that context, claimant gave the non-tenant an exclusion notice to leave the property, and he did not think at the time that he would be disciplined or discharged for having done so.[11] The preponderance of the evidence does not show that claimant acted with indifference to the employer's expected standards of behavior when he issued the exclusion notice to the non-tenant. Rather, the record suggests it is more likely than not that claimant sincerely believed that he was acting in the employer's interests and protecting tenants when he did so.

[3] *Id*. at 2.
[4] *Id*. at 5.
[5] *Id*.
[6] Transcript at 13.
[7] Transcript at 12, 32.
[8] Transcript at 21, 22, 24.
[9] Transcript at 22, 23.
[10] Transcript at 20, 33.
[11] Transcript at 24.

He was, ultimately, mistaken in the belief that the employer would approve or condone what he did, and mistaken in his belief that he should use the exclusion notice to do it. But the record does not show that he acted with indifference to the consequences of his conduct, or with indifference to the employer's expectations. It is more likely than not that he acted in good faith. Good faith errors are not misconduct.

The final incident that triggered the employer's decision to discharge claimant was not willful or wantonly negligent misconduct. Claimant's discharge was, therefore, not for misconduct. Having so concluded, we need not and do not analyze the employer's other allegations.

DECISION: Order No. 19-UI-125354 is modified, as outlined above.[12]

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

DATE of Service: April 2, 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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[12] This decision affirms the ALJ's conclusion that claimant's request to reopen should be allowed, and reverses the ALJ's decision that claimant's discharge was for misconduct. This decision therefore reverses an order that denied benefits. Please note that payment of any benefits, if owed, may take from several days to two weeks for the Department to complete.

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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