

EMPLOYMENT APPEALS BOARD DECISION
2019-EAB-0348

Affirmed
No Disqualification

PROCEDURAL HISTORY: On February 22, 2019, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant, but not for misconduct (decision # 151739). The employer filed a timely request for hearing. On March 26, 2019, ALJ M. Davis conducted a hearing, and on March 27, 2019, issued Order No. 19-UI-127154, affirming the Department's decision. On April 5, 2019, the employer filed an application for review with the Employment Appeals Board (EAB).

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

FINDINGS OF FACT: (1) TCG Enterprises, Inc. employed claimant from November 2016 until February 2, 2019 as a gas attendant.

(2) The employer expected claimant to follow reasonable instructions from his superiors at work. The employer's policies against discrimination and harassment prohibited employees from using racial slurs towards other employees. Claimant understood the employer's expectations as a matter of common sense.

(3) Before January 31, 2019, the employer had forbidden a former manager, "MB," from going on the employer's property, including the gas station where claimant worked. Claimant did not know the employer had prohibited MB from going onto the employer's property.

(4) On January 31, 2019, the employer had employees' W-2 forms available. Claimant sent a text message to MB stating that he should pick up his W-2 form at the gas station.

(5) Early in claimant's shift on February 1, 2019, someone went into the gas station and stole money from the register. Claimant notified the police.

(6) Later on February 1, 2019, while claimant was working at the employer's gas station, MB went in the gas station. Claimant gave MB the W-2 form that was sitting on the counter that had MB's name on it. The employer was displeased that claimant gave MB the W-2 form.

(7) The employer arrived at the gas station and questioned claimant about the earlier theft. Claimant felt "indignant" when the employer questioned him about the theft "as if [he were] involved." Transcript at 24. When the employer learned that MB had picked up his W-2 form, the employer told claimant that MB was not allowed on the property.

(8) On February 2, 2019, the manager went into the gas station several minutes before the end of claimant's shift. During a brief conversation, the manager discharged claimant, and told claimant he was being discharged for insubordination. Also during the conversation, claimant became angry and yelled "angry words" and "cursed" at the manager as he left the gas station, including calling the manager a "fucking asshole." Transcript at 21-22.

CONCLUSIONS AND REASONS: We agree with the ALJ 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) (December 23, 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).

The employer's written argument states that claimant had numerous "write ups" and "committed other "fireable offenses" before the employer discharged him on February 2, 2019. Employer's Written Argument at 2. However, the evidence from the employer's human resources representative and manager was that claimant's conduct during the final meeting with the manager on February 2, 2019 prompted the manager to discharge claimant, and that until that meeting, the employer planned to give claimant only a warning for prior conduct. Transcript at 7-8, 31-32. Therefore, because the record shows that claimant's conduct on February 2 caused the employer to discharge claimant, it is the proper initial focus of the misconduct analysis. Only if the final incident on February 2 were a wanton or willfully negligent violation of the employer's expectations would EAB then analyze prior incidents for evidence of willful or wantonly negligent behavior.

The employer alleged that a manager met with claimant on February 2 to give him a written warning for having given a W-2 to a former manager who was not permitted on the employer's property, and that the

manager discharged claimant when claimant reacted to the warning by calling the manager racial slurs. Transcript at 7-9. The employer alleged at hearing that a third employee who was present during the meeting signed a statement stating that claimant had used racial slurs during the meeting, but the employer did not provide the statement at hearing, and the employee did not testify at hearing.¹ Transcript at 10-11. In contrast to the employer's evidence, claimant denied having used racial slurs toward the manager on February 2 or at any other time. Transcript at 20-21. Although claimant admitted that he "lost his temper" and used foul language toward the manager on February 2, he testified that he did not do so until after the manager discharged him and as he was leaving the employer's premises. Transcript at 17, 21-22, 37-38. On this record, there is no basis to prefer the manager's testimony to claimant's testimony, or to doubt the credibility or accuracy of either witness. Where, as here, the evidence on a disputed issue is at best evenly balanced, the uncertainty must be resolved against the employer since it carries the burden of persuasion in a discharge case. On this record, the employer therefore did not meet its burden to show that claimant used racial slurs, or foul language toward the manager before the manager discharged him.

Because the record does not show by a preponderance of the evidence that claimant engaged in the conduct for which the employer discharged him, the record does not establish misconduct by a preponderance of evidence. Therefore, claimant was discharged, but not for misconduct under ORS 657.176. He is not disqualified from receiving unemployment insurance benefits based on this work separation.

DECISION: Order No. 19-UI-127154 is affirmed.

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

DATE of Service: May 10, 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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¹ The employer asserted in its written argument that it mistakenly believed the employee's statement would be provided to the administrative law judge (ALJ) prior to the hearing. However, the Office of Administrative Hearings (OAH) notified the parties prior to the hearing on the Notice of Hearing that "[i]f you have other documents that you wish to have considered, you must provide copies of your documents to all parties and to the ALJ at the Office of Administrative hearings . . . prior to the date of the scheduled hearing.," The employer did not provide OAH or claimant with copies of the statement.



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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