

EMPLOYMENT APPEALS BOARD DECISION
2019-EAB-0542

Affirmed
No Disqualification

PROCEDURAL HISTORY: On May 6, 2019, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 124314). Claimant filed a timely request for hearing. On May 30, 2019, ALJ Murdock conducted a hearing, and on May 31, 2019, issued Order No. 19-UI-130942, concluding the employer discharged claimant, but not for misconduct. On June 11, 2019, the employer filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Ameri-Tool Industries, Inc. employed claimant, last as a molding operator, from December 5, 2018 to April 11, 2019.

(2) The employer evaluated claimant's work production as a molding operator and concluded that he worked too slowly, although claimant believed his work production generally was good. The employer also received reports that claimant often left the injection molding machine to which he was assigned to instead help coworkers dismantle and clean grinders or perform other repair work. However, when claimant performed those other tasks, he often did so at the request of his shift supervisor, and when he performed them in front of the operations manager, he was not directed to stop or return to his assigned machine. The employer never gave claimant a written warning for poor production or for leaving his assigned work station without authorization to assist coworkers.

(3) The employer also received reports that claimant's work behavior and attitude were poor, and that he was sometimes rude and "snotty" to coworkers, referred to women as "bitches," endangered others by throwing around parts he had produced, and had been observed "slamming things." Transcript at 5-6. However, the employer never warned claimant about or against engaging in such behaviors.

(4) On April 11, 2019, the employer received a report that claimant again had been "throwing things around" during his shift that day. Transcript at 8. Without interviewing claimant about that report, the employer decided to discharge him for that reason and because it also had concluded his work production was low, his work area was "messy," he had been rude and "snotty" to coworkers, and he had referred to women as "bitches." However, after the employer summoned claimant to the human

resources office to end his employment, it told him that he was being discharged because he “wasn’t a good fit.” Transcript at 16.

CONCLUSIONS AND REASONS: The employer discharged claimant, but not for misconduct under ORS 657.176(2)(a).

ORS 657.176(2)(a) requires a disqualification from unemployment insurance benefits if the employer discharged claimant for misconduct connected with work. “As used in ORS 657.176(2)(a) . . . a willful or wantonly negligent violation of the standards of behavior which an employer has the right to expect of an employee is misconduct. An act or series of actions that amount to a willful or wantonly negligent disregard of an employer’s interest is misconduct.” OAR 471-030-0038(3)(a) (December 23, 2018). “[W]antonly negligent’ means 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.” OAR 471-030-0038(1)(c). In a discharge case, the employer has the burden to establish misconduct by a preponderance of evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

At hearing, the employer asserted that it discharged claimant because his production was low, his work area had been “messy” and a safety hazard, he had been rude and “snotty” to coworkers, had been observed slamming things, had referred to women as “bitches,” and had thrown around parts he had produced, potentially endangering others. Transcript at 5-6. The employer also asserted claimant had been warned about his behaviors “several times,” including once via email, prior to being discharged. *Id.* Claimant denied the employer’s assertions about both the behaviors in question and that he had been warned about them. Transcript at 14-20.

In support of its assertions, the employer’s witnesses generally presented hearsay evidence phrased in conclusory terms and unsupported by detail. For example, in support of its assertion that claimant’s work area had been “messy” and constituted a safety hazard, it offered no detail even after claimant denied it and asserted that he even cleaned up “other peoples’ areas.” Transcript at 19. In support of its assertion that claimant had been “snotty” and rude to coworkers, it offered only vague and conclusory allegations, and when prompted by the ALJ for detail, responded only that claimant had been “terse” and “unprofessional” without details about what he said or what his tone of voice or body language were like at the time. Transcript at 8. Although the operations manager implied that incident reports had been prepared concerning the incidents in question, it did not offer any such reports into evidence or provide any details about what the reports contained. Transcript at 29. Although the controller testified that an email warning about working faster and improving attitude had been sent to claimant, it did not offer a copy of the email into evidence or describe it in detail, and the employer did not dispute claimant’s assertions that he never received an email, that the employer did not know claimant’s personal email address, and that he did not have a business email address. Transcript at 5, 18. In support of its assertion that claimant’s production was low, the employer offered no detail and did not credibly dispute claimant’s response that he was never warned about low production and that his night shift supervisor had told him that he “could teach [the] day shift guys a little something about working.” Transcript at 19-20. Although the employer presented firsthand testimony that claimant had referred to women generally as “bitches,” and had been warned against leaving his workstation to help others, claimant denied both allegations at hearing. *Cf.* Transcript at 23-24, 35-37 and 18, 39-40. In the absence of

documentary or other evidence demonstrating that claimant was not a credible witness, his firsthand testimony was at least as credible as the employer's evidence. Where the evidence is no more than equally balanced, the party with the burden of persuasion – here, the employer – has failed to satisfy its evidentiary burden. Consequently, on matters in dispute, we based our findings on claimant's evidence.

Viewing the record as a whole, the employer failed to meet its burden to show that it discharged claimant for misconduct under ORS 657.176(2)(a), or in other words, because he willfully or with wanton negligence violated one or more of the employer expectations it described at hearing. More likely than not, the employer discharged claimant for the reason it gave him on April 11, 2019, because "it was not a good fit," which is not misconduct.

Accordingly, the employer discharged claimant, but not for misconduct. Claimant is not disqualified from receiving unemployment insurance benefits on the basis of his work separation.

DECISION: Order No. 19-UI-130942 is affirmed.

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

DATE of Service: July 18, 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 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 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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