

EMPLOYMENT APPEALS BOARD DECISION
2019-EAB-0573

Reversed
No Disqualification

PROCEDURAL HISTORY: On May 17, 2019, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 164022). Claimant filed a timely request for hearing. On June 10, 2019, ALJ Snyder conducted a hearing, and on June 18, 2019 issued Order No. 19-UI-131846, affirming the Department's decision. On June 22, 2019, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Waste Management of Washington Inc. employed claimant as a dispatcher and runner from August 24, 2018 until March 28, 2019.

(2) The employer expected claimant to treat coworkers respectfully and professionally, and to refrain from threatening and offensive behaviors, or behaviors that interfere with the ability to perform work. Claimant understood the employer's expectations as a matter of common sense.

(3) On March 27, 2019, one of claimant's coworkers thought claimant was speaking too loudly on the phone. Claimant and the coworker worked adjacent to each other. The coworker told claimant to "shut the hell up." Transcript at 20. Claimant told the coworker that he did not like her yelling at him, and did not lower his voice. Claimant and the coworker did not interact for the remainder of the workday.

(4) On March 28, 2019, claimant tried to limit his interactions with his coworker to avoid tension. A few hours into his shift, claimant told the coworker he needed to visit the restroom and asked the coworker to cover the phones. The coworker agreed. When claimant returned from the restroom, he noticed the coworker speaking with a second coworker, and claimant heard his name mentioned. As claimant resumed work, the coworker asked claimant if he had issues with her. Claimant responded that he had not appreciated her yelling at him the day before. The coworker became upset and told claimant that she had not yelled the previous day and that he was being "ridiculous" and "stupid." Transcript at 21. Claimant told the coworker it did not seem that they could talk about issue professionally, and they needed to get management involved.

(5) Later on March 28, 2019, the coworker spoke to a dispatch manager about her interactions with claimant on March 27 and earlier that day. The dispatch manager called the employer's senior human resources generalist. The generalist investigated the incident to determine if claimant's behavior on March 28 had violated the employer's expectations regarding workplace behavior.

(6) On April 4, 2019, the employer discharged claimant for allegedly treating his coworker disrespectfully and offensively on March 28, 2019.

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. "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 show establish misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976)

Order No. 19-UI-131846, concluded that the employer discharged claimant for misconduct. The facts found in the order were based on the hearsay testimony of the employer's witnesses about the March 28 incident, which characterized claimant's behavior that day as "aggressive and irate." Order No. 19-UI-131846. The order ignored claimant's hearing testimony and, based on the accounts of the employer's witnesses, concluded that claimant behaved with wanton negligence during his March 28 interaction with the coworker. However, the record does not support that conclusion.

The employer did not establish by a preponderance of the evidence that claimant's behavior on March 28 violated the employer's standards by being disrespectful, unprofessional or offensive. The evidence that the employer presented about the specifics of claimant's behavior that day was principally an email from a second coworker who allegedly overheard a "very uncomfortable" interaction between claimant and the first coworker on March 28, and characterized claimant as "getting very upset and raising his voice aggressively." Exhibit 1 at 5; Transcript at 5. The employer also relied on the broad impressions of the dispatch manager and the human resources generalist that claimant's behavior on March 28 had caused the first coworker to become "distracted," and fear coming to into work. Transcript at 10, 12. The employer did not offer any statements, hearsay or direct, from the first coworker as to the specific details of claimant's behavior during the interaction on March 28 that allegedly violated the employer's expectations.

Claimant's account of his behavior on March 28 contradicted the evidence that the employer presented. Transcript at 21-23. Absent evidence to the contrary, claimant's first-hand testimony as to the specifics of his behavior on March 28 is entitled to more weight than the employer's second-hand hearsay evidence from the coworker who overheard the interaction on March 28. On this record, the employer

failed to show that claimant's established behavior on March 28, telling his coworker that he had not appreciated her yelling at him the day before, and that they apparently could not talk about issue professionally and needed to get management involved, violated the employer's expectations. The employer therefore failed to show that claimant violated those expectations, much less that he did so willfully or with wanton negligence.

The employer failed to establish that claimant's discharge was for misconduct. Claimant is not disqualified from receiving unemployment insurance benefits based on his work separation from the employer.

DECISION: Order No. 19-UI-131846 is set aside, as outlined above.

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

DATE of Service: July 29, 2019

NOTE: This decision reverses an order that denied benefits. Please note that payment of benefits, if any are owed, may take approximately a week 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 ໄດ້ໂດຍປະຕິບັດຕາມຄໍາແນະນໍາທີ່ບອກໄວ້ຢູ່ຕອນທ້າຍຂອງຄໍາຕັດສິນນີ້.

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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