EO: 200
BYE: 202016

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

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DS 005.00

EMPLOYMENT APPEALS BOARD DECISION
2019-EAB-0612

Reversed & Remanded

PROCEDURAL HISTORY: On May 15, 2019, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 121016). Claimant filed a timely request for hearing. On June 10, 2019, ALJ Seideman conducted a hearing, and on June 14, 2019, issued Order No. 19-UI-131693, concluding the employer discharged claimant, but not for misconduct. On July 3, 2019, the employer filed an application for review with the Employment Appeals Board (EAB).

EVIDENTIARY MATTER: On June 7, 2019, the employer submitted to the Office of Administrative Hearings (OAH) copies of documents related to claimant's discharge from employment that it wished to present as evidence at the June 10, 2019 hearing. It served copies of the documents upon claimant by email prior to the hearing, and OAH included the employer's submission into the record of this case on June 10, 2019. At hearing, the ALJ declined to admit the documents as evidence because claimant's attorney asserted that she did not have access to them at that time, and the ALJ asserted that the employer's witness could testify regarding the documents' contents. Transcript at 7-11. However, the employer's witness was not given the opportunity to testify regarding the entire contents of the documents, and the documents were relevant to the issue of claimant's discharge because they concerned two prior incidents of discipline, and clarified the employer's expectations regarding claimant's behavior.

EAB has considered the additional evidence when reaching this decision under OAR 471-041-0090(1) (May 13, 2019). The additional evidence consists of the employer's July 11, 2018 "zero tolerance" warning to claimant concerning behavior toward a coworker, its December 13, 2018 "zero tolerance" warning to claimant concerning claimant's alleged "lack of professionalism" in the workplace, and claimant's acknowledgment of the December 13, 2018 warning. The additional evidence has been

marked as EAB Exhibit 1 and admitted into the record. A copy of EAB Exhibit 1 accompanies the copies of this decision sent to the parties. Any party who objects to the admission of EAB Exhibit 1 must submit any such objections to this office in writing, setting forth the basis for the objection, within ten days of the date on which this decision is mailed. Unless such an objection is received and sustained, EAB Exhibit 1 will remain a part of the record. As appropriate, EAB Exhibit 1 should be used as a basis for further inquiry of the parties at the hearing on remand.

EAB otherwise considered the parties' written arguments to the extent they were based on the record.

FINDINGS OF FACT: (1) Gartner Inc. employed claimant as a program manager from February 29, 2016 until April 8, 2019. The employer expected its employees to conduct themselves "with professionalism and with integrity at all times", and was "committed to providing its associates with a safe and harassment-free work environment." EAB Exhibit 1. It also expected its employees to "communicate professionally, express [themselves] responsibly and approach all subjects in a thoughtful and professional manner", which included "mak[ing] positive contributions to the working environment [and] Gartner's reputation and brand." EAB Exhibit 1. The employer's expectations were contained in its online employee handbook, "Gartner's Values and Code of Conduct," which claimant was familiar with and understood. EAB Exhibit 1

(2) In 2018, the employer gave claimant two written warnings for violations of expectations contained in the employee handbook. On July 11, 2018, the employer gave claimant a "zero tolerance" warning for using "an unwelcomed and inappropriate sexual innuendo while interacting with one of [his] co-workers." EAB Exhibit 1. When the employer confronted claimant about the complaint, claimant responded that he "didn't mean it that way" and the coworker "had taken it out of context." EAB Exhibit 1. Regardless, the employer required claimant to re-review the employer's code of conduct and acknowledge in writing that he had done so. The employer also warned claimant that it would "not tolerate such behavior again." EAB Exhibit 1. On December 13, 2018, the employer gave claimant a second "zero tolerance" written warning for several instances of what it characterized as claimant's lack of professionalism in the workplace. The conduct claimant was warned about included instances of using foul language, including the "F word," throwing office supplies on the floor, and acting belligerently toward and falsely accusing a coworker of providing incorrect information to him. EAB Exhibit 1. Claimant acknowledged the employer's disciplinary warning, that he had re-reviewed the employer' code of conduct, and agreed to maintain the employer's standards of professional behavior in the future.

(3) On April 8, 2019, both claimant's manager and an employer vice president of sales overheard claimant make what it considered disparaging remarks about the employer while speaking over the phone to an employer customer. They overheard claimant state that the employer compelled him to call the customer, refer to the employer's autodialing system as the "overlord" system and "silly," and state that it was all "B.S" and that a supervisor had forced him to perform "futile work" because it did not benefit anyone. Transcript at 9, 12-13. After the call ended, the employer's head of sales contacted the client and apologized for claimant's comments.

(4) The employer concluded that claimant speaking to an employer client about the employer "in such a derogatory manner" was violation of its code of conduct about which claimant had been warned before and discharged him on April 8, 2019 for that reason. Transcript at 13.

CONCLUSION AND REASONS: Order No. 19-UI-131693 is reversed and this matter is remanded for further development of the record.

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). Isolated instances of poor judgment and good faith errors are not misconduct. OAR 471-030-0038(3)(b).

Order No. 19-UI-131693 concluded that the employer discharged claimant, but not for misconduct. The order reasoned as follows:

> "[Claimant] had the two warnings in 2018. He felt that in each case the comments were misunderstood by the employer. … I conclude that claimant's comment to the client at the end was misunderstood by the employer. Claimant knew the person well and they even talked for 30 minutes after the comment. … My initial conclusion is that claimant's comment was not a willful or wantonly negligent disregard of the employer's interest, and therefore not misconduct. If one would disagree with that, then I conclude that it was an isolated instance of poor judgment. Under either theory, claimant was discharged but not for misconduct."

Order No. 19-UI-131693 at 4. However, because the record was not sufficiently developed to determine whether claimant's conduct, in the final or prior incidents, was a willful or wantonly negligent violation of a known employer expectation, the result of a good faith error or an isolated instance of poor judgment, rather than just "misunderstood" by the employer, Order No. 19-UI-131693 must be remanded for additional inquiry.

With regard to the final incident on April 8, 2019, claimant alleged that he doubted that the client needed an apology for claimant's disparaging comments about the employer. Transcript at 19. He did not deny that he made the comments but asserted that he made those comments to explain why a previous employer-sponsored New York dinner the client had attended and which made the client "not want to move forward with [the employer]" had been "disastrous." Transcript at 22. The record fails to show why claimant considered it necessary to disparage the employer to convince the client to move forward with the employer after the "disastrous" New York dinner. The record also fails to show if claimant understood he was disparaging the employer by describing it and its processes as he did, particularly after receiving the two prior "zero tolerance" warnings, and whether he believed the employer would condone his comments about it and its processes to the client. Finally, the record fails to show what the subsequent apology conversation between the client and the employer's head of sales consisted of and how the employer's apology was received by the client.

With regard to the July 11, 2018, "zero tolerance" warning for using an "unwelcomed and inappropriate sexual innuendo" while speaking with a coworker, claimant asserted that his comment concerned watering a plant, that the coworker took it "out of context" and that he signed the warning only because he was "compelled" to do so. Transcript at 23; EAB Exhibit 1. The record fails to show precisely what claimant said during that incident, the context of claimant's comment as claimant understood it, and why whatever claimant said resulted in the warning given by the employer.

With regard to the December 13, 2018, "zero tolerance" warning for multiple behaviors on claimant's part, claimant acknowledged "those events," his subsequent re-review of the employer's code of conduct and the employer's expectation that claimant "communicate professionally, express [him]self responsibly and approach all subjects in a thoughtful, professional manner" going forward. Transcript at 24; EAB Exhibit 1. However, the record fails to show why claimant engaged in those behaviors, if he understood at the time that the behaviors probably violated the employer's code of conduct and if so, if he had any reason to believe the employer would condone his actions.

The intent of this decision is not to constrain the inquiry on remand. In addition to the suggested lines of inquiry, any additional inquiry that is necessary or relevant to the nature of claimant's work separation and whether or not it is disqualifying also should be made. On remand, the parties should also be allowed to provide any additional relevant and material information or testimony about the work separation and prior incidents, and to cross-examine each other as necessary.

ORS 657.270 requires the ALJ to give all parties a reasonable opportunity for a fair hearing. That obligation necessarily requires the ALJ to ensure that the record developed at the hearing shows a full and fair inquiry into the facts necessary for consideration of all issues properly before the ALJ in a case. ORS 657.270(3); *see accord Dennis v. Employment Division*, 302 Or 160, 728 P2d 12 (1986). Because further development of the record is necessary for a determination of whether the employer discharged claimant for misconduct, Order No. 19-UI-131693 is reversed, and this matter is remanded for further inquiry.

NOTE: The failure of any party to appear at the hearing on remand will not reinstate Order No. 19-UI-131693 or return this matter to EAB. Only a timely application for review of the subsequent order will cause this matter to return to EAB.

DECISION: Order No. 19-UI-131693 is set aside, and this matter remanded for further proceedings consistent with this order.

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

DATE of Service: August 9, 2019

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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 Empleo. Si no está de acuerdo con esta decisión, puede presentar una Aplicación 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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