

EMPLOYMENT APPEALS BOARD DECISION
2019-EAB-0667

Affirmed
No Disqualification

PROCEDURAL HISTORY: On May 14, 2019, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant, but not for misconduct (decision # 91830). The employer filed a timely request for hearing. On June 26, 2019, ALJ Meerdink conducted a hearing, and on July 2, 2019, issued Order No. 19-UI-132633, affirming the Department's decision. On July 22, 2019, the employer filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Stein Oil Co. Inc. employed claimant from June 4, 2018 until April 22, 2019, last as a manager for one of its gas stations.

(2) The employer expected claimant to refrain from engaging in inappropriate conduct that interfered with a coworker's work performance or that created an intimidating, hostile or offensive work environment. The employer also expected claimant, as a manager, to prepare and post an employee schedule two weeks in advance and to refrain from making unnecessary changes to the schedule. Claimant understood the employer's expectations.

(3) In January 2019, claimant took a photograph with his telephone of the "lower . . . back side" of a female employee while she was standing at work and claimant was covering a shift for the employee's regular manager. Transcript at 10. Claimant sent the photograph to the employee's regular manager and told the regular manager that he thought the leggings the employee was wearing were "inappropriate" work attire. Transcript at 14.

(4) On February 5, 2019, the employer gave claimant a written warning for taking a photograph of an employee with his telephone and advised him that the employer did not permit him to take photographs of employees and that such conduct could be construed as harassment. Exhibit 1.

(5) Claimant occasionally changed the employees' work schedules at the "last minute" because some employees were unable to work due to illness or because the employer had discharged them. Transcript

at 7, 8. Claimant also changed the schedule if he realized he had inadvertently forgotten to schedule an employee for a shift. In early March 2019, the retail supervisor reminded claimant that he should refrain from changing employees' schedules on short notice.

(6) Before April 21, 2019, several employees complained to the employer's retail supervisor that claimant made changes to their schedule without adequate notice, that he had allegedly used a rude tone of voice and foul language toward them on several occasions, and that he had allegedly taken additional photographs of female employees after January 2019. On April 21, 2019, the retail supervisor met with a group of employees to discuss their complaints about claimant. The supervisor did not retain specific information about when the schedule changes or other alleged incidents occurred.

(7) On April 22, 2019, the employer discharged claimant based on the employees' complaints about claimant changing their schedules, allegedly behaving in a rude manner toward them, and allegedly taking photographs of female employees.

CONCLUSIONS AND REASONS: The employer discharged claimant 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 establish misconduct by a preponderance of evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

The employer discharged claimant based on employees' complaints that claimant had taken photographs of female employees, been rude, and changed employee schedules without notice. To the extent the employer discharged claimant for taking photographs of female employees, it did not discharge claimant for misconduct. In contrast to the employer's evidence, claimant denied having taken photographs of employees after having done so in January 2019. Transcript at 18. Although claimant had taken a photograph of a female employee in January 2019, that specific incident was not the basis for the discharge because the employer gave claimant a warning for that conduct in lieu of discharge in February 2019. Moreover, the record does not show that claimant knew or should have known that taking the photographs of work attire he considered inappropriate would violate the employer's expectations until he received the February 2019 warning.

To the extent the employer discharged claimant for having been rude to other employees, the employer did not provide details about claimant's conduct sufficient to establish that claimant intentionally or knowingly engaged in conduct that he knew or should have known would violate the employer's expectations. Similarly, to the extent the employer discharged claimant for having changed employees' schedules on short notice, the record does not show that claimant violated the employer's expectations when claimant changed the schedules to address inadvertent mistakes made in filling out the schedules,

and employee absences due to illness and personnel changes that came up after the initial schedules were created. The employees' allegations during the April 21, 2019 meeting about claimant's conduct therefore did not establish that claimant engaged in misconduct connected with work.

The employer discharged claimant, but not for misconduct. Claimant is not disqualified from receiving unemployment insurance benefits because of his work separation.

DECISION: Order No. 19-UI-132633 is affirmed.

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

DATE of Service: August 26, 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 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

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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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