

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

EMPLOYMENT APPEALS BOARD DECISION
2020-EAB-0021

Reversed
No Disqualification

PROCEDURAL HISTORY: On November 21, 2019, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct connected with work (decision # 84827). Claimant filed a timely request for hearing. On December 13, 2019, ALJ Frank conducted a hearing, and on December 20, 2019 issued Order No. 19-UI-141592, affirming decision # 84827. On January 9, 2020, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant's written argument contained information that was not part of the hearing record, and did not show that factors or circumstances beyond claimant's reasonable control prevented her from offering the information during the hearing. Under ORS 657.275(2) and OAR 471-041-0090 (May 13, 2019), EAB considered only information received into evidence at the hearing when reaching this decision.

FINDINGS OF FACT: (1) HDG Building Materials employed claimant as an architectural sales associate from February 1, 2017 to November 4, 2019.

(2) In 2017, claimant worked with a sales coordinator. In the course of working together, claimant and the sales coordinator discussed personal matters including that they both had teenagers and had both gone through custody battles. In July 2019, the sales coordinator was promoted to sales manager and began to supervise claimant.

(3) The sales manager prepared a code of conduct that required employees to collaborate with others, remain committed to professionalism, and exhibit respect, humility, and integrity. The employer expected claimant to comply with the code of conduct, and claimant was aware of the expectations included in the code of conduct.

(4) Claimant had concerns that the sales manager did not think she was competent. She also had concerns about the sales manager's management style, job qualifications, and what she perceived as his

attempts to assert authority over her. The sales manager perceived claimant's emails to company management as disrespectful and that her overall attitude was not cooperative.

(5) On July 22, 2019, the sales manager issued claimant a verbal warning, encouraging her to call if she felt frustrated and to maintain a respectful tone. On September 12, 2019, the sales manager gave claimant a written warning based on her attendance and performance of her duties. The warning stated that while constructive feedback was welcome it should be delivered in a way that shows consideration and willingness to hear others out. Claimant refused to sign it because she felt offended that the employer had chosen to issue a warning instead of pursuing other means of achieving "a mutually respectful conflict resolution," and disagreed with much of its contents. Exhibit 1.

(6) On October 10, 2019, the employer held a video call and issued claimant a final written warning. Exhibit 1. During the call, the employer told claimant that her emails the past few weeks were unprofessional and unproductive because they contained "hard push-backs, demands, or ultimatums." Exhibit 1. The employer asked claimant to consider transitioning to work as an independent contractor instead of as an employee so she could work independently and without having to submit to the sales manager's authority over the way she did her duties. Claimant declined to transition. She signed the warning, but submitted a response indicating that she strongly disagreed with many aspects of it.

(7) In late October 2019, the sales manager sent two emails to claimant asking for some information. Unbeknownst to claimant or the sales manager, both messages went to claimant's spam folder and she did not receive them. On November 1, 2019, the sales manager sent claimant sternly worded third and fourth emails stating, among other things, that her non-response was "not acceptable, nor is it compatible with the way we do business." Exhibit 1. In the fourth email, the sales manager scheduled a conference call for November 4, 2019. Claimant received the third and fourth emails but did not respond.

(8) On Monday, November 4, 2019, claimant and the sales manager participated in a conference call and determined that the sales manager's emails had gone to claimant's spam folder. Claimant told the sales manager that his tone was belittling, that he did "not have permission to talk to her that way," and that by assuming she had been ignoring him he made her look bad to management. Exhibit 1. The sales manager suggested that they agree it was a misunderstanding and move forward. During the November 4th meeting, claimant made references that the sales manager considered "poorly motivated and inappropriate" including: that the sales manager's background in retail management had not prepared him for the "professional world" while her background had; that the sales manager's "lack of ability to work with claimant may be a reflection of Oregon's parenting classes relative [to] those of her home state"; and that she was "feeling sorry" for the sales manager's daughters based upon claimant's perception of his management style. Exhibit 1.

(9) After the call, the sales manager questioned management as to whether there was any value in continuing to work with claimant because "she will carry on in whatever way she intends without regard for our direction (except where [the employer has] made it clear her job depends on it, and maybe not even then." Exhibit 1. Later on November 4, 2019, the employer discharged claimant for being "quite hostile" and making "personal attacks" on the sales manager during the meeting "rather than see the situation for what it was – a simple misunderstanding." Exhibit 1.

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 establish misconduct. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

Although the employer had specific concerns about claimant’s behavior at work from July 2019 through early November 2019, the employer did not decide to discharge claimant until after the November 4th conference call with the sales manager. Claimant’s behavior during the November 4th call was therefore more likely than not the proximate cause of the employer’s decision to discharge claimant, and the appropriate focus of the initial misconduct analysis. Only if claimant’s conduct in the final incident was willful or wantonly negligent would her conduct in prior instances be at issue.

The employer discharged claimant on November 4th after having concluded that her behavior during her conference call with the sales manager violated the employer’s code of conduct policy. The order under review concluded that claimant’s discharge was for misconduct because she violated the employer’s policy “repeatedly and with utter indifference.” Order No. 19-UI-141592 at 4. The order characterized claimant’s behavior as “defiant” and stated that claimant was “refusing to accept responsibility for any infraction and instead, focused on the employer’s management style relentlessly.” Order No. 19-UI-141592 at 4. With respect to the final meeting, the order characterized claimant as having “superciliously criticized” the sales manager, both personally and professionally, which was “probably an irreparable breach of the employment relationship.” Order No. 19-UI-141592 at 4.

The record supports the order’s conclusion that the employer reasonably expected claimant to comply with the code of conduct policy, and that the employer concluded claimant’s behavior in the final incident was non-compliant. For claimant’s conduct in this case to be considered “misconduct” that disqualifies her from receiving unemployment insurance benefits, however, the law requires that claimant have violated the code of conduct policy willfully or with wanton negligence. As such, whether claimant’s conduct was misconduct depends on her mental state when engaging in the conduct, and the record fails to show that she acted as she did in a “defiant” or “supercilious” manner.

Three aspects of claimant’s conduct during the November 4th conference call formed the basis for the employer’s decision to discharge her, including referring to the sales manager’s retail management experience as having not prepared him for the “professional world”; referring to parenting classes; and feeling sorry for the sales manager’s child (or children). The preponderance of the evidence does not suggest that claimant made those comments with the intent to violate the employer’s code of conduct policy; the comments therefore were not willful violations of the employer’s policy.

The next question is whether she made the comments with wanton negligence. Claimant perceived that the November 4th conversation with the sales manager was about managerial style. Transcript at 41. Claimant testified at the hearing that she mentioned the sales manager's background in retail because she thought the differences in their work backgrounds might be the reason they did not have a good rapport or communication. Transcript at 39. She referenced parenting classes because she and the sales manager had common history and she wanted to share advice she was given in the parenting classes she had attended. Transcript at 40. Claimant was not indifferent to the consequences of making that analogy because when she realized that the sales manager did not understand the reference she "wheeled it back," asked him to "forget it," and "didn't press on it." Transcript at 41. She did not intend the statement as a personal attack. Transcript at 41. Neither of those comments were wantonly negligent.

Claimant also told the sales manager that she felt sorry for his daughter if the sales manager spoke to her the same way he spoke to claimant. Transcript at 41. There is no reasonable dispute that, however intended, the comment was unprofessional and inappropriate in a work context. However, claimant made the comment during a conversation in which she felt unduly criticized, and did not use a heated tone. Claimant and the sales manager had worked together for nearly two years prior to November 4th, and appear to have formed a relationship in which they spoke freely and shared personal information about themselves. Although claimant's relationship with the sales manager had changed between that point and November 2019, it does not appear that her reference to the sales manager's personal life was done with knowledge that doing so would violate the code of conduct policy or result in her discharge. The record therefore does not reflect that claimant made the comment with awareness that the sales manager would consider it a violation of the code of conduct policy, or that she was indifferent to the consequences of her conduct when she said it. The comment was not wantonly negligent.

Because the record does not show that claimant engaged in conduct on November 4th that willfully or with wanton negligence violated the employer's code of conduct policy, the employer has not met its burden to prove that claimant's discharge was for misconduct. Claimant therefore is not disqualified from receiving unemployment insurance benefits based on her work separation.

DECISION: Order No. 19-UI-141592 is set aside, as outlined above.

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

DATE of Service: February 12, 2020

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 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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