EO: 200
BYE: 202012

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

176
DS 005.00

EMPLOYMENT APPEALS BOARD DECISION
2020-EAB-0031

Reversed
No Disqualification

PROCEDURAL HISTORY: On November 22, 2019, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant was discharged for misconduct (decision # 74310). Claimant filed a timely request for hearing. On January 8, 2020, ALJ Lease conducted a hearing, and on January 10, 2020, issued Order No. 20-UI-142453, affirming the Department's decision. On January 14, 2020, claimant filed an application for review with the Employment Appeals Board (EAB).

WRITTEN ARGUMENT: Claimant submitted written argument to EAB. Claimant did not declare that they provided a copy of their argument to the opposing party or parties as required by OAR 471-041-0080(2)(a) (May 13, 2019). The argument also contained information that was not part of the hearing record, and did not show that factors or circumstances beyond claimant's reasonable control prevented them from offering the information during the hearing as required by OAR 471-041-0090 (May 13, 2019). EAB considered only information received into evidence at the hearing when reaching this decision. *See* ORS 657.275(2).

FINDINGS OF FACT: (1) Kentwood Apartments (aka Periwinkle Creek Apartments) employed claimant from May 2019 until October 22, 2019 as an onsite maintenance person at the employer's apartment complex.

(2) At hire, the owner and manager told claimant that what he stated on the employer's property had to be "appropriate." Transcript at 10.

(3) In Summer 2019, the employer hired a contractor to re-roof the apartment complex. The contractor's name was Jose. The roofing project lasted "a long period of time," during which claimant "built a relationship" with the contractor. Transcript at 18. Claimant and the contractor used to "kid" each other and "say things and gesture things." Transcript at 18. On one occasion in August 2019, claimant was trying to talk to the contractor, but the contractor did not hear claimant. Claimant yelled to the contractor, "[Y]ou crazy Mexican, don't ignore the white trash * * *." Transcript at 18. Claimant was referring to himself as "the white trash." Transcript at 18. Claimant did not think his statement would

offend the contractor. The contractor turned around, laughed, and yelled. Claimant responded, "[H]ey, man, you've got a mess over here you need to clean up." Transcript at 19. The contractor responded, "[O]kay. I'll get to it." Transcript at 19. Claimant did not notice that anyone was nearby during the incident. However, a Latina tenant who witnessed the incident was offended by claimant calling the contractor "a crazy Mexican," and complained to the apartment manager.

(4) The apartment manager told the employer's owner about the tenant's complaint. The owner met with claimant and told claimant that the complaint was "ludicrous," but warned claimant that "those type of comments . . . put [the owner] at risk and . . . are offensive." Transcript at 19, 9. The owner told claimant he could not make comments about "race or . . . religion, or . . . sexual content or anything of that nature . . . at work." Transcript at 10. Claimant received no other warnings until October 22, 2019.

(5) Claimant and his coworker, who was a tenant of the apartment complex where he and claimant worked, would often "kid with each other" during the workday. Transcript at 15. They used "adult statements" around each other and would "pull all kinds of pranks on each other." Transcript at 15. Claimant and his coworker also used "adult humor" on a regular basis with some of the tenants and the apartment manager while they were working. Transcript at 17. Claimant felt that he had the same "level of camaraderie" with some of the tenants as he did with the tenant who was his coworker, and felt "very comfortable . . . with the way we used to kid each other." Transcript at 15-16, 25.

(6) On October 21, 2019, claimant's coworker was standing with some other adult tenants claimant knew. They were near the apartment complex playground, but not within earshot of the children playing on the playground at the time. Claimant walked up to the coworker, put his hand on his shoulder, and "jokingly" said, "I didn't think they let child molesters around here." Transcript at 6, 16. "A couple" of the other tenants laughed. However, claimant's comment offended and upset the coworker. Claimant responded, "Hey, man, I'm just kidding." Transcript at 16.

(7) On October 22, 2019, claimant approached the coworker again to apologize, but the coworker was still upset. Claimant told the apartment manager about the incident on October 21 and that the coworker was upset by the incident. The manager told the owner about the incident.

(8) On October 22, 2019, the employer discharged claimant for making a statement that offended his coworker on October 21, 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). The employer has the burden to show it discharged claimant for misconduct.

Babcock v. Employment Division, 25 Or App 661, 550 P2d 1233 (1976) (in a discharge case, the employer has the burden to establish misconduct by a preponderance of evidence).

Order No. 20-UI-142453 concluded that on October 22, 2019, the employer discharged claimant for misconduct because on October 21, claimant violated the employer's known and reasonable expectations by making a joking statement that another person found offensive at work, and because his conduct could not be excused as an isolated instance of poor judgment.[1] The order reasoned that claimant understood his statement to a coworker on October 21 would violate the employer's expectations as a matter of common sense, or from the August 2019 warning from the employer.[2] The order also reasoned that the October 21 incident could not be excused as an isolated instance of poor judgment because the comments he made in August and October 2019 established a pattern of willful or wantonly negligent conduct.[3] However, the record does not support the order's conclusion that claimant engaged in misconduct in the final incident.

The employer's owner testified that the employer discharged claimant for making inappropriate comments while working in August 2019 and on October 21, 2019, and that the comments were "putting [him] at risk" and could "get [him] sued." Transcript at 8, 9. However, the owner did not decide to discharge claimant until October 22, after claimant jokingly called a coworker, who was also a tenant, a "child molester" in front of other tenants. Therefore, because the record shows that claimant's conduct on October 21 caused the employer to discharge claimant, it is the proper initial focus of the misconduct analysis. Only if the final incident on October 21 was a wanton or willfully negligent violation of the employer's expectations would EAB then analyze the August 2019 incident for evidence of willful or wantonly negligent behavior.

The employer warned claimant in August 2019 to refrain from making comments about "race or . . . religion, or . . . sexual content or anything of that nature" at work. Claimant understood that he should refrain from making comments that would offend tenants or coworkers. However, the record fails to show that claimant understood that his statement on October 21 would violate the employer's expectations.

It was undisputed that claimant's conduct was not willful in that he did not mean to offend the coworker through his statement. The employer's owner testified that claimant made the October 21 comment "jokingly," and that although claimant offended the person, the owner did not "believe [claimant] meant harm to the person." Transcript at 6. Moreover, due to the atmosphere of "joking" and "adult humor" that was generally permitted between claimant, his coworker, and tenants in the workplace, claimant did not know or have reason to know that his comment on October 21 would probably result in a violation of the employer's standards of behavior at work. Claimant's uncontested testimony was that claimant, the coworker he offended on October 21, "quite a few" tenants, and the manager would "just kid each other" and use "adult humor" with each other. Transcript at 17. Claimant also testified that he did not know his comment would offend the coworker because "[the coworker] had the same level of humor with [claimant] * * * ." Transcript at 29. It is plausible that claimant did not understand from the August

[1] Order No. 20-UI-142453 at 3.

[2] Order No. 20-UI-142453 at 3.

[3] Order No. 20-UI-142453 at 3.

2019 warning that his October 21 comment would violate the employer's standards. Nor had the employer warned claimant any other time about the "adult humor" that occurred at work. The employer failed to show that claimant knew from prior training, experience or warnings that the statement he made would probably result in a violation of the employer's expectation that claimant refrain from making inappropriate statements at work.

Nor do we find the employer's expectations so obvious that claimant should have known as a matter of common sense that his October 21 statement would violate the employer's standards. Claimant was joking when he made the comment, and although the coworker was offended, the other tenants present apparently laughed and understood claimant's statement was false and a joke. The record does not therefore show that claimant's conduct was legally actionable defamation that he knew or should have known would violate the employer's standards as a matter of common sense. Because the record does not show that claimant knew or should have known that his conduct would probably result in a violation of the employer's standards, the record does not show that his conduct was wantonly negligent. It was not, therefore, misconduct.

The employer discharged claimant, but not for misconduct. Claimant is not disqualified from receiving unemployment insurance benefits based on this work separation.

DECISION: Order No. 20-UI-142453 is set aside, as outlined above.

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

DATE of Service:

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

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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 دستورالعمل موجود در پایان آن، از دادگاه تجدید نظر اورگان درخواست تجدید نظر کنید.

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