

EMPLOYMENT APPEALS BOARD DECISION
2020-EAB-0081

Reversed
No Disqualification

PROCEDURAL HISTORY: On December 10, 2019, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 144335). Claimant filed a timely request for hearing. On January 14, 2020, ALJ M. Davis conducted a hearing, and on January 16, 2020, issued Order No. 20-UI-142851, affirming the Department's decision. On January 27, 2020, claimant filed an application for review with the Employment Appeals Board (EAB).

EAB did not consider claimant's written argument when reaching this decision because they did not include a statement declaring 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).

FINDINGS OF FACT: (1) The Housing Authority employed claimant from December 3, 2012 until November 19, 2019 as a maintenance specialist.

(2) The employer expected all employees to complete their duties with a positive attitude and teamwork, and to serve the public and treat coworkers with respect, courtesy and professionalism. The employer required employees to refrain from treating people differently because they participated in an investigation or personnel matter. The employer expected employees to refrain from using "profane or abusive language, including ethnic slurs directed at other employees." Transcript at 16-17. The employer also expected employees to refrain from behaving in a way that created an intimidating or hostile work environment or unreasonably interfered with an employee's work performance or opportunities. Claimant understood the employer's expectations.

(3) Before May 30, 2019, claimant regularly avoided and did not speak to one of his coworkers because they did not get along. Claimant also regularly used foul language while working. On one

occasion, claimant participated in a conversation about the Portland Pride Parade and sex that was inappropriate for the workplace.

(4) On May 30, 2019, the employee that claimant did not speak to (complainant) complained to the employer's human resources department that claimant allegedly made multiple statements on different occasions that violated the employer's expectations regarding appropriate workplace conversation. One allegation was that, following an absence from work, claimant stated to the complainant, who was Latino, in front of two other Latino employees, that claimant had missed work due to food poisoning caused by "bad Mexican food." Transcript at 11. The complainant alleged that the comment was a negative reference to him and his national origin because he and claimant had a negative interaction the day before claimant missed work. The complainant also alleged that claimant was "taunting and teasing" an employee who attended the Portland Pride Parade. Transcript at 12. A third allegation was that claimant had repeatedly used "profanity and abusive language" in the workplace toward other employees and members of the public served by the employer, including repeatedly referring to the complainant as a "mother fucker." Transcript at 13. The complainant also alleged that claimant called the public the employer served "lazy fuckers," and "encouraged team members not to work hard [because] . . . [the people] don't deserve it." Transcript at 15. The complainant reported that claimant encouraged him to behave in that way. The complainant also alleged that he would knock on claimant's door, and claimant would slam the door on the complainant. The complainant alleged claimant accused him of performing his work incorrectly.

(5) The employer hired an outside source to conduct an investigation into the May 30 allegations. The investigator collected information from twelve witnesses, including claimant. During the investigation, one employee alleged that, while the complainant was on vacation, claimant stated about the May 30 complainant, "[I'm] glad that mother fucker's not here or [I] would have killed him." Transcript at 14.

(6) On September 13, 2019, the investigator provided their final report regarding the allegations to the employer. The employer began a review of the investigative findings and what discipline, if any, it should impose.

(7) On October 1, 2019, the employer placed claimant on paid administrative leave until it made a decision about claimant's continued employment.

(8) Until sometime after October 30, 2019, the employer was "on the verge" of imposing a thirty-day suspension in response to the May 30, 2019 complaints and investigative findings. Transcript at 19.

(9) On October 30, 2019, while claimant was still on administrative leave, claimant encountered the complainant and claimant's lead worker at a Home Depot store. The lead, who was also a union representative, pursued claimant in the store, and had a conversation with claimant about the workplace investigation. After October 30, the lead worker and other employee who encountered claimant at Home Depot reported to the employer that claimant stated in front of the lead worker and the complainant in Home Depot on October 30, "[G]et that mother fucker away from me." Transcript at 14.

(10) Because of claimant's alleged statement toward the coworker in the Home Depot store, the employer "reconsidered" its plan to suspend claimant for 30 days, and instead decided to discharge claimant.

(11) On November 19, 2019, the employer discharged claimant for allegedly engaging in inappropriate workplace conversation.

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).

Order No. 20-UI-142851 concluded that the employer discharged claimant for misconduct, finding that claimant repeatedly used “profanity” such as “motherfucker” in reference to the coworker who complained to the employer about him,¹ and concluding that claimant’s conduct violated the employer’s expectations, and was not an isolated instance of poor judgment or a good faith error.² However, EAB limited its initial misconduct inquiry to claimant’s alleged misconduct in the Home Depot on October 30, 2019. On this record, the employer failed to meet its burden to establish that claimant engaged in misconduct during that final incident.

EAB generally limits its initial misconduct inquiry to the final incident of alleged misconduct preceding the discharge.³ EAB inquires into prior incidents of misconduct only if necessary to determine whether a final incident of misconduct may be excused as an isolated incident of poor judgment. Here, the employer put claimant on paid administrative leave after it received the results of the investigation, and while it decided what discipline to impose. The employer’s executive director testified that, until claimant’s alleged act of calling his coworker a “mother fucker” at Home Depot on October 30, the employer was “on the verge” of imposing a thirty-day suspension rather than discharging claimant. We infer that this was because the employer decided the alleged prior incidents did not merit discharge. The record does not show the employer had already decided to discharge claimant because of the complainant’s allegations and the information the employer received through its investigation. Accordingly, the initial evaluation of whether claimant engaged in misconduct is limited to the facts surrounding claimant’s conduct on October 30, the final incident of alleged misconduct preceding claimant’s discharge.

¹ Order No. 20-UI-142851 at 4.

² Order No. 20-UI-142851 at 4.

³ See e.g. *Appeals Board Decision* 12-AB-0434, March 16, 2012 (discharge analysis focuses on proximate cause of the discharge, which is generally the last incident of misconduct before the discharge); *Appeals Board Decision* 09-AB-1767, June 29, 2009 (discharge analysis focuses on proximate cause of discharge, which is the incident without which the discharge would not have occurred when it did).

The employer had a reasonable expectation that claimant would refrain from directing abusive, foul language toward his coworkers. With respect to claimant's interaction with his lead and coworker on October 30, the executive director's hearsay information was that claimant told the lead worker, "[G]et that mother fucker away from me," in apparent reference to the employee who had initiated the employer's investigation. However, claimant testified that he did not refer to the employee as "mother fucker" on October 30. Transcript at 29. Claimant also testified that the lead worker initiated a conversation with claimant and stated that the employer's investigation was "totally fucked up," and "voicing his frustration and concerns" about the workload without claimant at work. Transcript at 27. Accordingly, the evidence is no more than equally balanced as to whether claimant responded to the lead worker or other employee by calling his coworker a foul name as alleged. Because the evidence is (no more than) equally balanced as to whether claimant willfully, or with wanton negligence, violated the standards of workplace behavior that an employer has the right to expect of an employee, the employer failed to meet its burden establish misconduct by a preponderance of evidence.

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

DECISION: Order No. 20-UI-142851 is set aside, as outlined above.

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

DATE of Service: March 3, 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 desisyong ito.

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

Employment Appeals Board - 875 Union Street NE | Salem, OR 97311
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