EO: 200
BYE: 202045

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

854
DS 005.00

EMPLOYMENT APPEALS BOARD DECISION
2020-EAB-0167

Reversed & Remanded

PROCEDURAL HISTORY: On December 5, 2019, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant, but not for misconduct (decision # 105751). The employer filed a timely request for hearing. On January 23, 2020, ALJ Wymer conducted a hearing, and on January 31, 2020, issued Order No. 20-UI-143622, affirming the Department's decision. On February 20, 2020, the employer filed an application for review with the Employment Appeals Board (EAB).

EAB considered the employer's written argument in reaching this decision.

FINDINGS OF FACT: (1) Goodwill Industries of the Columbia Willamette employed claimant as a warehouse worker from October 6, 2010 until October 23, 2019. One of claimant's job responsibilities included operating the "tipper, which is machine designed to assist employees with sorting large boxes of goods (referred to as "melon boxes"), by lifting and tipping the contents of the boxes onto a sorting table so that the goods can more easily be sorted. Two employees are normally required to operate the tipper.

(2) The employer had a written company policy prohibiting "abusive language, excessive profanity or improper language" and "[t]hreatening, intimidating, or interfering with … other employees." Exhibit 1, page 8 of 8. Violations of this policy could lead to disciplinary action, including termination. On November 9, 2010, claimant signed a written acknowledgment that he had received a copy of the employee handbook and that he agreed to become familiar with the company's polices.

(3) From July 11, 2019 until September 25, 2019, the employer placed claimant on probation "for this behavior." Exhibit 1 at page 2 of 8.

(4) On October 19, 2019, claimant was working at the employer's warehouse operating the tipper to assist with sorting a box of electrical equipment, while co-workers L.G. and D.W. sorted through a melon box of shoes in a different location of the warehouse. Claimant was operating the tipper on his own due to the employer being "short-handed." Transcript at 18-19. After L.G. and D.W reached the

halfway point of sorting their melon box of shoes, L.G. approached claimant and asked him to use the tipper to tip the rest of their melon box of shoes. Claimant responded that when he finished dumping the electrical equipment, he would come dump her shoes.[1] L.G. and D.W. moved on to a second melon box of shoes and when they reached the halfway point of their sorting, L.G. again approached claimant and requested that he now tip both melon boxes. Because claimant was "hot" about the fact that L.G. and D.W. were able to get through a second melon box of shoes before he could set the tipper to dump the first melon box of shoes, and because claimant was "irritated" about the fact that he had to operate the tipper alone, claimant smacked the tipper with his hand while using profanity. Transcript at 18. Claimant's actions scared L.G. and D.W.

(5) On October 20, 2019, an assistant manager became aware of the incident and conducted an investigation, which included taking witness statements from L.G., D.W., and speaking with claimant. Based on her understanding of the events, the assistant manager suspended claimant, without pay, pending further notification of any additional disciplinary action the employer would take. The assistant manager later obtained the statement of, E.P., a different worker who the assistant manager learned was "afraid" to work with claimant. Exhibit 1, page 2 of 8. In his statement, E.P. indicated that he had worked with claimant on more than ten occasions and that claimant called him names like "sissy," made demeaning comments about E.P.'s sexuality, and pulled E.G.'s arm hairs whenever E.G. wore short sleeves. Exhibit 1 at page 5 of 8. Claimant had harassed E.G. in this manner for several months with the most recent incident being a week before E.G.'s statement. The assistant manager forwarded the matter to the employer's intervention specialist for final disciplinary action.

(6) On October 22, 2020, the intervention specialist spoke with claimant to obtain his side of the story.

(7) On October 23, 2020, the intervention specialist terminated claimant's employment. The employer terminated claimant because of his conduct on October 19, 2020, and because of his treatment of E.P.

(8) Claimant understood why L.G. and D.W. would view his actions on October 19, 2019 as "rude or threatening" and he recognized that he made a "dumb mistake" and that "I've been there so long, and I knew I shouldn't a done it, but it was just a reaction… I couldn't stop myself…." Transcript at 23-24. Claimant viewed his actions toward E.G. as "joking around" and giving him a "bad time," which was consistent with the type of "teasing" that would be periodically directed by all male employees to all male employees at the warehouse, including claimant. Transcript at 24-26.

CONCLUSIONS AND REASONS: The order under review is reversed, and this matter is remanded.

ORS 657.176(2)(a) requires a disqualification from unemployment insurance benefits if the employer discharged claimant for misconduct connected with work. OAR 471-030-0038(3)(a) (December 23, 2018) defines misconduct, in relevant part, as a willful or wantonly negligent violation of the standards of behavior which an employer has the right to expect of an employee, or an act or series of actions that amount to a willful or wantonly negligent disregard of an employer's interest. OAR 471-030-0038(1)(c) defines wanton negligence, in relevant part, as 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

[1] Transitioning the tipper from one melon box to the next was a process that can take up to 15 minutes to complete.

result in a violation of the standards of behavior which an employer has the right to expect of an employee. The employer carries the burden to show claimant's misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976). Isolated instances of poor judgment and good faith errors are not misconduct. OAR 471-030-0038(3)(b).

Order No. 20-UI-143622 concluded that the employer discharged claimant, but not for misconduct. In reaching this conclusion, Order No. 20-UI-143622 found that the proximate cause of claimant's discharge was claimant's conduct on October 19, 2019, when claimant became irritated and made a profane comment, while slapping the tipper, causing fear in his coworkers. According to Order No. 20-UI-143622, but for claimant's conduct on October 19, 2019, the employer would not have discharged claimant.

Contrary to Order No. 20-UI-143622's finding, however, the record demonstrates that after claimant's October 19, 2019 conduct, the employer conducted an investigation into the circumstances surrounding the incident and discovered that claimant had also been harassing E.G. by making rude statements and calling him names, along with pulling the hair on his arms whenever E.G. wore a short-sleeve shirt. Claimant had harassed E.G. in this manner for several months with the most recent incident being a week before the investigation. The record demonstrates that the employer decided to terminate claimant based on both his conduct on October 19, 2019, and his treatment of co-worker, E.G., however, Order No. 20-UI-143622 failed to establish a record sufficient to determine whether claimant's treatment of E.G. constituted a willful or wantonly negligent violation of the employer's policies.

To the extent Order No. 20-UI-143622 found that claimant's October 19, 2019 conduct did not constitute misconduct, the record does not support Order No. 20-UI-143622's conclusion. Order No. 20-UI-143622 reached this conclusion by reasoning that "although claimant agreed that his conduct violated the employer's prohibition… the persuasive evidence is that his conduct was not intentional" and, therefore, claimant's conduct was neither willful nor wantonly negligent. Order No. 20-UI-143622 at 3. This finding, however, conflates a finding of "willfulness" with a finding of "wanton negligence" despite the different definitions associated with those terms for purposes of a misconduct analysis. While the employer may not have met its burden in demonstrating that claimant's conduct constituted willful misconduct (because the conduct was not intentional), an open question remains whether claimant's conduct on October 19, 2019, was the result of his indifference to the consequences of his actions where claimant was conscious of his conduct and knew or should have known that his conduct would result in a violation of the employer's policies and/or standards of behavior.

On remand, the record should be developed with respect to claimant's behavior toward E.G., including claimant's understanding of any policy with respect to treatment of others, his awareness that his treatment of E.G. would violate any policy, whether E.G. participated in treating claimant in a like manner, whether others in the employer's facility engaged in similar behavior with or toward claimant, and whether claimant had reason to sincerely believe that his treatment of E.G. would be acceptable.

With respect to claimant's October 19th behavior, the record establishes that claimant's conduct was not willful, but the record was not sufficiently developed to support a conclusion whether the conduct was wantonly negligent. The record shows that, in hindsight, claimant understood that his conduct was inappropriate and he should not have done it. However, in order to reach a determination, the record must show whether claimant had this same understanding at the time of the events, not just afterward.

On remand, the record must be developed as to whether – at the time claimant slapped the tipper and used profanity – claimant understood that his conduct was inappropriate, was conscious of his conduct, and showed indifference to the consequences of his conduct.

Likewise, the record must be developed with respect to claimant's July 11, 2019 through September 25, 2019 probationary period. The record does not show what conduct led to claimant being placed on probation, nor whether that conduct was willful or wantonly negligent. Through further development of these issues on remand, light will be shed on whether this entire probationary episode operated to place claimant on notice that the conduct forming the basis for his discharge violated the employer's polices or expectations.

Absent further inquiry into claimant's treatment of E.G., the October 19th events, or claimant's probation, the record cannot support a conclusion of whether those incidents were at least wantonly negligent, or whether claimant's conduct in any of those incidents was excusable as a good faith error or an isolated instance of poor judgment. 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. 20-UI-143622 is reversed, and this matter is remanded.

DECISION: Order No. 20-UI-143622 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: March 27, 2020

NOTE: The failure of any party to appear at the hearing on remand will not reinstate Order No. 20-UI-143622 or return this matter to EAB. Only a timely application for review of the subsequent order will cause this matter to return to EAB.

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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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