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

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DS 005.00

EMPLOYMENT APPEALS BOARD DECISION
2020-EAB-0272

Reversed
No Disqualification

PROCEDURAL HISTORY: On February 10, 2020, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct and claimant was disqualified from receiving benefits effective January 19, 2020 (decision # 93704). Claimant filed a timely request for hearing. On March 11, 2020, ALJ Frank conducted a hearing, and on March 13, 2020, issued Order No. 20-UI-146218, affirming the Department's decision. On March 30, 2020, claimant filed an application for review with the Employment Appeals Board (EAB).

With the application for review, claimant filed a written argument. Claimant's 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 them 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) Wells Fargo Bank NA employed claimant as a team manager from August 6, 2012 to January 21, 2020.

(2) The employer expected claimant to treat coworkers respectfully and to refrain from referring to them in a derogatory manner. Claimant was aware of and understood the employer's expectations as a matter of common sense.

(3) In August 2019, two employees reported to claimant's supervisor that claimant had been overheard discussing an employee who, several years earlier, had inadvertently soiled a branch chair, which subsequently required cleaning. The employees reported that claimant made fun of the employee by referring to her as a "cunt waffle." Transcript at 14-15. When interviewed by the employer, claimant denied making that comment but did admit to describing the employee as an "idiot savant," which claimant believed was complimentary because she considered the employee to be "really smart...but socially awkward." Transcript at 14-15, 19. On September 3, 2019, the employer gave claimant a written

warning for calling the employee in question an "idiot savant," which the employer considered a derogatory comment.

(4) On December 6, 2019, while at work with members of her team at approximately 5:00 a.m., claimant raised her voice at a coworker who had seated herself away from her workstation and admonished her to return to her desk. Claimant did not intend to be disrespectful or demeaning to the coworker but believed the place where the coworker had seated herself posed a safety risk. When claimant saw that the coworker appeared upset by her comment, she immediately apologized to her and explained that she did not intend to upset or embarrass her. Later, another coworker reported to claimant's supervisor that claimant had "yell[ed] at a team member across the floor." Transcript at 6. The employer opened an investigation into that allegation.

(5) During the investigation, the employer received reports from three employees that claimant had made a derogatory remark about new hires to other coworkers on three occasions between November 4 and December 4, 2019. When the supervisor interviewed claimant about the reports she had received, claimant admitted that she had raised her voice at the coworker on December 6, but had apologized to her thereafter when she realized she had upset her. Transcript at 12. Claimant denied the reports from coworkers that she had made a derogatory remark about another coworker on any occasion between November 4 and December 4, 2019. Transcript at 11-13.

(6) On January 21, 2020, the employer discharged claimant for unsatisfactory performance of her leadership and management duties in failing to treat coworkers respectfully and referring to them in a derogatory manner based on the December 6 incident and the three reports of alleged derogatory remarks about coworkers between November 4 and December 4, 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). In a discharge case, the employer has the burden to establish misconduct by the preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

The employer discharged claimant for failing to treat coworkers respectfully and referring to them in a derogatory manner based on the December 6 incident and the three reports of alleged derogatory remarks about coworkers between November 4 and December 4, 2019. Order No. 20-UI-146218 concluded that the employer discharged claimant for misconduct, reasoning,

> As a matter of common sense, employees were reasonably expected to refrain from engaging others in a hostile, aggressive or obscene manner within the employer's bank

> branch. The preponderance of the evidence adduced at hearing shows that claimant violated this policy and did so repeatedly, even after being warned… It is…highly unlikely that a number of other employees would arbitrarily fabricate such detailed accounts. Claimant willfully violated the standards of behavior that the employer had a reasonable right to expect of an employee.

Order No. 20-UI-146218 at 3-4. However, the record fails to show that the employer met its burden of proof.

To the extent the employer discharged claimant because on December 6, 2019 she allegedly "yell[ed] at a team member across the floor" it failed to establish that she did so willfully or with wanton negligence. Claimant admitted to the employer that she raised her voice at the coworker on that date but apologized to her thereafter when she realized she had upset her. She also explained, and the employer did not dispute, that she raised her voice at that time because she believed that where the coworker had seated herself posed a safety risk and that she never intended to upset or embarrass the coworker in question. Accordingly, the preponderance of the evidence fails to show that on December 6, 2019, claimant was consciously disrespectful to the coworker in question or was indifferent to the consequences of her actions. Even if yelling to the team member violated the employer's expectations, the violation was neither willful nor wantonly negligent.

To the extent the employer discharged claimant for referring to coworkers in a derogatory manner on November 4, November 11, and December 4, 2019 based on reports allegedly made by coworkers, the employer failed to meet its burden to show that claimant actually made the derogatory remarks in question. The employer's evidence was based entirely on hearsay statements the supervisor reportedly received from three individuals, and claimant denied making the remarks, and none of the individuals in question testified at hearing. Transcript at 19-20. Claimant's denials at hearing were consistent with her previous denials to the employer, and the ALJ did not explicitly find that claimant was not credible. The employer's hearsay evidence was the only evidence of claimant's reported derogatory comments about her coworkers on the dates in question, and because the individuals who reportedly were the source of those reports did not testify at hearing, claimant was denied the critical opportunity to question them regarding their observations, recollections, truthfulness, or potential bias, which she alleged to both the employer and at hearing in her testimony and through her written submissions. Transcript at 20; Exhibit 1. On this record, the employer had the alternative of presenting live testimony from current employees to substantiate its allegations, and the facts sought to be proved were central to its assertion of misconduct. Absent a reasonable basis for concluding that claimant was not a credible witness, claimant's first-hand denials are at least as credible as the employer's hearsay. The evidence as to whether claimant made disrespectful or derogatory comments about some coworkers to others as alleged was, at best, equally balanced.[1] Where the evidence is no more than equally balanced, the party with the burden of persuasion - here, the employer - has failed to satisfy its evidentiary burden.

[1] *See, Cole/Dinsmore v DMV,* 336 Or 565, 585, 87 P3d 1120 (2004) (to determine whether hearsay evidence may constitute substantial evidence in a particular case, several factors should be considered, including, (1) whether there was an alternative to the hearsay statement; (2) the importance of the facts sought to be proved by the hearsay; (3) whether there is opposing evidence to the hearsay; and (4) the importance of cross examination regarding the hearsay statements).

Accordingly, the employer discharged claimant, but not for misconduct under ORS657.176(2)(a). Claimant is not disqualified from receiving unemployment insurance benefits on the basis of her work separation.

DECISION: Order No. 20-UI-146218 is set aside, as outlined above.

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

DATE of Service: April 29, 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.

Please help us improve our service by completing an online customer service survey. To complete the survey, please go to https://www.surveymonkey.com/s/5WQXNJH. If you are unable to complete the survey online and wish to have a paper copy of the survey, please contact our office.

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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