

EMPLOYMENT APPEALS BOARD DECISION
2021-EAB-0521

Affirmed
No Disqualification

PROCEDURAL HISTORY: On March 25, 2021, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that the employer discharged claimant for misconduct, disqualifying claimant from receiving unemployment insurance benefits effective February 21, 2021 (decision # 103455). Claimant filed a timely request for hearing. On June 9, 2021, ALJ Kaneshiro conducted a hearing, and on June 15, 2021 issued Order No. 21-UI-168783, reversing decision # 103455 by concluding that claimant's discharge was not for misconduct, and did not disqualify claimant from receiving benefits. On June 29, 2021, the employer filed an application for review with the Employment Appeals Board (EAB).

WRITTEN ARGUMENT: The employer's argument contained information that was not part of the hearing record, and did not show that factors or circumstances beyond the employer'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. EAB considered the employer's argument to the extent it was based on the record.

FINDINGS OF FACTS: (1) Avalon International Aluminum employed claimant as a general laborer from November 30, 2020 until March 2, 2021.

(2) On January 21, 2021, two of claimant's coworkers got into an argument, and claimant's floor lead yelled at them to stop yelling at each other. Claimant said to the floor lead that yelling at the coworkers to stop yelling "doesn't make much sense." Transcript at 30. The floor lead asked claimant why he said that and claimant responded "I probably just make bad life choices." Transcript at 30. Claimant intended the comment as a joke but the floor lead thought the comment showed a poor attitude and sent claimant home for the day.

(3) In the late afternoon of February 26, 2021, claimant was working with a coworker assembling doors. The coworker noticed the doors were damaged and would not close properly. The coworker asked claimant what he should do about the damaged doors, and claimant advised that the coworker should

raise the issue with the employer's Chief Operating Officer (COO). The coworker did so, outside the presence of claimant.

(4) Based on what the coworker told him, the COO formed the belief that claimant was "trying to pass off" the damaged doors and that claimant had told the coworker "we've got to get these doors out so let's just go ahead and sen[d] it. It's Friday. Fuck it. Who cares?" Transcript at 8-9. The COO went to claimant and the coworker's work area, inspected the doors, and determined rework was necessary. The doors were remilled and returned to the coworker and claimant for assembly near the end of the business day.

(5) When the doors were returned, the coworker struggled to fasten a metal piece to the side of a door. Claimant said "fuck it" and suggested fastening the metal piece as the rest of the door was being assembled, "to hurry the progress up." Transcript at 28. The coworker became "distracted" because the doors had to be completed and shipped by close of business. Transcript at 27. Claimant told the coworker that shipping the doors that day "wasn't a possibility" because of the amount of work remaining to be done, and the two continued to assemble what they could until the end of the shift. Transcript at 27.

(6) On February 26, 2021, based on the events of that afternoon, the employer decided to discharge claimant for showing a poor attitude and insufficient concern for work quality. The employer intended to communicate claimant's discharge to him on March 1, 2021. However, on March 1, 2021, claimant was absent from work.

(7) On March 2, 2021, claimant reported for work and the employer communicated to him that he was discharged.

CONCLUSIONS AND REASONS: The employer discharged claimant, not for misconduct.

If the employee is willing to continue to work for the same employer for an additional period of time but is not allowed to do so by the employer, the separation is a discharge. OAR 471-030-0038(2)(b) (September 22, 2020). "Work" means "the continuing relationship between an employer and an employee." OAR 471-030-0038(1)(a). "[T]he date an individual is separated from work is the date the employer-employee relationship is severed." OAR 471-030-0038(1)(a).

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) (September 22, 2020). "[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).

Here, it is necessary to determine whether the final incident resulting in claimant's discharge were the events of February 26, 2021 or claimant's subsequent absence from work on March 1, 2021. At hearing, the employer testified that the "quality issue on Friday [February 26, 2021]" was "what broke the camel's back," and that claimant "would have been fired on Monday because he . . . messed up on Friday." Transcript at 21-22. However, the record also shows that during January and February 2021, claimant was absent from or tardy for work on a number of occasions, and that claimant's absence from work on Monday March 1, 2021 meant that his discharge "was guaranteed for . . . Tuesday [March 2, 2021]." Transcript at 22. Nevertheless, the record shows that the employer became unwilling to allow claimant to continue working based on the events of February 26, 2021. Given that the employer was unwilling to allow claimant to work for an additional period of time as of February 26, 2021, the discharge occurred on that date, and the employer-employee relationship was severed at that time. Therefore, the final incident resulting in claimant's discharge were the events of February 26, 2021.

The employer discharged claimant for showing a poor attitude and insufficient concern for work quality on February 26, 2021. Claimant likely understood as a matter of common sense that the employer expected him to not display a poor attitude, and maintain sufficient concern for work quality. However, the employer failed to meet their burden to show that claimant's conduct on the afternoon of February 26, 2021 constituted misconduct.

The employer's view that claimant showed a poor attitude and insufficient concern for work quality on February 26, 2021 was rooted in the COO's belief that claimant was "trying to pass off" damaged doors to customers because, based on information provided to the COO by claimant's coworker, claimant told the coworker "we've got to get these doors out so let's just go ahead and sen[d] it. It's Friday. Fuck it. Who cares?" Transcript at 8-9. However, claimant credibly testified that he did not tell the coworker to send out the doors but instead stated that shipping the doors that day "wasn't a possibility" given the amount of work remaining to be done on them. Transcript at 27. Claimant also explained that he said "fuck it," not as an expression meant to convey a poor attitude, but in connection with a suggestion he gave the coworker "to hurry the progress" of assembling the doors. Transcript at 28. Because the coworker did not testify at hearing, the weight of the evidence supports claimant's firsthand account of what he told the coworker and why.

The employer therefore failed to show that claimant deliberately violated the employer's expectations, or that he consciously engaged in conduct he knew or should have known probably violated those expectations. Absent such a showing, the employer failed to establish that claimant violated the employer's expectations willfully or with wanton negligence on February 26, 2021.

For the foregoing reasons, the employer failed to establish that it discharged claimant for misconduct. Claimant therefore is not disqualified from receiving benefits based upon this work separation.

DECISION: Order No. 21-UI-168783 is affirmed.

D. Hettle and A. Steger-Bentz;
S. Alba, not participating.

DATE of Service: August 4, 2021

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 ໂດຍປະຕິບັດຕາມຄຳແນະນຳທີ່ບອກໄວ້ຢູ່ຕອນຫ້າຍຂອງຄຳຕັດສິນນີ້.

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.

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