

EMPLOYMENT APPEALS BOARD DECISION
2021-EAB-0540

Reversed
No Disqualification

PROCEDURAL HISTORY: On March 5, 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 14, 2021 (decision # 60257). Claimant filed a timely request for hearing. On June 24, 2021, ALJ Ramey conducted a hearing, and on June 30, 2021 issued Order No. 21-UI-169617, affirming decision # 60257. On July 6, 2021, claimant filed an application for review with the Employment Appeals Board (EAB).

WRITTEN ARGUMENT: Claimant did not declare that he provided a copy of his 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 him 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) Fred Meyer Stores, Inc. employed claimant as a grocery store worker from January 14, 2019 until February 16, 2021.

(2) The employer had a policy that prohibited violence in the workplace. Under this policy, the employer expected their employees to refrain from making threats of violence in the workplace. Claimant was aware of and understood that expectation.

(3) On January 31, 2021, claimant asked a coworker to return some grocery items to the shelves. The coworker responded "okay, cool" in a tone of voice that claimant thought was disrespectful. Transcript at 7. Claimant and the coworker had a tense relationship and claimant believed the coworker had bullied him in the past. When claimant tried giving the return items to the coworker, the coworker said something to claimant that claimant thought was "just rude." Transcript at 19. Claimant departed the

room the two were in, and approached a supervisor intending to ask the supervisor to deescalate the situation.

(4) As claimant began explaining the situation to the supervisor, the coworker walked to where they were standing and joined the discussion. Claimant told the coworker to go away, but the coworker said, “you can’t tell me what to do” and refused to leave. Transcript at 19. Claimant “lost [his] temper” and called the coworker a “bitch.” Transcript at 19. The coworker responded, “I’m gonna make . . . the situation calmer” and walked away. Transcript at 20. During the interaction, claimant and the coworker stood two and a half feet from each other, spoke to each other at a low volume, and had no physical contact with one another.

(5) Shortly thereafter, claimant had a conversation about the incident with the supervisor. The conversation occurred in the supervisor’s office and outside the presence of the coworker. During the conversation, claimant explained to the supervisor that he felt bullied by the coworker. The coworker was younger than claimant was, and claimant “felt ashamed for being bullied by a kid who was younger” than claimant was. Transcript at 20. Claimant told the supervisor “even though I probably could wipe the floor with him, I could still feel bullied by him.” Transcript at 21.

(6) The employer investigated the incident that occurred between claimant and the coworker on January 31, 2021. On February 16, 2021, the employer discharged claimant for allegedly violating their violence in the workplace policy by making threats of violence toward the coworker.

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) (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).

The order under review concluded that claimant was discharged for misconduct because he “willfully engage[d] in threatening and aggressive behavior when he lost his temper, called the co-worker a ‘bitch’ and said he ‘could wipe the floor’ with the co-worker.” Order No. 21-UI-169617 at 3. The record does not support a conclusion that claimant was discharged for misconduct.

The employer discharged claimant for allegedly violating their expectation that claimant would refrain from making threats of violence in the workplace. At hearing, the employer’s witness testified that the employer considered claimant’s “wipe the floor” comment to have been a threat of violence against the coworker. Transcript at 9. The employer’s witness also testified that the employer also considered

claimant to have threatened the coworker with violence during their interaction after claimant approached the supervisor to deescalate the situation. Transcript at 9.

As a preliminary matter, the parties differed regarding claimant's conduct during his interaction with the coworker after claimant approached the supervisor to deescalate the situation. At hearing, the employer's witness, reading from notes, testified that during the interaction between claimant and the coworker, claimant "got up in [the coworker's] face," made gestures that made the coworker afraid claimant "was going to swing on him," and followed the coworker "back upstairs to continue the conversation" after the coworker walked away. Transcript at 8. However, the coworker did not testify that he did not follow the coworker, use threatening gestures, or get "in [the coworker's] face." Transcript at 23. Given that claimant provided a credible firsthand account and that the employer bears the burden of persuasion, the weight of the evidence supports claimant's description of what occurred, and this decision's findings of facts on these disputed points were based on claimant's testimony.

Next, with respect to the "wipe the floor" comment, the employer did not meet their burden to show that, by making the comment, claimant willfully or with wanton negligence violated the employer's policy prohibiting making threats of violence in the workplace. Claimant mentioned that he could "probably wipe the floor with" the coworker in a private meeting with his supervisor while explaining that he felt bullied by the coworker and was ashamed of that because the coworker was younger than claimant. Transcript at 20-21. At no point did claimant direct the comment at the coworker. The record therefore fails to show that claimant willfully violated the employer's expectation by making the comment because he did not intend to threaten the coworker with violence, but merely to explain to the supervisor that he felt bullied by the coworker. Nor does the record show that by making the comment, claimant violated the employer's expectation with wanton negligence. The employer did not establish that claimant knew or should have known that mentioning in a private meeting with the supervisor that he could "probably wipe the floor" with the coworker, in the context of explaining that he felt bullied by the coworker, probably violated the employer's policy against making threats of violence.

Finally, the record fails to show that claimant violated the employer's policy prohibiting workplace threats of violence when he called the coworker a "bitch" after claimant approached the supervisor to deescalate the situation between them. Transcript at 19. The record does not show that by directing that word at the coworker, claimant made a threat of violence toward the coworker. While the record shows that claimant meant the word to be insulting, the record does not indicate that claimant expressed the word in a manner that would imply a threat of violence. Claimant said the word while speaking at a low volume, had no physical contact with the coworker while he was saying it, and the coworker walked away. On this record, the employer failed to show that claimant's use of the word "bitch" in addressing the coworker constituted a threat of violence. Therefore, the employer failed to show that claimant violated the employer's policy against making threats of violence by calling the coworker a "bitch."

For the foregoing reasons, the employer discharged claimant, but not for misconduct. Claimant is not disqualified from receiving benefits based upon this work separation.

DECISION: Order No. 21-UI-169617 is set aside, as outlined above.

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

DATE of Service: August 6, 2021

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 ໄດ້ ໂດຍປະຕິບັດຕາມຄໍາແນະນໍາທີ່ບອກໄວ້ຢູ່ຕອນຫ້າຍຂອງຄໍາຕັດສິນນີ້.

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

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