

EMPLOYMENT APPEALS BOARD DECISION
2021-EAB-0636

Reversed & Remanded

PROCEDURAL HISTORY: On June 1, 2021, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant was discharged but not for misconduct and was not disqualified from receiving unemployment insurance benefits based on the work separation (decision # 84850). The employer filed a timely request for hearing. On August 2, 2021, ALJ Kaneshiro conducted a hearing and issued Order No. 21-UI-171563, affirming decision # 84850. On August 5, 2021, the employer filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Butler Ford Inc. employed claimant as a vehicle maintenance advisor from December 27, 2018 until May 7, 2021.

(2) The employer had a zero-tolerance policy that prohibited harassment in the workplace. Under this policy, the employer expected claimant to refrain from subjecting his coworkers to harassment or unprofessional treatment. Claimant knew and understood this expectation.

(3) On April 30, 2021, one of claimant's coworkers reported to the employer that they had observed claimant treating another coworker, H.A., in an unprofessional manner. The employer's operations director interviewed the coworker who made the report.

(4) On May 4, 2021, another one of claimant's coworkers reported to the employer that they had observed claimant treating H.A. in an unprofessional manner. The operations director also interviewed this coworker. Later that day, the operations director interviewed claimant about the allegations. Claimant acknowledged "joking around" but told the operations director that he had not harassed H.A. or treated her in an unprofessional manner. Transcript at 10. The operations director then interviewed H.A. H.A. told the operations director that, among other things, claimant threw objects at her, called her names, and made inappropriate comments about her body.

(5) On May 5, 2021, the employer suspended claimant while it reviewed the information compiled by the operations director. On May 7, 2021, the employer discharged claimant for violating their expectation that claimant would refrain from subjecting H.A. to harassment or unprofessional treatment.

CONCLUSIONS AND REASONS: Order No. 21-UI-171563 is set aside and this matter remanded for further development of the record.

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 but not for misconduct because the weight of the evidence favored claimant’s account, which was that he had not subjected H.A. to any harassment or unprofessional treatment. Order No. 21-UI-171563 at 3. The record as developed does not support this conclusion.

At hearing, the employer’s operations director testified to interviewing H.A. and the coworkers, and discussed the allegations of harassment H.A. described in her interview. Transcript at 6-9. These allegations included that during March and April 2021, claimant had thrown pens, key rings, and key tags at H.A.; had thrown a wadded up piece of paper at H.A. and hit her in the back of the head with it; and took his recycling bin and dumped its contents on top of H.A.’s desk. The operations director also testified that H.A. stated claimant called her by insulting nicknames, such as “McSqueezy” and “Heifer” and made derogatory comments about the foods H.A. ate and her weight, including once telling her not to drink a soda because if she did so, it would “go straight to her ass” and then looking at H.A.’s posterior and saying “oh, too late.” Transcript at 7-8. The operations director also testified that H.A. stated that she had told claimant that she was getting a new pocket knife and claimant responded “Oh, you’re getting a knife? Good, then you can cut yourself.” Transcript at 12. In contrast, claimant testified at hearing and denied all allegations of harassment. Transcript at 20-23; 26-28. The operations director did not have personal knowledge of claimant’s alleged unprofessional conduct, but when he sought to testify as to the details described by the other coworkers in their interviews, which he stated “lined up” with H.A.’s allegations, the ALJ did not allow him to do so. Transcript at 34, 12.

A firsthand account, such as claimant’s testimony at hearing, is entitled to more weight than hearsay. However, if hearsay statements are numerous, reliable, detailed, and consistent, it may be possible for the weight of the evidence to favor them over a firsthand account. Therefore, on remand, the employer’s operations director should be allowed to testify to the details of claimant’s alleged unprofessional conduct described by the other coworkers in their interviews. The ALJ should also ask questions to

develop when each instance of claimant's alleged harassment occurred, and how frequently claimant allegedly subjected H.A. to each instance of harassment.

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 claimant was discharged for misconduct, Order No. 21-UI-171563 is reversed, and this matter is remanded.

DECISION: Order No. 21-UI-171563 is set aside, and this matter remanded for further proceedings consistent with this order.

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

DATE of Service: September 8, 2021

NOTE: The failure of any party to appear at the hearing on remand will not reinstate Order No. 21-UI-171563 or return this matter to EAB. Only a timely application for review of the subsequent order will cause this matter to return to EAB.

Please help us improve our service by completing an online customer service survey. To complete the survey, please go to <https://www.surveygizmo.com/s3/5552642/EAB-Customer-Service-Survey>. You can access the survey using a computer, tablet, or smartphone. If you are unable to complete the survey online and need 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 الاستئناف 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
 Phone: (503) 378-2077 | 1-800-734-6949 | Fax: (503) 378-2129 | TDD: 711
www.Oregon.gov/Employ/eab

The Oregon Employment Department is an equal opportunity employer/program. Auxiliary aids and services are available upon request to individuals with disabilities. Language assistance is available to persons with limited English proficiency at no cost.

El Departamento de Empleo de Oregon es un programa que respeta la igualdad de oportunidades. Disponemos de servicios o ayudas auxiliares, formatos alternos y asistencia de idiomas para personas con discapacidades o conocimiento limitado del inglés, a pedido y sin costo.