

EMPLOYMENT APPEALS BOARD DECISION
2021-EAB-0682

Affirmed
No Disqualification

PROCEDURAL HISTORY: On July 13, 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 June 6, 2021 (decision # 72748). Claimant filed a timely request for hearing. On August 13, 2021, ALJ Micheletti conducted a hearing, and on August 18, 2021 issued Order No. 21-UI-172872, reversing decision # 72748 by concluding that claimant's discharge was not for misconduct and did not disqualify claimant from receiving benefits. On August 23, 2021, the employer filed an application for review with the Employment Appeals Board (EAB).

EVIDENTIARY MATTER: At hearing, the ALJ admitted Exhibits 1, 2, 3, and 4 into evidence, but failed to mark them. As a clerical matter, EAB identified the exhibits based on the ALJ's description of them, and marked them as Exhibits 1, 2, 3, and 4. Audio Record at 2:20.

FINDINGS OF FACT: (1) The city of Salem employed claimant as a wastewater facility operator from 2008 until June 8, 2021.

(2) The employer expected claimant to refrain from using language in the workplace that was offensive, discriminatory or created a hostile work environment. The employer also expected claimant to provide truthful and accurate information to the employer regarding claimant's workplace behavior. Claimant was aware of and understood these expectations.

(3) In April 2021, one of claimant's coworkers informed the employer that they had observed claimant talking to coworkers about a news item he had read that featured a person of a non-binary gender. The coworker informed the employer that claimant had stated to the coworkers, "If you don't know what sex you are, just drop your pants and I'll tell you." Exhibit 2.

(4) Claimant did not make the comment the coworker attributed to him.

(5) The employer investigated the incident reported by the coworker. The employer took statements from two coworkers who stated that claimant had made the comment. The employer also took a statement from a different coworker, who was unsure whether claimant had made the comment and thought they may have made the comment. The employer also interviewed claimant, who denied making the comment.

(6) On June 1, 2021, the employer held a due process hearing in which claimant again denied stating, “If you don’t know what sex you are, just drop your pants and I’ll tell you.” Exhibit 2. The employer determined, based on the statements of the coworkers, that claimant had made the comment and considered the comment to violate their expectation that claimant refrain from using language in the workplace that was offensive, discriminatory or created a hostile work environment. The employer also considered claimant’s denial that he had made the comment to violate the employer’s expectation that claimant provide truthful and accurate information to the employer regarding claimant’s workplace behavior. On June 8, 2021, the employer discharged claimant for allegedly violating these expectations.

CONCLUSIONS AND REASONS: Claimant was discharged, 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) (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 employer discharged claimant for allegedly commenting to coworkers, “If you don’t know what sex you are, just drop your pants and I’ll tell you,” and for allegedly being untruthful to the employer by denying that he had made that comment. At hearing, the parties disagreed as to whether claimant made the comment. The employer’s witness, who lacked personal knowledge of whether or not claimant made the comment, testified that two of claimant’s coworkers reported that he had. Transcript at 9. In contrast, claimant testified that he did not make the comment. Transcript at 23. Additionally, there is hearsay evidence that bolsters claimant’s version of events in that a different coworker interviewed by the employer stated they were unsure whether claimant had made the comment and thought they may have made the comment. Exhibit 4 at 2. Thus, viewed objectively, the weight of the evidence favors claimant’s account because it is a firsthand account partially corroborated by hearsay evidence, whereas the employer’s account is based on hearsay alone, which is generally less reliable than firsthand testimony. Consequently, on the disputed issue of whether claimant made the comment, EAB based its findings on claimant’s evidence.

Accordingly, the record shows, more likely than not, that claimant did not state, “If you don’t know what sex you are, just drop your pants and I’ll tell you” and was not untruthful to the employer when he denied having said it. The record therefore fails to show that the employer discharged claimant for

violating their expectations relating to using offensive language in the workplace and providing truthful and accurate information regarding his workplace conduct. As such, the employer did not meet their burden to show that they discharged claimant for engaging in a willful or wantonly negligent violation of the standards of behavior the employer had the right to expect of him. Therefore, the employer did not discharge claimant for misconduct under ORS 657.176(2)(a).

The employer discharged claimant, not for misconduct. Claimant is not disqualified from receiving benefits based on this work separation.

DECISION: Order No. 21-UI-172872 is affirmed.

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

DATE of Service: September 23, 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 ໄດ້ໂດຍປະຕິບັດຕາມຄໍາແນະນໍາທີ່ບອກໄວ້ຢູ່ຕອນທ້າຍຂອງຄໍາຕັດສິນນີ້.

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.

Employment Appeals Board - 875 Union Street NE | Salem, OR 97311
 Phone: (503) 378-2077 | 1-800-734-6949 | Fax: (503) 378-2129 | TDD: 711
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