

EMPLOYMENT APPEALS BOARD DECISION
2021-EAB-0769

Affirmed
No Disqualification

PROCEDURAL HISTORY: On August 3, 2021, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant was discharged for misconduct and was disqualified from receiving unemployment insurance benefits effective July 11, 2021 (decision # 130421). Claimant filed a timely request for hearing. On September 13, 2021, ALJ Mott conducted a hearing, and on September 14, 2021 issued Order No. 21-UI-174617, reversing decision # 130421 by concluding that claimant was discharged, but not for misconduct, and was not disqualified from receiving benefits based on the work separation. On September 27, 2021, the employer filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACTS: (1) Blackbird Shopping Center employed claimant as a sales clerk from April 22, 2021 until July 12, 2021.

(2) The employer expected claimant not to make disrespectful comments about other employees. Claimant knew and understood this expectation.

(3) On June 26, 2021, claimant arrived for her shift and noticed that her supervisor had written several comments that were critical of claimant's job performance in a log book the employer maintained. The critical comments bothered claimant and claimant mentioned to a coworker that the supervisor "need[ed] to leave [claimant] the 'f alone." Transcript at 31. The supervisor learned of claimant's statement to the coworker, confronted claimant, and told claimant "I really wanna punch you in the face right now . . . you do nothing but cause problems in this department and I've had enough of it." Transcript at 30. The supervisor's comment made claimant upset and she went home early that day.

(4) On July 10, 2021, claimant was working and went to the back of the employer's store to get a pair of shoes. While there, claimant overheard her supervisor talking about claimant to another employee. The supervisor was talking about having worked with claimant on a previous occasion and said that she "really wanted to . . . hit [claimant] in the face" on that occasion. Transcript at 26.

(5) After hearing the supervisor explain her desire to hit claimant, claimant became “tremendously agitated” and went to the break room, where the supervisor was not present, to calm down because she felt “targeted” by the supervisor. Transcript at 23-24. While claimant was in the break room, two employees overheard claimant refer to the supervisor as a “bitch.” Transcript at 11. Thereafter, the two employees conveyed to the employer’s general manager what they had heard claimant say.

(6) On July 12, 2021, the employer discharged claimant for violating their expectation regarding making disrespectful comments about other employees by referring to her supervisor as a “bitch.”

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 employer discharged claimant on July 12, 2021 for violating their expectation regarding making disrespectful comments about other employees by referring to her supervisor as a “bitch” on July 10, 2021. The employer failed to meet their burden to show that claimant’s conduct in making that comment constituted misconduct because the preponderance of evidence indicates that claimant did not breach the employer’s expectation willfully or with wanton negligence. The record reflects that when claimant made the disrespectful comment about her supervisor, she was “tremendously agitated,” felt “targeted,” and was in the break room trying to calm down because she had just heard the supervisor talk about her desire to “hit [claimant] in the face.” Transcript at 23-24, 26. The record shows that the supervisor had told claimant she wanted to punch her “in the face” on June 26, 2021 as well. Transcript at 30. In light of the evidence that claimant was “tremendously agitated” after having learned, for the second time, of the supervisor’s desire to hit her, it is unlikely that claimant was acting with deliberateness when she referred to the supervisor as a “bitch.” Therefore, it is more likely than not that claimant’s violation of the employer’s expectation was not willful. Similarly, due to claimant’s agitated state of mind as well as the fact that her disrespectful comment was not directed to the supervisor but was merely overheard in the break room by others, it is more likely than not that claimant was not acting with indifference to the consequences of her actions at the time she referred to the supervisor as a “bitch,” but was instead a result of claimant trying to regain her composure and avoid a direct confrontation with her supervisor. Therefore, the record does not show that claimant violated the employer’s expectation with wanton negligence. Because claimant did not violate the employer’s expectation willfully or with wanton negligence, claimant’s conduct did not amount to misconduct.

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

DECISION: Order No. 21-UI-174617 is affirmed.

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

DATE of Service: November 2, 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 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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