EO: 200
BYE: 202237

State of Oregon
Employment Appeals Board
875 Union St. N.E.
Salem, OR 97311

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DS 005.00

EMPLOYMENT APPEALS BOARD DECISION
2022-EAB-0089

Reversed & Remanded

PROCEDURAL HISTORY: On October 7, 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 September 19, 2021 (decision # 132736). Claimant filed a timely request for hearing. On December 15, 2021, ALJ Blam-Linville conducted a hearing, and on December 22, 2021 issued Order No. 21-UI-182506, reversing decision # 132736 by concluding that claimant was discharged, but not for misconduct, and was not disqualified from receiving benefits based on the work separation. On January 11, 2022, the employer filed an application for review with the Employment Appeals Board (EAB).

WRITTEN ARGUMENT: EAB did not consider the employer's written argument when reaching this decision because they did not include a statement declaring that they provided a copy of their argument to the opposing party or parties as required by OAR 471-041-0080(2)(a) (May 13, 2019).

FINDINGS OF FACT: (1) Best Buy Stores, LP employed claimant, most recently as a specialty sales manager, from approximately November 2014 until September 20, 2021.

(2) The employer prohibited employees from "[e]ngaging in behavior that creates an intimidating, offensive, or disrespectful work environment (e.g. profanity, among other behaviors) for employees, applicants, customers, vendors, or contract workers." Exhibit 1 at 6. Claimant was provided with, and acknowledged receipt of, a copy of this policy when he was hired. The employer also "discouraged" employees in management or leadership positions from "fraterniz[ing]" with employees who reported directly to them. Transcript at 10.

(3) Some time in either 2014 or 2016, claimant and another employee made inappropriate comments about female customers and employees while at work. The employer advised claimant that those comments were inappropriate, and claimant subsequently completed a training on sexual harassment.

(4) Sometime during or prior to 2019, claimant became friends with two female employees, "M" and "J." M and J were not members of management, but did not directly report to claimant at the time.

Claimant's friendship with M and J primarily consisted of the three exchanging "funny jokes, memes," and similar items via a group text chat. Transcript at 17. Claimant sometimes helped M or J with transportation to or from work. On one occasion, while neither of them were working, claimant accompanied J to an Apple store because she "wanted to go check out the new watchbands." Transcript at 26–27.

(5) Around December 2019, J requested that claimant send her a shirtless photograph of himself, which he did. J responded by sending claimant a photograph of herself in lingerie. Thereafter, claimant and J agreed that they would not exchange any further photographs with each other and would keep their relationship "on a friend level." Transcript at 17. J became claimant's subordinate around December 2020, approximately a year after the photograph exchange occurred.

(6) Throughout his tenure with the employer, claimant occasionally bought food for employees, threw parties for morale, and lent or offered to lend money to employees to purchase items required for work. The employer never advised claimant that he should refrain from such activities.

(7) Sometime in 2021, both M and J were disciplined for poor attendance. The employer ultimately discharged M because of her attendance, and J voluntarily quit before she could be discharged for the same reason. Around that time, one or both of those employees informed the employer about their text message and photograph exchanges with claimant, claimant's activities with them outside of work, and similar behaviors as described above. Thereafter, the employer's human resources department investigated the matter. The investigation resulted in findings that claimant "invited female employees to spend one-on-one time with [him]" outside of the store; "showed favoritism towards female employees to whom [he] was attracted;" and "texted inappropriate materials to at least one female employee, including a nude photograph of [himself] in the shower." Exhibit 1 at 3.

(8) On September 20, 2021, as a result of the investigation's findings, the employer discharged claimant for the reasons outlined therein.

CONCLUSIONS AND REASONS: Order No. 21-UI-182506 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). Isolated instances of poor judgment are not misconduct. OAR 471-030-0038(3)(b). The following standards apply to determine whether an "isolated instance of poor judgment" occurred:

> (A) The act must be isolated. The exercise of poor judgment must be a single or infrequent occurrence rather than a repeated act or pattern of other willful or wantonly negligent behavior.
>
> (B) The act must involve judgment. A judgment is an evaluation resulting from discernment and comparison. Every conscious decision to take an action (to act or not to act) in the context of an employment relationship is a judgment for purposes of OAR 471-030-0038(3).
>
> (C) The act must involve poor judgment. A decision to willfully violate an employer's reasonable standard of behavior is poor judgment. A conscious decision to take action that results in a wantonly negligent violation of an employer's reasonable standard of behavior is poor judgment. A conscious decision not to comply with an unreasonable employer policy is not misconduct.
>
> (D) Acts that violate the law, acts that are tantamount to unlawful conduct, acts that create irreparable breaches of trust in the employment relationship or otherwise make a continued employment relationship impossible exceed mere poor judgment and do not fall within the exculpatory provisions of OAR 471-030-0038(3).

OAR 471-030-0038(1)(d).

The employer discharged claimant due to their belief that claimant engaged in behavior such as sexual harassment, fraternization, and favoritism, which violated their policies. The order under review concluded that the employer did not meet their burden of proof to show that claimant's conduct constituted willful or wantonly negligent violations of the employer's standards of behavior because, in relevant part, the employer did not make claimant adequately aware of their relevant policies; claimant "denied treating his subordinates differently based on their gender," and claimant's "mutually flirty text exchange with an employee in 2019. . . occurred outside of work hours and she was not a direct subordinate of his at the time." Order No. 21-UI-182506 at 4. The record supports the conclusion that the employer did not meet their burden to show that the cited behaviors were willful or wantonly negligent violations of the employer's standards of behavior. However, the order under review failed to acknowledge an inconsistency within the record which suggested that claimant might have engaged in other behavior that could constituted a willful or wantonly negligent violation of the employer's standards of behavior.

At hearing, claimant testified that the shirtless photograph he sent to J was taken in his bathroom; and that claimant never exchanged photographs with J after that, or with M at any point. Transcript at 18. However, the employer's witness also testified that claimant sent a message containing a photograph of himself "in a shower with no clothes." Transcript at 35. It is not clear from the record whether the employer's witness was referring to the shirtless photograph that claimant had sent to J in late 2019, or whether this was a different incident. If claimant sent a nude photograph of himself to another employee at some point, he may have engaged in willful or wantonly negligent behavior, which could constitute misconduct connected with work so long as it was the reason the employer discharged claimant and did not fall within the exculpatory provisions of OAR 471-030-0038(3). However, further inquiry is necessary to determine whether he did. On remand, the ALJ should inquire as to whether the employer

was referring to another photograph or the shirtless one that claimant sent to J in late 2019. If it was another photograph, the ALJ should inquire when claimant sent it, to whom, whether they reported to claimant directly at the time; and whether, beyond that incident, claimant ever sent any other nude or otherwise inappropriate photographs or messages to any other employee at any time.

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-182506 is reversed, and this matter is remanded.

DECISION: Order No. 21-UI-182506 is set aside, and this matter remanded for further proceedings consistent with this order.

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

DATE of Service: February 23, 2022

NOTE: The failure of any party to appear at the hearing on remand will not reinstate Order No. 21-UI-182506 or return this matter to EAB. Only a timely application for review of the subsequent order will cause this matter to return to EAB.

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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 – 本判决会影响您的失业救济金。 如果您不明白本判决， 请立即联系就业上诉委员会。 如果您不同意此判决，您可以按照该判决结尾所写的说明，向俄勒冈州上诉法院提出司法复审申请。

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 ໂດຍປະຕິບັດຕາມຄຳແນະນຳທີ່ບອກໄວ້ຢູ່ຕອນທ້າຍຂອງຄຳຕັດສິນນີ້.

Arabic

هذا القرار قد يؤثر على منحة البطالة الخاصة بك، إذا لم تفهم هذا القرار، إتصل بمجلس منازعات العمل فورا، 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 دستورالعمل موجود در پایان آن، از دادگاه تجدید نظر اورگان درخواست تجدید نظر کنید.

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