

EMPLOYMENT APPEALS BOARD DECISION
2022-EAB-0625

Reversed
No Disqualification

PROCEDURAL HISTORY: On December 21, 2020, 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 August 30, 2020 (decision # 142519). Claimant filed a timely request for hearing. On May 11, 2022, ALJ Vincent conducted a hearing, and on May 19, 2022 issued Order No. 22-UI-194138, affirming decision # 142519.¹ On June 1, 2022, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Dansons USA Inc. employed claimant as a call center supervisor from January 6, 2020 until September 2, 2020.

(2) Claimant is originally from Colombia, and is not a native English speaker. Claimant affectionately referred to her husband using the Spanish term “gordo,” which literally translates to mean “fat,” but is used as a term of affection in her culture. Transcript at 9; Audio Record at 15:55. Claimant similarly used the term “negrito” as a term of affection. Audio Record at 16:15.

(3) On August 28, 2020, the employer received reports that claimant had been speaking inappropriately toward other employees. The reports alleged that claimant had referred to other employees using the Spanish terms “gordito” and “negrito,” which the other employees found offensive, and also alleged that claimant had asked a transgender employee personal questions about their transition surgery. Transcript at 12–13. Based on these reports, the employer began an investigation into claimant’s conduct. The employer was not aware of these issues prior to August 28, 2020.

¹ The order under review stated that “the administrative decision mailed December 21, 2020 is *set aside*. Claimant is subject to disqualification from benefits under ORS 657.176(2)(a), effective August 30, 2020, until requalified under Employment Department law.” Order No. 22-UI-194138 at 3 (emphasis added). Because the order under review reached the same conclusion as decision # 142519, the statement that the administrative decision was “set aside” is presumed to be scrivener’s error.

(4) On September 2, 2020, the employer discharged claimant because of the reports that claimant had been speaking inappropriately towards other employees.

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). Good faith errors are not misconduct. OAR 471-030-0038(3)(b).

The employer discharged claimant because they had received reports that claimant had spoken inappropriately towards other employees, including referring to other employees using the Spanish terms “gordito” and “negrito” and asking a transgender employee about their transition surgery. The order under review concluded that claimant’s actions constituted misconduct. Order No 22-UI-194138 at 2. The order under review based this conclusion on findings that claimant “understood the employer’s expectations [regarding treatment of coworkers], both as a matter of common sense and because she had been warned about her use of inappropriate and unprofessional language on multiple occasions,” and therefore made a “conscious decision to use language which she knew was inappropriate.” Order No 22-UI-194138 at 2. The record does not support this conclusion or the findings upon which it is premised.

First, the record does not show that the employer provided claimant with a copy of their policies regarding interactions with other employees, or that claimant knew or had reason to know what any such policies contained. Neither does the record show that the employer had warned claimant about “her use of inappropriate and unprofessional language” on any occasion, let alone multiple occasions. It is not clear why the order under review so found, as no such evidence is contained in the record.

The order under review also found that while claimant used the terms “gordo”² and “negrito” as terms of endearment, claimant was “aware that other people consider them derogatory and offensive.” Order No 22-UI-194138 at 2. Again, it is not clear why the order under review so found, as the record does not show that claimant was aware, prior to being discharged, that other employees considered these terms offensive.

In order for claimant’s use of the above terms, or her posing personal questions to other employees, to be willful or wantonly negligent disregards of the employer’s standards of behavior, the employer must prove by a preponderance of the evidence that claimant understood these standards of behavior, and

² The employer’s witness testified that claimant used the term “gordito” rather than “gordo.” Transcript at 12. As the former is the diminutive form of the latter, the terms are presumed to be used more or less interchangeably.

knew or should have known her conduct probably violated them. Because the record does not show that claimant either knew or had reason to know that the employer did not permit claimant to engage in such speech, or that claimant had been offending other employees by doing so, the employer has not met their burden.

To the extent claimant violated the employer's expectations by engaging in speech that others found offensive, claimant's actions were, at worst, good faith errors, and not willful or wantonly negligent. The record shows that claimant is originally from Columbia, does not speak English natively, and used the offending terms as terms of affection, as apparently is accepted practice within her own culture. Because claimant neither knew nor had reason to know that she had been offending other employees with her speech, and in light of the cultural context of the terms in question, it is reasonable to infer from the record that she was similarly using those terms to refer to coworkers affectionately. The record similarly fails to show that claimant knew or should have known that simply asking a transgender employee about their transition surgery probably violated the employer's expectations. Because good faith errors are not misconduct, claimant's conduct, to the extent it violated the employer's expectations, it was not misconduct.

For the above reasons, and the employer failed to establish that claimant's discharge was for misconduct. Claimant therefore is not disqualified from receiving unemployment insurance benefits based on the work separation.

DECISION: Order No. 22-UI-194138 is set aside, as outlined above.

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

DATE of Service: September 9, 2022

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

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