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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-0725

Reversed & Remanded

PROCEDURAL HISTORY: On February 22, 2022, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that the employer discharged claimant, but not for misconduct, and that claimant therefore was not disqualified from receiving unemployment insurance benefits based on the work separation (decision # 121202). The employer filed a timely request for hearing. On June 16, 2022, ALJ Griffin conducted a hearing, and on June 17, 2022 issued Order No. 22-UI-196423, affirming decision # 121202. On June 27, 2022, the employer filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Pacific Fibre Products Inc. employed claimant as a bucket loader operator from March 13, 2017 until January 28, 2022.

(2) The employer expected claimant not to direct foul language at his supervisor. Claimant was aware of this expectation. While use of foul language was generally tolerated at the employer's workplace, claimant understood that telling his supervisor to "fuck off" is a violation of the employer's expectations. Transcript at 19. The employer also expected claimant to perform regular maintenance tasks on his bucket loader, including lubricating the loader.

(3) On November 12, 2021, claimant's supervisor met with claimant to discuss occasions when the manager believed claimant had not lubricated the loader and had used his cell phone while operating the loader. On January 19, 2022, the supervisor met with claimant regarding another occasion when the supervisor believed claimant used his cell phone while operating the loader.

(4) On January 21, 2022, claimant's supervisor told claimant to lubricate his loader before leaving work for the day. Claimant had lubricated the loader the previous day, and had not used the loader very much on January 21, 2022, so he thought the loader was already sufficiently lubricated. Claimant completed his shift on January 21, 2022 without lubricating the loader.

(5) After claimant's shift ended, the supervisor checked the loader and saw it had not been lubricated. The supervisor conveyed to the employer's human resources (H.R.) manager that claimant had failed to

lubricate the loader. The H.R. manager decided to suspend claimant when he reported for his next work shift for failure to lubricate the loader as instructed.

(6) On January 24, 2022, claimant arrived for his next shift. The supervisor informed claimant that he was being suspended due to failure to lubricate the loader as instructed. In response, claimant, in the presence of other employees, told the manager to "fuck off." Transcript at 7. The supervisor asked for claimant's keys. Claimant then told the manager to "fuck off" a second time and left the job site. Transcript at 8. Prior to January 24, 2022, claimant had never before told his supervisor to "fuck off." Transcript at 9.

(7) The supervisor informed the H.R. manager that claimant had directed foul language at him, and the H.R. manager decided to discharge claimant for directing foul language at the supervisor. On January 28, 2022, the employer discharged claimant for that reason.

CONCLUSIONS AND REASONS: Order No. 22-UI-196423 is set aside, and this matter remanded for further proceedings consistent with this order.

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 record shows that claimant's behavior on January 24, 2022 breached the employer's reasonable expectations with at least wanton negligence. On that day, claimant repeatedly told his supervisor to "fuck off." Transcript at 7-8. The record shows that claimant knew or should have known that directing foul language at the supervisor probably violated the employer's expectations. While use of foul language was generally tolerated at the employer's workplace, claimant testified that he understood that telling his supervisor to "fuck off" was unacceptable to the employer, and that his conduct was "unprofessional and childish." Transcript at 19. Thus, the record evidence is sufficient to conclude that claimant's conduct on January 24, 2022 relating to telling his supervisor to "fuck off" was a willful or wantonly negligent violation of the employer's expectations.

The order under review concluded correctly that claimant's conduct directing foul language at the supervisor was willful or wantonly negligent behavior. However, order further concluded that the violation was an isolated instance of poor judgment, and therefore not misconduct. Order No. 22-UI-196423 at 4. The record as developed does not support that conclusion.

Under OAR 471-030-0038(1)(d)(A), in order for claimant's January 24, 2022 violation of the employer's expectations to be an isolated instance of poor judgment, it is necessary that the conduct not be a repeated act or part of a pattern of other willful or wantonly negligent behavior. The record shows that the conduct was not a repeated act because prior to January 24, 2022, claimant had never before told his supervisor to "fuck off." Transcript at 9. However, the record as developed does not show whether claimant's act of directing foul language at his supervisor was part of a pattern of other willful or wantonly negligent behavior. The record shows that it is possible that it was. Claimant failed to lubricate the loader on January 21, 2022 despite being instructed to do so (although it is not evident from the record whether claimant believed he had discretion to not do the lubrication if he thought it was unnecessary). The record also contains documentary evidence that claimant may have failed to lubricate the loader on prior occasions, and used his cell phone in a manner prohibited by the employer. *See* Exhibit 1 at 5. Further, at hearing, claimant's supervisor testified that "the failure to do the equipment was an ongoing thing[,]" and the H.R. manager testified to receiving documentation concerning claimant's alleged failure to service the loader on November 12, 2021 and January 19, 2022. Transcript at 8; 12-13. However, no further inquiry into these alleged prior incidents was conducted at hearing.

On remand, the ALJ should ask questions to determine whether claimant's failure to lubricate the loader at the end of his shift on January 21, 2022 was a willful or wantonly negligent breach of the employer's expectations. The ALJ should also inquire into the incidents relating to claimant's alleged failure to lubricate the loader on prior occasions, and using his cell phone in a manner prohibited by the employer, to determine whether those alleged violations were willful or wantonly negligent. Only if the record shows that claimant's act of directing foul language at his supervisor was not part of a pattern of other

willful or wantonly negligent behavior can it be concluded that claimant's conduct may be treated as an isolated instance of poor judgment, and not misconduct.

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's conduct was an isolated instance of poor judgment and, therefore not misconduct, Order No. 22-UI-196423 is reversed, and this matter is remanded.

DECISION: Order No. 22-UI-196423 is set aside, and this matter remanded for further proceedings consistent with this order.

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

DATE of Service: September 23, 2022

NOTE: The failure of any party to appear at the hearing on remand will not reinstate Order No. 22-UI-196423 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 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 دستورالعمل موجود در پایان آن، از دادگاه تجدید نظر اورگان درخواست تجدید نظر کنید.

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