

EMPLOYMENT APPEALS BOARD DECISION
2022-EAB-1121

Affirmed
No Disqualification

PROCEDURAL HISTORY: On September 14, 2022, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that the employer discharged claimant for misconduct, disqualifying claimant from receiving benefits effective July 31, 2022 (decision # 141844). Claimant filed a timely request for hearing. On October 28, 2022, ALJ Lucas conducted a hearing, and on October 31, 2022 issued Order No. 22-UI-206249, reversing decision # 141844 by concluding that the employer discharged claimant, but not for misconduct, and that claimant was not disqualified from receiving benefits based on the work separation. On November 8, 2022, the employer filed an application for review with the Employment Appeals Board (EAB).

WRITTEN ARGUMENT: Claimant's written argument contained information that was not part of the record about negotiations that occurred between the parties in November 2022, apparently to resolve other legal matters. While claimant has demonstrated that factors or circumstances beyond her reasonable control prevented her from offering the information during the hearing because the negotiations had not yet transpired, the information will not be considered because these negotiations and the employer's motive for filing the application for review now before EAB are not relevant and material to EAB's determination of whether claimant's discharge was for misconduct. *See* OAR 471-041-0090(b)(A) (May 13, 2019). Claimant's written argument was considered to the extent it was based on the record.

The employer's argument also contained information that was not part of the hearing record. The employer contended that they faxed the information to the Office of Administrative Hearings (OAH) on October 19, 2022, prior to the hearing. Employer's Written Argument of December 4, 2022 at 2. However, the employer did not submit evidence establishing that the information was faxed to OAH or served on the claimant prior to the hearing, and the employer did not correct the ALJ during the hearing when he stated that he had not received any evidence from the parties to be marked as exhibits. Audio Recording at 2:40 to 2:46. More likely than not, the additional information was not submitted prior to the hearing, and the employer did not show that factors or circumstances beyond the employer's reasonable control prevented them from offering the information during the hearing. Further, the

information is not material to EAB's determination of whether claimant's discharge was for misconduct. Under ORS 657.275(2) and OAR 471-041-0090, EAB considered only information received into evidence at the hearing when reaching this decision.

FINDINGS OF FACT: (1) The Department of Corrections employed claimant as a food service manager from December 10, 2017 through August 3, 2022.

(2) The employer expected their employees to behave in a professional and courteous manner while interacting with others in the course of their employment, and had written policies reflecting these expectations. Claimant was aware of these policies and expectations.

(3) On January 19, 2022, claimant told a correctional officer to "be more professional" in front of others because he was rude to claimant in front of others when claimant misunderstood why he was present and attempted to assist him in completing the tasks she thought he was there to perform. Transcript at 22-23.

(4) On February 7, 2022, claimant did not say, "I don't care what you think" to a subordinate. Transcript at 26.

(5) On February 14, 2022, claimant slowly closed the door to her office to end a conversation with a subordinate who had angrily called claimant "a piece of shit." Transcript at 24-25.

(6) On or about March 7, 2022, claimant asked a corrections officer whether he had gotten a food cart yet and he replied that he had not. Claimant did not use an accusatory tone in speaking to him. Transcript at 27-28.

(7) Claimant did not tell one subordinate he "outranked" another, or that the other subordinate thought he "was the boss." Transcript at 26-27.

(8) On August 3, 2022, the employer discharged claimant for violating their policies regarding professionalism because they believed she committed the following acts:

On January 19, 2022, claimant told a correctional officer to "be more professional" in front of others without justification [Transcript at 7-8];

On February 7, 2022, claimant said, "I don't care what you think" to a subordinate in the presence of others, as an example of a pattern of "dismissive" behavior towards this employee [Transcript at 12-13];

On February 14, 2022, claimant slammed a door between her and a subordinate who was calmly asking her a question [Transcript at 11-12];

On or about March 7, 2022, claimant reminded a correctional officer in an "extremely stern and accusatory" manner to make sure he returned food carts he was taking out because the carts were not being returned as they should have been [Transcript at 14-15]; and

On an unknown date, claimant told a subordinate who held the same position as another subordinate that he "outranked" the other subordinate, and joked that the other subordinate thought he "was the boss," all

of which was said in the presence of both subordinates and made one feel “disrespected” [Transcript at 14].

CONCLUSIONS AND REASONS: The employer discharged claimant, 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. OAR 471-030-0038(3)(a) (September 22, 2020) defines misconduct, in relevant part, as a willful or wantonly negligent violation of the standards of behavior which an employer has the right to expect of an employee, or an act or series of actions that amount to a willful or wantonly negligent disregard of an employer’s interest. OAR 471-030-0038(1)(c) defines wanton negligence, in relevant part, as 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. The employer has the burden to prove misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

The employer had the right to expect their employees would conduct themselves in a professional manner in their dealings with fellow employees. The employer’s witness testified that claimant was discharged because the employer believed claimant violated this expectation by her conduct on five specific occasions from January 2022 through March 2022. Transcript at 5-6. The employer’s witness was not present at any of these occasions and did not have first-hand knowledge of them, but instead testified based on what she read in an investigative report of the incidents. Claimant’s first-hand account of these incidents is entitled to greater weight. Therefore, more likely than not, claimant did not make the statements attributed to her by the employer regarding one subordinate outranking the other, or the statements of February 7 or March 7, 2022, all of which claimant denied making.

Further, it is more likely than not that on January 19, 2022, claimant told a correctional officer to “be more professional” only because he acted rudely and unprofessionally in response to claimant’s attempt to assist him, as claimant testified, and claimant’s response therefore did not violate the employer’s standards of behavior. Similarly, it is more likely than not that on February 14, 2022, claimant did not slam the door on a fellow employee but slowly closed it to end that employee’s angry and vulgar outburst toward her, as claimant stated in her account of the incident. The employer’s hearsay testimony of these events, as weighed against claimant’s denials and explanations, was insufficient to establish that claimant committed the acts for which she was discharged.

Because the employer has not proven by a preponderance of evidence that claimant committed the acts they alleged, they have not shown that she committed a willful or wantonly negligent violation of the standards of behavior which an employer has the right to expect of an employee, or an act or series of actions that amount to a willful or wantonly negligent disregard of an employer’s interest. Accordingly, the record is insufficient to conclude that claimant was discharged for misconduct.

Because the employer failed to establish that claimant’s discharge was for misconduct, claimant is not disqualified from receiving benefits based on the discharge.

DECISION: Order No. 22-UI-206249 is affirmed.

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

DATE of Service: January 13, 2023

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

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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