

EMPLOYMENT APPEALS BOARD DECISION
2022-EAB-1258

Reversed
No Disqualification

PROCEDURAL HISTORY: On August 3, 2022, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant was discharged for misconduct and therefore was disqualified from receiving unemployment insurance benefits effective July 10, 2022 (decision # 103941). Claimant filed a timely request for hearing. On November 15, 2022, ALJ Goodrich conducted a hearing, and on November 29, 2022 issued Order No. 22-UI-208363, affirming decision # 103941. On December 19, 2022, claimant filed an application for review with the Employment Appeals Board (EAB).

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

FINDINGS OF FACT: (1) Riverside Training Center, Inc. employed claimant as a direct support professional (DSP) from July 11, 2017 until July 12, 2022. Claimant's duties involved providing care and support for intellectually or developmentally disabled adults who lived at one of the employer's residential facilities.

(2) The employer maintained a policy that required employees to interact with other employees in a respectful manner. This policy was contained in the employer's handbook, a copy of which was provided to claimant.

(3) At least as early as late 2020, the employer became concerned about the manner in which claimant interacted with coworkers or supervisors. For example, in November 2022, claimant left a sticky note on the house's microwave criticizing his coworkers for failing to clean it.

(4) On March 25, 2022, the employer issued claimant a warning in connection with an incident that occurred on January 26, 2022 in which the employer felt that claimant had communicated with a manager in a way that “does not follow the company’s policies or guidelines.” Exhibit 2 at 7.

(5) On June 10, 2022, following additional incidents in which the employer felt that claimant had acted disrespectfully or otherwise violated their policy regarding interactions with other employees, claimant’s supervisor called claimant into a meeting. Sometime after claimant entered the meeting, the employer’s executive director arrived. Thereafter, claimant became upset because he did not realize that the executive director would be present, and felt that he was “ambushed.” Transcript at 66. Over the course of the two-hour meeting, the employer explained to claimant how they expected him to interact with coworkers (including supervisors and managers), and how he had not been meeting those expectations. After the meeting, one of the customer service managers, who had also been present at the meeting, advised the executive director to discharge claimant, but the executive director decided to give claimant additional time to improve his conduct. The executive director and claimant also set a performance review meeting to follow up on the matter. The parties agreed to meet at 3:00 p.m. on July 8, 2022.

(6) Around 10:00 a.m. on July 8, 2022, claimant received a phone call from his mechanic, who informed claimant that he would be able to repair claimant’s vehicle if claimant dropped it off later that afternoon. Claimant accepted the appointment, as he had been waiting for about a month and a half to have his car repaired.

(7) Around noon on July 8, 2022, claimant arrived at the employer’s office. Claimant was not scheduled to work a shift that day, but had stopped by to pick up a “swag bag” that the employer had been offering to their employees as a thank-you gift. Transcript at 71. When he arrived, the executive director was onsite and told claimant, “Oh, you’re . . . here early.” Transcript at 71. Claimant, who had forgotten about the scheduled performance review meeting, expressed confusion, and the executive director reminded him of the appointment. Claimant apologized, explained that he was unable to attend the meeting because he had an appointment with his mechanic to get his car repaired, and asked her if they could reschedule. Claimant was in the building for about five minutes, and then left for his mechanic appointment. The executive director felt that claimant “yelled” at her during the exchange. Transcript at 33. Prior to this exchange, the executive director had not decided to discharge claimant, though she had considered it because of his history of interactions with other employees that the employer considered disrespectful.

(8) The executive director waited for claimant to return for the scheduled meeting, but claimant did not do so. Thereafter, she decided to discharge claimant.

(9) On July 11, 2022, the executive director contacted the employer’s human resources office and notified them that claimant should be discharged.

(10) Early on the morning of July 12, 2022, after his shift ended, claimant sent the executive director a message, again apologizing and requesting to reschedule the meeting he had missed.

(11) Later on July 12, 2022, the employer discharged claimant. The executive director did not see the message that claimant had sent to her until after claimant had been discharged.

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).

The employer discharged claimant on July 12, 2022 after claimant’s interaction with the executive director on July 8, 2022 regarding the performance review meeting scheduled for later that day. That meeting was scheduled for the employer and claimant to follow up regarding claimant’s interactions with other employees. Because of claimant’s previous behavior, and because of his behavior during the meeting on June 10, 2022, the employer had been considering discharging claimant but had not yet decided to do so. After the interaction with claimant on July 8, 2022, and claimant’s failure to return to the office to attend the meeting that day, the executive director decided to discharge claimant. At hearing, she testified that she might not have done so if claimant “had . . . come back to the meeting as scheduled, and calm[ly] been able to talk things through[.]” Transcript at 24. Thus, although the employer’s decision was based in part on claimant’s prior conduct, the events of July 8, 2022 constituted the final incident without which the discharge would not have occurred when it did.¹

At hearing, claimant and the executive director offered conflicting testimony regarding claimant’s demeanor on July 8, 2022. The executive director testified that claimant was yelling at her “for the majority of the time that he was at the building” that day. Transcript at 33. Claimant refuted this, testifying that he was not “angry or belligerent” towards the executive director during their interaction that day, but was instead “giddy” because he was about to finally get his vehicle fixed. Transcript at 72. In weighing this conflicting testimony, the order under review found that the executive director’s testimony was “more persuasive” because claimant’s having forgotten the scheduled meeting made it likely that he “lashed out toward the executive director in frustration,” while the executive director “had attempted to give claimant every benefit of the doubt regarding his workplace communication issues right up to the July 8, 2022 date when the final incident occurred,” and had waited for claimant to appear at the meeting. Order No. 22-UI-208363 at 5. Based on this finding, the order under review found that claimant “became upset and yelled at the executive director on July 8, 2022,” and concluded that this constituted misconduct because he “knew or should have known that he was violating the employer’s reasonable expectations for professional workplace communication.” Order No. 22-UI-208363 at 5. The record does not support this conclusion.

¹ See e.g. *Appeals Board Decision* 12-AB-0434, March 16, 2012 (discharge analysis focuses on proximate cause of the discharge, which is generally the last incident of misconduct before the discharge); *Appeals Board Decision* 09-AB-1767, June 29, 2009 (discharge analysis focuses on proximate cause of discharge, which is the incident without which the discharge would not have occurred when it did).

As a preliminary matter, the evidence as to whether claimant behaved in an appropriate manner, or whether he “yelled” at the executive director is, at best, evenly balanced. No other witnesses were apparently present for this interaction. Further, while the employer submitted extensive documentation regarding claimant’s interactions with his coworkers, as well as administrative discussions such as the executive director’s internal communications regarding claimant’s employment status, the record lacks any contemporaneous narrative account by the executive director regarding the final incident on July 8, 2022. The order under review attempted to resolve the parties’ conflicting testimony by making inferences as to the motivations of the two parties involved. However, without testimony or documentary evidence to support those supposed motivations, these inferences are mere conjecture, and not supported by substantial evidence. Because the evidence on this point is equally balanced, and because the employer bears the burden of proof in a discharge case, the employer did not meet their burden to show that claimant “yelled” at the executive director or otherwise violated the employer’s policy during his interaction with her on July 8, 2022. To the extent that the employer discharged claimant for having behaved in a manner that violated their policy regarding interactions with other employees on July 8, 2022, claimant was not discharged for misconduct because the preponderance of evidence does not show that he violated the policy as alleged.

The executive director’s testimony indicated that she might not have discharged claimant if he had “come back to the meeting as scheduled, and calm[ly] been able to talk things through.” However, it is difficult to determine whether she would have discharged him if she believed him to have acted respectfully during their interaction on July 8, 2022, but if claimant still failed to attend the meeting scheduled for later that day. However, to the extent that the employer discharged claimant for failing to attend the meeting itself, they also have not shown that his failure to do so constituted misconduct. Claimant’s failure to attend the meeting was the result of his having accepted an appointment with his mechanic that conflicted with the scheduled meeting. The record shows that claimant had been waiting for some time to have his vehicle repaired, and his testimony that he was “giddy” at the prospect of finally having it repaired suggests that it was a matter of some urgency.

Because claimant scheduled the repair appointment at a time that made it impossible to attend the scheduled work meeting, his failure to attend the meeting may have been negligent. However, the record shows that claimant attempted to mitigate this by requesting, on several occasions, to reschedule the meeting. Therefore, even if claimant’s failure to attend the meeting was negligent, it was not due to indifference to the consequences of his actions, was not a *wantonly* negligent disregard of the employer’s standards of behavior, and was not therefore misconduct.

For the above reasons, claimant was discharged, but not for misconduct, and is not disqualified from receiving unemployment insurance benefits based on the work separation.

DECISION: Order No. 22-UI-208363 is set aside, as outlined above.

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

DATE of Service: February 21, 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.

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.

Please help us improve our service by completing an online customer service survey. To complete the survey, please go to <https://www.surveygizmo.com/s3/5552642/EAB-Customer-Service-Survey>. You can access the survey using a computer, tablet, or smartphone. If you are unable to complete the survey online and need a paper copy of the survey, please contact our office.



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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