

EMPLOYMENT APPEALS BOARD DECISION
2023-EAB-0002

Reversed
No Disqualification

PROCEDURAL HISTORY: On October 24, 2022, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant, but not for misconduct, and claimant was therefore eligible to receive unemployment insurance benefits based on the work separation (decision # 112317). The employer filed a timely request for hearing. On December 12, 2022, ALJ Taylor conducted a hearing, and on December 13, 2022, issued Order No. 22-UI-209755, reversing decision # 112317 by concluding that the employer discharged claimant for misconduct and that claimant was therefore disqualified from receiving benefits effective September 11, 2022. On December 19, 2022, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Stanley Steemer International, Inc. employed claimant as an operations supervisor from January 6, 2020 until September 13, 2022.

(2) The employer expected that their management employees to refrain from unnecessarily divulging internal communications or other information that would reflect poorly on the company or other managers to subordinate employees. Claimant's supervisor conveyed this to claimant, at least in part, by telling him multiple times, "Make sure you have my back," meaning that claimant should not undermine him or portray him in a negative light with subordinate employees. Transcript at 21-23.

(3) On September 9, 2022, claimant's supervisor asked claimant to speak with a subordinate employee who worked as a technician, T, about entering a management training program. Claimant and T discussed the matter, and claimant acknowledged and agreed with T's complaints that the employer had not treated T well over the preceding three years by admitting him to and then removing him from the management training program twice, including once at the behest of claimant's current supervisor. They also discussed that T would probably have to take a small pay cut to proceed with the program. However, claimant advised T that things would likely be different for him this time due to anticipated management position vacancies in the near future, and encouraged him to enter the program.

(4) Shortly after this conversation took place, claimant's supervisor asked T to recount the details of the conversation. Based on T's account, the supervisor concluded that claimant had told T that claimant had disagreed with the past decisions of the supervisor and the employer and had encouraged T to quit. The supervisor decided to discharge claimant for this reason.

(5) On September 13, 2022, the employer discharged claimant.

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. "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 order under review concluded that the employer discharged claimant for misconduct because claimant spoke negatively about the employer or other members of management to a subordinate after warnings not to do so, and that such action constituted a willful or wantonly negligent violation of the employer's reasonable expectations. Order No. 22-UI-209755 at 3. The record does not support these conclusions.

The employer discharged claimant because they believed claimant disparaged the company and his supervisor to a subordinate employee. According to claimant's account, claimant spoke with T on September 9, 2022 because claimant's supervisor asked him to do so. Transcript at 20. The goal of this conversation was to persuade T to join the management training program. During the conversation, T stated that he had "been shafted over" by the employer and claimant's supervisor on his two previous attempts at the program and was therefore skeptical of pursuing a third. Transcript at 31-32. Claimant testified that he had heard the supervisor "say the exact same thing" about T getting "shafted." Transcript at 20. Claimant also shared this belief. Claimant, in his role as an operations supervisor, told T that he agreed with T's assessment about his past treatment. More likely than not, claimant did so in order to show T that he was being transparent and therefore could be trusted when he told T that things would be different this time because of upcoming vacancies that would create a greater need for management employees. Claimant also discussed with T that he would have to take a small pay cut if he participated in the program, but the record is unclear as to whether claimant volunteered this information or offered it in response to T's inquiry.

In contrast, the supervisor testified that, according to T, claimant was "venting" to T that claimant and the supervisor had gotten into an argument days before and claimant hated "having to take advice from a 26-year-old," referring to the supervisor. Transcript at 13. Claimant also allegedly stated to T that he "would just quit if he [were] a technician," which the supervisor interpreted as "swaying" T to quit.

Transcript at 6, 9. To the extent that the supervisor's account of this conversation, as relayed to him by T, conflicted with claimant's account, claimant's account is entitled to greater weight than the supervisor's hearsay testimony because it is a firsthand account. Therefore, more likely than not, claimant did not disparage the employer or his supervisor beyond what was reasonably necessary to establish trust with T. Any stated agreement by claimant with T's negative assessment of the employer or supervisor was made only in furtherance of the employer's goal of persuading T to enter the management training program, and claimant did not say anything intended to persuade T to quit.

An employer has the right to expect that their management employees will refrain from unnecessarily divulging internal communications or other information that would reflect poorly on the company or other managers to subordinate employees. The employer did not prove that claimant's statements to T willfully violated these expectations, or otherwise disregarded the employer's interests. To the extent claimant felt it necessary to agree with T's negative impressions of the employer and the supervisor in order to ultimately further the employer's interests in encouraging T to seek advancement within the company, the employer has not shown claimant acted with indifference to the consequences of his actions. Similarly, the employer has failed to demonstrate that claimant knew or should have known his actions would probably result in a violation of the standards of behavior expected by the employer. Therefore, the employer also did not prove that claimant violated the employer's expectations with wanton negligence. Accordingly, the employer has not met their burden of establishing misconduct by a preponderance of evidence.

Therefore, the employer discharged claimant, but not for misconduct. Claimant is not disqualified from benefits based on the work separation.

DECISION: Order No. 22-UI-209755 is set aside, as outlined above.

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

DATE of Service: February 16, 2023

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 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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