

EMPLOYMENT APPEALS BOARD DECISION
2023-EAB-0034

Affirmed
Late Request for Hearing Allowed
No Disqualification

PROCEDURAL HISTORY: On October 20, 2020, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant was discharged, but not for misconduct, and was not disqualified from receiving unemployment insurance benefits based on the work separation (decision # 62947). On November 9, 2020, decision # 62947 became final without the employer having filed a request for hearing. On March 2, 2021, the employer filed a late request for hearing. ALJ Kangas considered the employer's request, and on April 13, 2021 issued order No 21-UI-164632, dismissing the employer's late request for hearing, subject to the employer's right to renew the request by responding to the appellant questionnaire by April 27, 2021. On April 16, 2021, the employer filed a timely response to the appellant questionnaire. On December 20, 2021, the Office of Administrative Hearings (OAH) mailed a letter stating that Order No. 21-UI-164632 was vacated and that a new hearing would be scheduled to determine whether the employer had good cause to file the late request for hearing and, if so, the merits of decision # 62947. On December 15, 2022, ALJ Fraser conducted a hearing, and on December 19, 2022, issued Order No. 22-UI-210316, allowing the employer's late request for hearing and affirming decision # 62947. On December 29, 2022, the employer filed an application for review with the Employment Appeals Board (EAB).

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

Based on a *de novo* review of the entire record in this case, and pursuant to ORS 657.275(2), the portion of the order under review concluding that the employer had good cause to file the late request for hearing is **adopted**. The remainder of this decision addresses whether claimant should be disqualified from receiving benefits based on his work separation from the employer.

FINDINGS OF FACT: (1) J. B. Hunt Transport Inc. employed claimant as an intermodal driver from November 9, 2015 until April 28, 2020.

(2) The employer maintained a policy that required that employees' "performance, conduct, and attitude" were in the best interest of the employer. Transcript at 18. This policy did not explicitly state that yelling or using foul language constituted a policy violation, but the employer interpreted the policy in this way. Claimant was generally aware that the employer maintained this policy, but was not aware of the specific provisions of the policy or how the employer interpreted them.

(3) The employer had a reoccurring problem where drivers would accidentally be locked out of their vehicle's computer, requiring the driver to contact a manager to unlock the computer. This occurred before a driver's shift, and the driver would not be able to begin their daily tasks until a manager unlocked the vehicle's computer.

(4) In early April 2020, claimant began his shift and noticed that he was locked out of his vehicle's computer. Claimant became frustrated and made a telephone call to a manager during which claimant raised his voice and used foul language. As a result, claimant was given a verbal warning for violating the company's policy that employees' "performance, conduct, and attitude" be in the best interest of the employer.

(5) On April 27, 2020, one of the employer's managers alleged that claimant became locked out of his vehicle's computer again. The manager also alleged that claimant subsequently entered the employer's office and said, "I'm tired of this shit happening every day, just fucking tired of it." Transcript at 38.

(6) On April 28, 2020, the employer discharged claimant for the statement he allegedly made on April 27, 2020.

CONCLUSION 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 because they believed, based on the allegation of one of the employer's managers, that claimant used foul language and yelled while working on April 27, 2020. The employer asserted that on this date, claimant was locked out of his vehicle's computer and then began yelling and using foul language. Transcript at 38. The employer's witness at hearing was not present for this incident and instead relied on notes from the manager on duty at the time. Transcript 19-20. Claimant, on the other hand, asserted that this did not occur. Transcript at 33-34. He acknowledged that

he received a verbal warning in early April, but denied yelling, using foul language, or even entering the employer's office on April 27, 2022. Transcript at 34.

The employer bears the burden of persuasion and has not offered sufficient evidence to meet this burden. The employer's witness was not present for claimant's alleged conduct and could only relay information that he read from notes taken by others. Claimant's account, by contrast, was based on his own first-hand experience. As such, claimant's testimony is afforded more weight. Given this disparity in the evidence offered, the record shows that more likely than not, claimant did not yell or use foul language on April 27, 2020. Therefore, the employer has not proven by a preponderance of the evidence that claimant committed a willful or wantonly negligent violation of a standard of behavior that the employer has a right to expect. Accordingly, the record does not show that claimant was discharged for misconduct.

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

DECISION: Order No. 22-UI-210316 is affirmed.

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

DATE of Service: February 24, 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

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

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