

EMPLOYMENT APPEALS BOARD DECISION
2023-EAB-0194

Affirmed
No Disqualification

PROCEDURAL HISTORY: On December 22, 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 November 27, 2022 (decision # 153014). Claimant filed a timely request for hearing. On January 31, 2023, ALJ Ainardi conducted a hearing which was continued on February 1, 2023 and February 2, 2023, and on February 3, 2023 issued Order No. 23-UI-214872, reversing decision # 153014 by concluding that claimant was discharged, but not for misconduct, and was not disqualified from receiving benefits based on the work separation. On February 9, 2023, the employer filed an application for review with the Employment Appeals Board (EAB).

WRITTEN ARGUMENT: The employer did not declare that they provided a copy of their written arguments to the opposing party as required by OAR 471-041-0080(2)(a) (May 13, 2019). The arguments also contained information that was not part of the hearing record, and did not show that factors or circumstances beyond the employer's reasonable control prevented them from offering the information during the hearing as required by OAR 471-041-0090 (May 13, 2019). EAB considered only information received into evidence at the hearing when reaching this decision. *See* ORS 657.275(2).

The employer asserted that the hearing proceedings were unfair. EAB reviewed the hearing record in its entirety, which shows that the ALJ inquired fully into the matters at issue and gave all parties reasonable opportunity for a fair hearing as required by ORS 657.270(3) and (4) and OAR 471-040-0025(1) (August 1, 2004).

FINDINGS OF FACT: (1) Tree Masters, Inc. employed claimant as a climber at their tree service business from August 10, 2020 until November 30, 2022.

(2) The employer expected that their employees would not harass, intimidate, abuse, or threaten others. Claimant was aware of this expectation because it was printed in a handbook made available to claimant

during his employment. Claimant had never been disciplined for engaging in such behavior prior to November 30, 2022.

(3) Claimant regularly drove a specific truck provided by the employer to carry out his work duties. Over the course of 2022, claimant complained several times, verbally and in writing, to his foreman and the employer about safety concerns with this truck.

(4) On September 15, 2022, claimant made a written complaint about the truck to the employer. The complaint involved the truck's turn signals, windshield, driver's side window, emergency brake, and defroster. The employer sent the truck to be repaired the following week.

(5) In October 2022, after the truck was returned to service, claimant complained that some issues remained in an unsafe condition, such as the windshield, emergency brake, and defroster. The truck was sent for service again. While that truck was being serviced, claimant was assigned to use a different truck. Claimant also had complaints about the safety of the alternate truck, including that the fueling process was dangerous, it lacked seatbelts, a side mirror was not visible to the driver, and cargo could not be properly secured. Claimant was able to observe this truck parked at the business even after he resumed driving his primary truck, and could see that his complaints about the alternate truck remained unresolved.

(6) By November 29, 2022, claimant's primary truck had been returned to service and claimant was driving it on this day. Claimant noted that the defroster was not working properly, causing the windshield to fog up and making the truck unsafe to drive. The emergency brake was also not working, causing claimant to have to put blocks behind the truck to prevent it from rolling as he repeatedly stopped to deal with the windshield fogging. Claimant became upset by this and planned to speak with the employer's owner the following day about it.

(7) On November 30, 2022, claimant entered the owner's office and complained about the safety of the primary truck. Claimant stood approximately five to six feet from the owner, who was seated. The owner gave claimant the options of checking the fuses on the truck, which claimant felt had been done repeatedly and were not relevant to his current complaints, or driving the alternate truck, which claimant said he believed to also be in an unsafe condition. The owner claimed to be unaware of the ongoing maintenance issues with the trucks and stated, "I don't wanna deal with this right now." February 1, 2023 Transcript at 30. After claimant continued to insist that his concerns be addressed before driving either truck, the owner began raising his voice, ultimately getting up and "yelling at" claimant to get out and telling claimant that he was discharging him. February 1, 2023 Transcript at 6, 31. The owner came within a foot of claimant during the interaction, and ultimately walked away. February 1, 2023 Transcript at 6.

(8) The employer discharged claimant because they believed that claimant's insistence on the truck safety issues being immediately addressed was actually claimant "trying to find any reason he could to get out of working." January 31, 2023 Transcript at 10. The owner considered claimant's repeated insistence on the maintenance issues being addressed and refusing to drive the trucks he felt were unsafe until they were fixed to be a "verbal attack" because claimant was "very threatening to [the owner] with regard to his work." January 31, 2023 Transcript at 17-18. The owner therefore concluded that claimant

was “harass[ing], intimidating, [and using] abusive and threatening language, actions and behavior” in violation of the employer’s written policies.

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). “[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 that claimant’s conduct during his November 30, 2022 complaints to the owner about his safety concerns involving the employer’s trucks violated the employer’s expectation that an employee would not engage in harassing, intimidating, abusing, or threatening others. The owner stated the specific reasons he discharged claimant were “just the degree of rudeness, and the complete refusal to come up with any type of a solution to what [claimant] imagined to be a dangerous situation.” January 31, 2023 Audio Record at 41:49 to 42:07. The parties presented photographic and documentary evidence, in addition to testimony, to support their respective positions that the trucks at issue either were or were not in a safe operating condition at the time of claimant’s discharge. Regardless of the actual condition of the trucks, the record shows that, more likely than not, claimant believed on November 29, 2022 that both trucks were unsafe to drive and that his ongoing complaints about their safety had not been addressed to his satisfaction. It therefore did not violate the employer’s reasonable expectations for claimant to speak with the owner on November 30, 2022 about his complaints, and insist that they be addressed before he was required to drive either truck again.

The owner testified that he told claimant that there was “nothing in the company he was being forced to do” and testified to other work which claimant could have performed that day instead of driving the trucks. January 31, 2023 Transcript at 13-14. Had the employer offered this other work, or clarified to claimant that he was not being required to drive either truck, the interaction likely could have ended amicably. However, the employer faulted claimant for not offering to perform this other work as an alternative, and did not explain why he did not offer this alternative to claimant as a solution to the situation. January 31, 2023 Transcript at 13-14. Instead, a heated exchange ensued, about which the parties offered differing accounts.

The owner testified that claimant “started to raise his voice, and started to accuse [the owner] more and more of various things.” January 31, 2023 Transcript at 10. The owner further described claimant as having an expression “of anger” and said that claimant’s “body language was like aggressively approaching [the owner], getting in [his] face [and] attacking [him] verbally.” January 31, 2023 Transcript at 17. In contrast, claimant testified that when he walked into the owner’s office, claimant stood approximately “five or six” feet away from where the owner was seated. February 1, 2023

Transcript at 5-6. Claimant further stated he felt “intimidated” when the owner “got up and raised his voice” coming within “almost a foot” of claimant as he was asking claimant to leave. February 1, 2023 Transcript at 6. As the employer bears the burden of proving misconduct by a preponderance of evidence, and the two accounts are no more than equally balanced, the employer has not met their burden. Therefore, more likely than not, claimant did not approach the owner, get in his face, or yell at him during the interaction. While claimant may have emphatically insisted that his safety complaints be immediately addressed, and refused to drive work vehicles under conditions he felt were unsafe, this insistence did not amount to a violation of the employer’s harassment policy or other reasonable expectations, even if the owner thought it “rude” of claimant to repeatedly question him about the issue. As claimant’s actions did not violate the employer’s written policy or the standards of behavior an employer has the right to expect of an employee, the employer has not established a willful or wantonly negligent disregard of the employer’s interest.

For these 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. 23-UI-214872 is affirmed.

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

DATE of Service: March 30, 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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