

EMPLOYMENT APPEALS BOARD DECISION
2023-EAB-0817

Reversed
No Disqualification

PROCEDURAL HISTORY: On June 12, 2023, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant was discharged by the employer for misconduct and was disqualified from receiving benefits effective May 14, 2023 (decision # 120440). Claimant filed a timely request for hearing. On July 11, 2023, ALJ Frank conducted a hearing, and on July 13, 2023 issued Order No. 23-UI-230380, affirming decision # 120440. On July 25, 2023, claimant filed an application for review with the Employment Appeals Board (EAB).

WRITTEN ARGUMENT: Claimant did not declare that she provided a copy of her argument to the opposing party or parties as required by OAR 471-041-0080(2)(a) (May 13, 2019). The argument also contained information that was not part of the hearing record, and did not show that factors or circumstances beyond claimant's reasonable control prevented her 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).

FINDINGS OF FACT: (1) Wildhorse Resort & Casino employed claimant as a custodian at their golf course from April 19, 2021 until May 19, 2023.

(2) The employer expected that their employees would not harass others. Claimant understood this expectation.

(3) On May 13, 2023, one of claimant's coworkers went to use a restroom that claimant maintained as part of her work duties. Claimant propped open the restroom door and asked the coworker, who was in a stall within the restroom, "to please leave the light on." Transcript at 19. Claimant did this because customers had asked claimant that the restroom lights remain on. The coworker became angry and yelled at claimant to "shut up and leave me alone," using foul language. Transcript at 20-21. Claimant replied, "I'll just take it up [with the manager]. I'm not going to yell." Transcript at 21. Claimant then left the restroom area.

(4) The coworker reported to the employer that claimant had followed her into the restroom and told her that she “needed to stop turning off the light” in the restroom after she used it. Transcript at 7. She reported that she asked claimant to leave her alone multiple times and that claimant refused to leave “and continued harassing her while using the restroom.” Transcript at 5. Two unrelated complaints had been made against claimant by others for other purported violations of the employer’s policies during the course of claimant’s employment, which claimant disputed.

(5) On May 19, 2023, based on the coworker’s complaint, and in light of the two previous complaints, the employer discharged claimant for harassing the coworker during the May 13, 2023 incident.

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 order under review concluded that claimant was discharged for misconduct because she “willfully violated the standards of behavior that the employer had a reasonable right to expect of an employee” on May 13, 2023. Order No. 23-UI-230380 at 4. The record does not support this conclusion.

The employer discharged claimant because they believed claimant harassed a coworker about leaving on restroom lights on May 13, 2023. The employer reasonably expected that their employees would not harass others in the workplace. Claimant testified that she understood this expectation “as a matter of common sense.” Transcript at 19.

While claimant maintained that she did nothing more than politely relay customers’ requests to leave the lights on to her coworker, through the open restroom door, a single time, the coworker told the employer that claimant repeated the request multiple times and refused to leave the restroom despite repeatedly being asked, which the coworker considered harassment. In her testimony, claimant initially stated that she “did not hear for me to leave her alone.” Transcript at 19. She also testified that, “She’s never told me to – what I said, she’s never told me to leave her alone.” Transcript at 20. Claimant then testified, “She said, leave me – shut up and leave me alone[.]” Transcript at 20. Claimant’s supervisor testified he spoke with claimant regarding the incident and that “in the beginning, [she] said that she didn’t go in there at all. Then she admitted to just going in there and telling her to turn the lights off.” Transcript at 13. He also testified that another person “witnessed that claimant followed [the coworker] into the

restroom[.]” Transcript at 14. Claimant denied that this witness was present, and denied “confess[ing] to anything” to her supervisor. Transcript at 22-23.¹

In finding claimant was discharged for misconduct, the order under review assigned greater weight to the coworker’s account than claimant’s partly because it was corroborated by the hearsay account of a witness, and in part because of “claimant’s inconsistent statements about the matter (both at hearing and to her supervisor)[.]” Order No. 23-UI-230380 at 4.² However, the record does not demonstrate that claimant’s testimony at hearing was necessarily internally inconsistent. It could reasonably be inferred that claimant was referring to a lack of prior conflict with the coworker when she at one point testified that the coworker “never told me to leave her alone” before immediately thereafter testifying that the coworker yelled at claimant to leave her alone on this occasion. Transcript at 20. Further, as claimant denied making any admission attributed to her by her supervisor regarding the incident, the evidence is no more than equally balanced as to whether claimant made such an admission, and the employer therefore failed to prove by a preponderance of evidence that claimant made any admission or prior inconsistent statement to the supervisor regarding the incident.

Similarly, claimant offered testimony that the hearsay witness was not present during the incident, and therefore was unable to observe whether claimant entered the restroom. Claimant’s first-hand account that the witness was not present and therefore could not have observed the incident is entitled to greater weight than the witness’s hearsay account to the contrary, and the employer therefore has not established by a preponderance of evidence that the witness corroborated the coworker’s hearsay account where it differed from claimant’s. Accordingly, claimant’s first-hand account of the incident is entitled to greater weight than the coworker’s uncorroborated hearsay account. The employer therefore has not met their burden of showing by a preponderance of evidence that claimant did anything other than ask a coworker once to leave the restroom lights on during the May 13, 2023 incident. Such conduct did not violate the employer’s expectation that their employees refrain from harassing others, and therefore did not constitute misconduct.

For these reasons, the employer failed to establish misconduct, and claimant is not disqualified from receiving unemployment insurance benefits based on the discharge.

DECISION: Order No. 23-UI-230380 is set aside, as outlined above.

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

¹ Though the ALJ did not permit claimant to finish her answer, claimant was asked if she thought the second witness, the coworker who made the complaint, and claimant’s supervisor were all lying about the May 13, 2023 incident. Transcript at 22. Claimant answered that the supervisor “wasn’t even there . . . And then neither – neither was . . .” Transcript at 22. As claimant did not dispute that the coworker was in the restroom, and testified that the supervisor was not present, it can be inferred that she was testifying that the second witness was not present to observe the incident as the second witness claimed.

² The order under review also cited claimant’s “prior history” as a reason why claimant’s account of the incident was outweighed by the coworker’s hearsay account, apparently referring to allegations by the employer that in two prior, unrelated instances, claimant violated the employer’s expectations, which claimant denied in testimony. Order No. 23-UI-230380 at 4; Transcript at 9-11; 22-23. That claimant may have violated other expectations of the employer on previous occasions for which she was not discharged, or had differing accounts of those incidents than the employer, does not undermine her credibility with regard to the May 13, 2023 incident.

DATE of Service: September 6, 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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