

EMPLOYMENT APPEALS BOARD DECISION
2023-EAB-1209

Modified
Request to Reopen Allowed
No Disqualification

PROCEDURAL HISTORY: On December 21, 2022, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant was discharged by the employer for misconduct and disqualified from receiving benefits effective November 6, 2022 (decision # 74315). Claimant filed a timely request for hearing. On February 21, 2023, the Office of Administrative Hearings (OAH) served notice of a hearing scheduled for March 7, 2023. On March 7, 2023, ALJ Adamson conducted a hearing at which the employer failed to appear, and on March 8, 2023 issued Order No. 23-UI-218275, reversing decision # 74315 by concluding that claimant was discharged, but not for misconduct, and was not disqualified from receiving benefits based on the work separation. On March 15, 2023, the employer filed a timely request to reopen the hearing. On October 3, 2023, ALJ Adamson conducted a hearing, and on October 6, 2023 issued Order No. 23-UI-238010, allowing the employer's request to reopen the hearing and affirming decision # 74315. On October 26, 2023, claimant filed an application for review with the Employment Appeals Board (EAB).

WRITTEN ARGUMENT: Claimant filed written arguments on November 24 and 26, 2023. EAB considered claimant's November 26, 2023 argument when reaching this decision. Claimant's November 24, 2023 argument 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. Under ORS 657.275(2) and OAR 471-041-0090 (May 13, 2019), EAB considered only information received into evidence at the hearing when reaching this decision. EAB considered claimant's November 24, 2023 argument to the extent it was based on the record.

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 allowing the employer's request to reopen the hearing is **adopted**. The remainder of this decision addresses claimant's discharge from work.

FINDINGS OF FACT: (1) Severson Plumbing & Mechanical, Inc. employed claimant as a project engineer from June 8, 2021 until November 10, 2022.

(2) The employer generally expected their employees to treat each other with respect.

(3) On March 18, 2022, the employer engaged claimant in a discussion about a number of topics relating to her work performance and responsibilities. During that discussion, the employer “discussed the negative attitude she’s had in the office and how it affects other people,” and that “bullying... any of the other employees was unacceptable[.]” Transcript at 13.

(4) On or around October 22, 2022, the employer received a call from one of claimant’s peers who reported that claimant “had said some really critical, rude things to her, about her ability to do a job that [the employer was] trying to train her for[.]” Transcript at 12. The employer did not report this to claimant at the time.

(5) On or around October 27, 2022, claimant sent an email to the employer in which she outlined her concerns about a potential double-booking of the employer’s technicians for jobs that day. The employer responded by reminding claimant that she was only responsible for the booking of projects, rather than staff for those projects. However, claimant told the employer that she needed to “know what’s going on.” Transcript at 10. The employer felt that claimant “snapped back” in replying to his initial response. Transcript at 10.

(6) On November 10, 2022, the employer discharged claimant due to concerns about her “conduct and performance.” Transcript at 9.

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 due to concerns about her “conduct and performance.” At hearing, the employer testified that the final incident which led him to discharge claimant was the October 27, 2022 incident in which claimant expressed concern about the double-booking of some of the employer’s technicians. Transcript at 9–10. Additionally, the employer testified that the incident around October 22, 2023 in which claimant allegedly said some “really critical, rude things” to a colleague made the employer “feel like at that point [he] knew... that at some point [claimant’s] employment was gonna be terminated in the near future.” Transcript at 12. From this testimony, it is reasonable to conclude that the October 27, 2022 incident was the proximate cause of the employer’s decision to discharge claimant, as it occurred last in time. *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).

The order under review concluded that the employer discharged claimant for misconduct, reasoning that, following several other alleged instances of claimant’s difficult interactions with colleagues, “[the] employer testified to an interaction on October 27, 2023, in which claimant snapped at [the] employer directly; and that these incidents occurred after the employer “warned claimant on March 18, 2023, about her negative behavior[.]” Order No. 23-UI-238010 at 5. However, the record does not support this conclusion.

In suggesting that claimant “snapped” at the employer, the order under review infers meaning that is not obviously present in the employer’s testimony. The employer testified, in relevant part:

I told her that it was unnecessary for her to be involved in the scheduling and reiterated that we needed to – her to focus on commercial projects, to which she snapped back, “Well I need to know what’s going on. I’m the one scheduling them[.]”

Transcript at 10. In context, the employer’s testimony that claimant “snapped back” appears to mean that claimant *responded* to the employer to explain her concerns. The employer did not clarify his meaning further. Without such clarification, characterizing claimant’s behavior as “negative” is unsupported by a preponderance of evidence and is, at best, speculation. Thus, while claimant’s response may have violated the employer’s expectations for claimant’s behavior, the employer failed to meet their burden to show that their expectations in that regard were reasonable, or that claimant’s violation of their expectations was done willfully, or that claimant knew or should have known her behavior probably violated their expectations. As such, the record does not show, by a preponderance of the evidence, that this incident constituted misconduct.

Similarly, to the extent that the October 22, 2022 incident contributed to the employer’s decision to discharge claimant, the employer has also not met their burden to show that claimant engaged in misconduct in this instance. The employer broadly described the actions that claimant allegedly engaged in in subjective terms, suggesting that claimant said some “really critical, rude things” to a colleague. However, the employer’s account lacks both specificity and objectivity, and as such it is not clear either what claimant actually said or whether it actually violated the employer’s standards of behavior. As such, the record does not show by a preponderance of the evidence that claimant’s behavior on October 22, 2022 constituted 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. 23-UI-238010 is modified, as outlined above.

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

DATE of Service: December 14, 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 الاستئناف 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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