

EMPLOYMENT APPEALS BOARD DECISION
2023-EAB-1325

Affirmed
No Disqualification

PROCEDURAL HISTORY: On June 21, 2023, 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 May 14, 2023 (decision # 82701). Claimant filed a timely request for hearing. On July 19 and August 2, 2023, ALJ Lewis conducted a hearing, and on August 4, 2023, issued Order No. 23-UI-232387, reversing decision # 82701 by concluding that claimant was discharged, but not for misconduct, and was not disqualified from receiving benefits based on the work separation. On August 21, 2023, 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 or parties as required by OAR 471-041-0080(2)(a) (May 13, 2019).

FINDINGS OF FACT: (1) The Tree Masters, Inc. employed claimant on three occasions from February 20, 2020, through May 20, 2023. Claimant's most recent period of employment was in marketing, from May 15, 2023, until May 20, 2023.

(2) The employer's policies called for the accrual of one week of vacation time for employees after twelve months of continuous employment.

(3) The employer expected that their employees would not be disrespectful to management or others, including not "using obscene or abusive language, or inappropriate, malicious, disparaging or derogatory oral or written statements concerning [the employer] or any of its clients, employees, or representatives." July 19, 2023, Transcript at 22. Claimant was aware of this expectation. The employer believed that claimant violated this expectation on several occasions during his first two periods of employment.

(4) Claimant's initial period of employment was from February 20, 2020, until January 2, 2023. Claimant was off work in connection with a workers' compensation claim from November 29, 2022,

until January 2, 2023. On January 2, 2023, claimant returned to work and the employer discharged claimant.

(5) On February 20, 2023, the employer rehired claimant. He worked for a period of approximately sixty days, then was considered by the employer to have quit work after having failed to report to work for three days without contacting the employer.

(6) On May 12, 2023, the employer made an offer to rehire claimant, effective May 15, 2023, for a third period of employment. Claimant had not anticipated this offer and had earlier arranged for a family vacation to take place approximately two weeks after May 15, 2023, for which airline tickets had already been purchased. Claimant accepted the offer of employment.

(7) On Monday, May 15, 2023, claimant's first day of work in the most recent period of employment, claimant asked a co-owner of the business for a vacation request form and requested a week of vacation time. After asking for the form, claimant said, "I didn't know I would be doing this," referring to being back at work during the time he had expected to be on vacation with his family. July 19, 2023, Transcript at 9. Claimant intended it to be an apologetic explanation for requesting vacation time on his first day back at work, while the co-owner believed it was spoken in "a derogatory, resentful tone" which indicated to her "his resistance to wanting to work." July 19, 2023, Transcript at 9, 15. The employer granted the vacation request. Claimant worked that day and the rest of the week without incident.

(8) On Saturday, May 20, 2023, the employer's owners texted claimant that he was being discharged, without further explanation. They had decided to discharge claimant for showing "disrespect for a supervisor" in making his request for vacation time on May 15, 2023. July 19, 2023, Transcript at 14. The employer believed the request was "representative of [a pattern of] discourteous communication [and] harassment" from his previous periods of employment. August 2, 2023, Transcript at 5.

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).

A discharge analysis focuses on the proximate cause of the discharge, which is generally the last incident of misconduct before the discharge. *See e.g. Appeals Board Decision 12-AB-0434*, March 16, 2012. The proximate cause of discharge is the incident without which the discharge would not have occurred when it did. *Appeals Board Decision 09-AB-1767*, June 29, 2009.

The employer expected that their employees would not be disrespectful to their supervisors in accordance with their written policy. Claimant was aware of this policy. The employer contended that claimant violated the policy on several occasions during his first and second periods of employment and presented testimony and other evidence in this regard. However, claimant subsequently separated from employment, and on May 12, 2023, the employer offered to rehire claimant. Therefore, claimant's actions prior to the beginning of his final period of employment on May 15, 2023, could not have been the proximate cause of his discharge. The last incident of alleged misconduct—the incident without which claimant would not have been discharged—was his request for vacation time on May 15, 2023, according to the employer's testimony. July 19, 2023, Transcript at 8. Therefore, only claimant's conduct on *that* occasion is analyzed to determine if it constituted a willful or wantonly negligent violation of the employer's policy against being disrespectful toward supervisors.

The employer discharged claimant because on May 15, 2023, his first day at work after being rehired, claimant made a request for vacation time to accommodate a prepaid vacation he had arranged prior to the employment offer being extended. Though the parties offered differing accounts of the tone in which claimant spoke, both agreed that immediately after making the request, claimant stated to the co-owner, "I didn't know I would be doing this," which both parties understood to refer to claimant's unexpected return to work. July 19, 2023, Transcript at 9. Claimant testified that in making this statement he believed he had "apologized that [the vacation request] was [being made] immediately upon returning to work[.]" August 2, 2023, Transcript at 11. However, based on this statement, the co-owner testified she "made a note of his reaction to coming to work, and. . . it was upsetting because. . . we were offering him work and he was resistive. . ." July 19, 2023, Transcript at 9. She later relayed this impression of claimant's vacation request and statement to the other co-owner, who did not witness the exchange. The other co-owner testified he then discharged claimant because "[claimant] came back to work and the first thing you know, in a disgruntled manner according to [the co-owner], is he did not appreciate coming back to work. He didn't really wanna do it, and the second thing is that he immediately requested a weeks' paid vacation" to which the owners did not believe he was entitled under their policy. July 19, 2023, Transcript at 26. This co-owner made the decision to discharge claimant and texted him that he was discharged on May 20, 2023.

The employer has not met their burden to show that claimant's request for vacation time and the statement that followed violated the employer's policy against being disrespectful to supervisors. Given that claimant had worked for the employer for the majority of the preceding three years, it was not unreasonable for him to ask whether he had accrued vacation time under the employer's policy, or to request to use such time. The employer has not demonstrated how simply requesting vacation time was "derogatory" or otherwise disrespectful to anyone. Claimant's explanatory statement about the request intended to convey that he needed to request the vacation time on his first day at work because he had not expected to be working when he made the vacation plans. This statement did not objectively violate the employer's written policy against disrespectful conduct because it was not obscene, abusive, inappropriate, or the like.

While claimant may have engaged in violations of the employer's expectations during previous periods of employment, the employer has not shown by a preponderance of evidence that he was discharged on May 20, 2023, for a willful or wantonly negligent violation of the standards of behavior which an employer has the right to expect of an employee occurring on May 15, 2023. Accordingly, 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-232387 is affirmed.

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

DATE of Service: December 29, 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 desisyong ito.

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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