

EMPLOYMENT APPEALS BOARD DECISION
2024-EAB-0449

Affirmed
No Disqualification

PROCEDURAL HISTORY: On December 7, 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 August 6, 2023 (decision # 100041). Claimant filed a timely request for hearing. On April 25, 2024, ALJ Roberts conducted a hearing, and on April 30, 2024, issued Order No. 24-UI-253224, reversing decision # 100041 by concluding that claimant was discharged, but not for misconduct, and was not disqualified from receiving benefits based on the work separation. On May 17, 2024, the employer filed an application for review with the Employment Appeals Board (EAB).

WRITTEN ARGUMENT: EAB considered the employer's argument in reaching this decision.

FINDINGS OF FACT: (1) Bend-Redmond Habitat for Humanity employed claimant as a thrift store manager from November 2017 until August 7, 2023.

(2) The employer expected that their employees would not display "disrespectful behavior" toward a manager or co-worker. Exhibit 1 at 14. Claimant was aware of this expectation, which was printed in an employee handbook claimant acknowledged receiving, and from several conversations with management regarding displays of anger over the course of his employment.

(3) Beginning in November 2022, discord existed between claimant and other members of the employer's management. Claimant was dissatisfied with having to do the work of a vacant position in addition to his own without additionally receiving the compensation budgeted for that position. The employer's other managers were dissatisfied with claimant's refusal to do work associated with the vacant position, with claimant's displays of what they felt was inappropriate anger on several occasions,

and with what they perceived as claimant having ignored or circumvented directives from claimant's superiors. Claimant was advised of these points of dissatisfaction on several occasions from November 2022 through July 2023, either through informal conversations or more formal warnings.

(4) On July 31, 2023, immediately upon arriving at work, claimant discovered that one of the store employees was ill, and claimant drove the employee to the hospital. Claimant remained with the employee while he was being treated, and returned to the store at approximately 1:00 p.m. Claimant immediately went to his office and began eating lunch.

(5) At some point prior to or during claimant's lunch, a store employee reported to the employer's human resources manager, S.B., that claimant "was very, very angry in his office, and was yelling about not getting the position he wanted" and that the employee "deescalated Claimant[.]" Exhibit 1 at 11. The employee further reported "that they no longer felt safe around Claimant, his behavior had gotten worse, they felt physically threatened enough to step backwards, felt the workplace no longer was safe, and were considering leaving [the employer] because 'walking on eggshells' around Claimant was not enough to avoid his angry outbursts." Exhibit 1 at 11.

(6) Claimant had not received any news about any other position on July 31, 2023, and had not yelled or displayed anger in front of anyone that day, as he had been at the hospital between the start of the workday and eating lunch alone in his office.

(7) Later that day, a volunteer at the store "came to management with a complaint about Claimant having another angry outburst and talking derogatively about management in front of staff and customers." Exhibit 1 at 11. The employer decided to suspend claimant from work while they investigated the complaints.

(8) As claimant ate lunch, claimant's supervisor and S.B. entered claimant's office to "ask claimant to go home for the rest of the day to 'cool off.'" Exhibit 1 at 8. Claimant asked why he was being told to go home, but they refused to tell him, and he "[got] angry." Transcript at 13. The employer's interim chief executive officer (CEO) joined the other managers in claimant's office shortly thereafter. Claimant told them, "I'm not going home" and "I am going to stay here and do my job." Transcript at 13, 20. Claimant raised his voice but did not use foul language. The CEO responded that claimant "had been given a directive by [his supervisor and] needed to comply with the directive." Exhibit 1 at 11. Claimant immediately left the store after hearing this. Claimant was later notified that he was suspended from work pending investigation until August 7, 2023.

(9) On August 7, 2023, claimant reported for work after the conclusion of the suspension and investigation. The employer immediately discharged claimant based on the findings of the investigation, including that claimant's "violent mood swings were growing worse[.]" Exhibit 1 at 11.

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 cited several instances of what they considered misconduct, occurring from November 2022 through July 2023, as the basis for claimant’s discharge. *See* Exhibit 1 at 2-4. However, the initial focus of the discharge analysis is on the proximate cause of the discharge, which is the incident without which the discharge would not have occurred when it did. *See e.g. Appeals Board Decision* 09-AB-1767, June 29, 2009. The record suggests that the incidents occurring prior to July 31, 2023, were known to the employer at or shortly after the time they occurred, and that the employer chose either not to discipline claimant for them or to impose discipline less severe than discharging him. Accordingly, the incidents prior to July 31, 2023, were not the proximate cause of claimant’s discharge. Therefore, the prior incidents are relevant to the misconduct analysis only if the proximate cause of the discharge is shown to be a willful or wantonly negligent violation of the standards of behavior which an employer has the right to expect of an employee, as necessary to determine whether such a violation was an isolated instance of poor judgment, and not misconduct.¹

The employer discharged claimant because on July 31, 2023, an employee and a volunteer separately complained that claimant had angry outbursts in their presence that day. Claimant additionally admitted in testimony to a contentious interaction with managers that day while being disciplined for at least one of these complaints. Transcript at 13. However, the record suggests that this interaction was not part of the proximate cause of claimant’s discharge. One of two affidavits from members of management who were in claimant’s office when he was asked to leave work mentioned that claimant initially refused to leave before complying minutes later, but did not specifically cite this as a reason for his discharge, while the other affidavit made no mention of the refusal. Exhibit 1 at 8-11. Further, a summary of the reasons for claimant’s discharge submitted by the employer did not mention claimant’s initial refusal to leave when requested. Exhibit 1 at 2-4. Therefore, more likely than not, claimant’s brief, angry refusal to comply with his supervisor’s request to “go home” for the rest of the day before he ultimately complied was not part of the proximate cause of the employer’s decision to discharge claimant, despite its occurrence on July 31, 2023. Exhibit 1 at 8. Accordingly, only the two complaints of other outbursts of anger which the employer received that day are at issue.

The employer reasonably expected that claimant would not display “disrespectful behavior” toward a manager or co-worker, such as angry outbursts that claimant had previously been warned against displaying. However, the employer has not met their burden to show by a preponderance of the evidence that claimant engaged in such conduct on July 31, 2023.

¹ OAR 471-030-0038(3)(b) (September 22, 2020). To be considered an isolated instance of poor judgment, a willful or wantonly negligent act must be a single or infrequent occurrence rather than a repeated act or pattern of other willful or wantonly negligent behavior, and must not exceed mere poor judgment by violating the law or being tantamount to unlawful conduct, or making a continued employment relationship impossible. OAR 471-030-0038(1)(d).

Evidence of the two alleged angry outbursts at issue presented by the employer consisted of hearsay contained in an affidavit by S.B. This affidavit related accounts made to S.B. by an employee that claimant had just had an angry outburst in his office in that employee's presence, and by a volunteer that claimant had "another" angry outburst "in front of staff and customers." Exhibit 1 at 11. It is reasonable to infer from this affidavit that both individuals were alleging that the outbursts had occurred on July 31, 2023, the day they were reported. In contrast to these accounts, claimant testified that he had not been at work that day because he had taken an employee to the hospital as soon as he had arrived at work, and that he immediately went to his office to have lunch alone when he returned from the hospital at approximately 1:00 p.m. Transcript at 12, 27-28. Both parties agreed that claimant was sent home while having lunch, went directly from his office to the parking lot, and did not return to work until August 7, 2023. Transcript at 20. Claimant further denied engaging in, or having an opportunity to engage in, any angry outbursts or acts of intimidation on July 31, 2023, toward or in the presence of an employee or volunteer. Transcript at 12.

Claimant's first-hand testimony regarding his activities and whereabouts on July 31, 2023, is entitled to greater weight than the contrary accounts of the employee and volunteer, which were presented through two layers of hearsay, and the facts have been found accordingly. The employer has not shown by a preponderance of the evidence that claimant engaged in the angry outbursts complained of on July 31, 2023, and that he therefore violated the employer's policy against displaying "disrespectful behavior" toward others. Because the employer has not shown that claimant engaged in the conduct for which he was discharged, they have not met their burden to show that he was discharged for misconduct. Therefore, the additional policy violations alleged by the employer need not be assessed to determine whether claimant was discharged for an isolated instance of poor judgment.

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. 24-UI-253224 is affirmed.

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

DATE of Service: June 26, 2024

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، می توانید با استفاده از دستور العمل موجود در پایان آن، از دادگاه تجدید نظر اورگان درخواست تجدید نظر کنید.

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