

EMPLOYMENT APPEALS BOARD DECISION
2024-EAB-0765

Affirmed
No Disqualification

PROCEDURAL HISTORY: On July 30, 2024, 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 June 23, 2024 (decision # L0005436378).¹ Claimant filed a timely request for hearing. On September 30, 2024, ALJ Monroe conducted a hearing, and on October 9, 2024, issued Order No. 24-UI-268704, reversing decision # L0005436378 by concluding that claimant was discharged, but not for misconduct, and therefore was not disqualified from receiving benefits based on the work separation. On October 28, 2024, the employer filed an application for review with the Employment Appeals Board (EAB).

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

FINDINGS OF FACT: (1) Eastern Oregon Alcoholism Foundation employed claimant as a technician in their detoxification department from August 1, 2022, until June 27, 2024.

(2) The employer expected their employees to treat coworkers with courtesy and respect and to refrain from subjecting coworkers to intimidation or bullying treatment. Claimant understood these expectations.

(3) Near the end of May 2024, the employer adopted some changes to their approach to scheduling shifts for technicians in their detoxification department, which included scheduling technicians for ten-hour shifts, among other things.

(4) On June 13, 2024, the employer's shift scheduler sent an email to claimant, stating that any upcoming Wednesday that claimant was "able and willing to fill until we get more people will be greatly

¹ Decision # L0005436378 stated that claimant was denied benefits from July 14, 2024, to July 12, 2025. However, decision # L0005436378 should have stated that claimant was disqualified from receiving benefits beginning Sunday, June 23, 2024, and until she earned four times her weekly benefit amount. See ORS 657.176.

appreciated.” Transcript at 33. Claimant responded that she could work on Wednesday, June 26, 2024. The scheduler replied, thanking claimant. Thereafter, the work schedule for June 26, 2024, was left blank and not updated. However, claimant’s email exchange with the scheduler gave claimant the impression that the employer wanted her to work a shift on June 26, 2024.

(5) On June 26, 2024, claimant stopped at a gas station on her way to work. While checking out, claimant was approached by another technician who worked for the employer. That technician was also on her way to work the June 26, 2024, shift and asked claimant if she was working that day. In a non-aggressive manner, claimant confirmed that she was, then departed the gas station.

(6) Claimant then arrived at the workplace and clocked in. Shortly thereafter, the other technician arrived. The technician stated that she had received a text message from the nursing supervisor that she was supposed to work the shift. Claimant stated that she was under the impression that she had to work based on the scheduler’s email, but that the schedule was not updated for that day so it was not clear who was supposed to work. The other technician asked for the scheduler’s phone number, and claimant provided it to the technician. Claimant also suggested the technician call the nursing supervisor for clarification. The technician went outside the workplace a few times to make phone calls, and slammed doors as she did so. The technician raised her voice at claimant, yelling that claimant was “a bully,” and then left the workplace for the night. Transcript at 35.

(7) During the interaction, claimant spoke with the technician in a calm tone, while sitting at one of two workstations, so that one workstation was vacant for the other technician to use if desired. After the other technician left the premises, claimant stayed and worked the shift. Shortly after the shift ended, claimant sent the employer’s executive director an email advising him of the interaction.

(8) The other technician emailed an account to the employer of what occurred in which claimant was described as having “glared at” and “bull[ied]” the other technician. Transcript at 10. The other technician met with the employer’s executive director and told him that claimant “had been aggressive[.]” Transcript at 24. Based on the other technician’s statements, the executive director decided to discharge claimant for her conduct during the June 26, 2024, interaction as violating the employer’s prohibition on subjecting coworkers to intimidation or bullying treatment. The executive director did not ask claimant for her account of what occurred on June 26, 2024.

(9) On June 27, 2024, the employer discharged claimant.

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) (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 for her conduct during the June 26, 2024, interaction with the other technician. The employer failed to prove that more likely than not claimant's conduct on June 26, 2024, violated their prohibition against subjecting coworkers to intimidation or bullying treatment. At hearing the parties offered conflicting accounts of what occurred at the workplace on the night of June 26, 2024. Because the weight of the evidence favors claimant's account, the record does not show that claimant violated the employer's expectations during her interaction with the other technician.

The employer presented the other technician's account of what occurred on June 26, 2024, by reading portions of a statement the technician gave the employer and via the testimony of the employer's executive director, who spoke with the technician. Transcript at 9-11, 24-26. Under these sources of evidence, claimant was described as having "glared at" and "bull[ied]" the other technician, and was implied to have been sitting at the lone workstation, making it practically difficult or impossible for the other technician to work the shift. Transcript at 9-10. The executive director stated that the technician told him that claimant "had been aggressive[.]" Transcript at 24. The executive director also asserted, although he had not been present at the workplace that night, that the work schedule was posted at the workplace and showed that the other technician was supposed to be working and therefore that claimant's insistence on working the shift was unreasonable. Transcript at 24-25. Under further questioning, the executive director stated that he knew the work schedule had been posted at that time because the employer's nursing supervisor had told him it was posted, but the executive director also conceded that the nursing supervisor was not actually present at the workplace when the interaction between claimant and the other technician occurred. Transcript at 27-28, 29. It is therefore not evident how the nursing supervisor would have firsthand knowledge to verify to the executive director that the schedule was posted and showed that the other technician was supposed to be working.

Claimant's firsthand account of what occurred on June 26, 2024, differed significantly. Claimant testified that the work schedule for June 26, 2024, was blank and had not been updated, and that she was under the impression the employer wanted her to work that shift. Transcript at 31. Claimant testified this was the case because of the June 13, 2024, email from the employer's scheduler, because claimant volunteered to work Wednesday June 26, 2024, and because the scheduler emailed thanking claimant. Transcript at 33. Claimant further testified that she had a brief interaction with the other technician at a gas station before the shift, in which the technician asked claimant if she was going to work and, in a non-aggressive manner, claimant answered that she was. Transcript at 33-34.

Claimant then testified that she went to the workplace and clocked in to work and that shortly thereafter the other technician also arrived. Transcript at 34. Claimant stated that the technician said she had received a text message from the nursing supervisor to work that night, and asked for the scheduler's phone number from claimant. Transcript at 34. Claimant testified that she told the technician that she was under the impression that she had to work but that the schedule was not updated for that day so it was not clear who was supposed to work. Transcript at 35. Claimant testified that she suggested the technician call the nursing supervisor for clarification, and the technician went outside a few times to make phone calls. Transcript at 35. Claimant stated that the technician slammed doors, raised her voice at claimant, yelled at claimant that she was "a bully," and then left the workplace for the night. Transcript at 35-36. Claimant testified that she spoke with the technician in a calm tone, while sitting at

one of two workstations, and that claimant never refused to leave but stayed and worked the shift because she was under the impression she was supposed to work and the other technician had left. Transcript at 36-37.

The employer bears the burden of proof in this case. Given that claimant's account is primarily drawn from firsthand knowledge, whereas the accounts of the employer's witnesses are based primarily on hearsay, the weight of the evidence favors claimant's account of what occurred. The facts of this decision relating to the June 26, 2024, interaction have therefore been found in accordance with claimant's account.

As such, the record shows that a misunderstanding regarding who was supposed to work on June 26, 2024, occurred between claimant and the other technician but that claimant's treatment of the other technician was not disrespectful or intimidating. Therefore, claimant's conduct on June 26, 2024, did not violate the employer's prohibition against subjecting coworkers to intimidation or bullying treatment. Because claimant did not violate the employer's expectations, the employer discharged claimant, but not for misconduct. Claimant is therefore not disqualified from receiving unemployment insurance benefits based on the work separation.

DECISION: Order No. 24-UI-268704 is affirmed.

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

DATE of Service: November 22, 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 stated above**. See ORS 657.282. For forms and information, visit <https://www.courts.oregon.gov/courts/appellate/forms/Pages/appeal.aspx> and choose the appropriate form under "File a Petition for Judicial Review." You may also contact the Court of Appeals by telephone at (503) 986-5555, by fax at (503) 986-5560, or by mail at 1163 State Street, Salem, Oregon 97301.

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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

ទោរទោស – តម្រូវការនេះមិនមែនជាភារកិច្ចរបស់យើងទេ បើសិនជាមានការបញ្ជាក់ពីការខ្វះខាតរបស់លោកអ្នក។ បើលោកអ្នកមិនយល់អំពីសេចក្តីសម្រេចនេះទេ សូមទាក់ទងគណៈកម្មការឧទ្ធរណ៍ការងារភ្លាមៗ។ ប្រសិនបើលោកអ្នកមិនយល់ស្របចំពោះសេចក្តីសម្រេចនេះទេ លោកអ្នកអាចដាក់ពាក្យប្តឹងសុំឲ្យមានការពិនិត្យរឿងក្តីឡើងវិញជាមួយតុលាការឧទ្ធរណ៍រដ្ឋ Oregon ដោយអនុវត្តតាមសេចក្តីណែនាំដែលសរសេរនៅខាងចុងបញ្ចប់នៃសេចក្តីសម្រេចនេះ។

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 دستورالعمل موجود در پایان آن، از دادگاه تجدید نظر اورگان درخواست تجدید نظر کنید.

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