

State of Oregon
Employment Appeals Board
875 Union St. N.E.
Salem, OR 97311

EMPLOYMENT APPEALS BOARD DECISION
2025-EAB-0034

Reversed
No Disqualification

PROCEDURAL HISTORY: On August 12, 2024, 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 July 7, 2024 (decision # L0005511155). Claimant filed a timely request for hearing. On December 3 and 17, 2024, ALJ Frank conducted a hearing, and on December 24, 2024, issued Order No. 24-UI-277926, affirming decision # L0005511155. On January 13, 2025, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Precision Machine and Manufacturing, Inc. employed claimant as a fabricator from May 30, 2013, through July 8, 2024.

(2) The employer expected that their employees would not engage in obscene, harassing, or intimidating behavior, including “[d]emeaning or disrespecting” another employee. Exhibit 2 at 7. This expectation was contained in an employee handbook, and claimant understood it.

(3) The employer believed that claimant displayed a “bad attitude” for much of his employment, which included him getting “very agitated and. . . throwing tools, cussing, and walking out of the shop.” December 17, 2024, Audio Record at 7:48. The employer warned claimant about engaging in this type of behavior on multiple occasions, including in November 2020 and April 2024.

(4) In June 2024, the employer’s fabrication superintendent gave claimant a verbal warning “about his language” because he was “cussing and swearing,” which made others “uncomfortable.” December 17, 2024, Audio Record at 10:50.

(5) On July 3, 2024, an employee, M, was discussing the work schedule of another employee, R, with the employer’s operations manager. M reported that R wanted to “quit working here because of the way [claimant] is treating him.” Exhibit 1 at 5. The operations manager then spoke with R, who said that claimant “is constantly yelling and cussing in the shop and making it very uncomfortable for [R] to work.” Exhibit 1 at 5. R also reported that he had complained to the fabrication manager about this, and

“[o]n each of the occasions” that he complained, the fabrication manager “pulled [claimant] into his office to talk to him.” Exhibit 1 at 5. R also stated that after the fabrication manager left for the day, claimant “confronted” R about having complained. Exhibit 1 at 5.

(6) During R’s conversation with the operations manager, R also reported that claimant had said to him, “You’ve been in the U.S. for 25 fucking years and you still can’t speak English,” and “I’m fucking stuck on swing shift because you can’t do your job.” Exhibit 1 at 5.

(7) Also on July 3, 2024, M reported to the operations manager that claimant had said to her on July 1, 2024, “I have to come into work [on swing shift] until that Mother Fucker goes to swing,” and “I don’t mind stopping to help R but after 25 years he needs to learn the language.” Exhibit 1 at 5.

(8) Based on these reports, the employer sent claimant home from work while they decided how to respond. Claimant was next scheduled to work on July 8, 2024.

(9) On July 8, 2024, the employer told claimant that they were discharging him for his alleged July 1, 2024, statements to M and the statements that R alleged claimant made to him according to his July 3, 2024, report. Claimant did not work for the employer after July 8, 2024.

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 because they believed he had made statements to M and R that were demeaning and harassing, and which included foul language. The order under review concluded that the employer proved by a preponderance of the evidence that claimant made these statements, which constituted misconduct. Order No. 24-UI-277926 at 4. However, the record does not support that the employer met the burden of proof regarding the statements.

The employer reasonably expected that their employees would not engage in obscene, harassing, or intimidating behavior. Claimant understood this expectation. Though the employer believed that claimant displayed a “bad attitude” for many years, including using foul language, the employer elected through June 2024 to warn claimant for such conduct, rather than discharging him. It can reasonably be inferred from the fact that the employer took no investigatory or disciplinary action against claimant between July 1, 2024, and July 3, 2024, that M had not reported the statements claimant allegedly made to her on July 1, 2024, until July 3, 2024. Therefore, the conduct reported to the operations manager on

July 3, 2024, by M and R constituted the proximate cause of claimant's discharge, and is the proper subject of the misconduct analysis.¹

The record does not show when in June 2024 claimant was warned for using foul language. The record also does not show the date on which, according to R's allegations, claimant had made those statements. In his hearsay account, R stated that he complained to the fabrication manager about claimant on more than one occasion, and that, each time he did so, claimant was called into the fabrication manager's office. This suggests that R may have reported claimant's alleged statements to the fabrication manager in June 2024, and the employer, through the fabrication manager, chose to discipline claimant by issuing a verbal warning rather than by discharging him. However, even if R was asserting that claimant made the statements after the June 2024 warning, claimant rebutted R's assertion by denying at hearing that he made the statements R had attributed to him. December 17, 2024, Audio Record at 20:08. Additionally, claimant testified that the June 2024 warning was about his language toward R "in context," and that the foul language at issue in that warning "was never directed at anybody personally." December 17, 2024, Audio Record at 21:27. Claimant further testified regarding the warning, "After he talked to me about my language, I made sure I wasn't swearing around [R]." December 17, 2024, Audio Record at 21:52.

The employer's only witness at hearing was their operations manager, who had no first-hand knowledge of the events M and R reportedly witnessed. R's hearsay account regarding claimant's alleged statements, as related at hearing through the operations manager, is entitled to less weight than claimant's first-hand testimony that he did not make the statements. Therefore, the employer did not meet their burden of showing that claimant more likely than not made the statements to R.

The operations manager also related M's hearsay account at hearing, which asserted that on July 1, 2024, claimant made statements to her about R that were similar to those reported by R on July 3, 2024. The alleged statements were similarly demeaning of R, and included foul language. Claimant also rebutted M's hearsay account, testifying that he and M only discussed that claimant was waiting for R to move to day shift so that claimant could move to swing shift, and that he "didn't say anything other than that." December 17, 2024, Audio Record at 24:37. As with R's hearsay account, claimant's first-hand testimony that he did not use foul language or disparage R when speaking with M is entitled to greater weight than M's hearsay account to the contrary. Therefore, the employer did not meet their burden of showing that claimant more likely than not made statements to M on July 1, 2024, that disparaged R or contained foul language.

Because the employer did not prove by a preponderance of the evidence that claimant made the statements alleged by R and M, they have not shown that claimant willfully or with wanton negligence violated their policies regarding the treatment of others. Accordingly, the employer has not shown that claimant was discharged for misconduct.

For these reasons, claimant was discharged, but not for misconduct, and is not disqualified from receiving unemployment insurance benefits based on the work separation.

¹ 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).

DECISION: Order No. 24-UI-277926 is set aside, as outlined above.

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

DATE of Service: February 12, 2025

NOTE: This decision reverses the ALJ's order denying claimant benefits. Please note that in most cases, payment of benefits owed will take about 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 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 – 本判决会影响您的失业救济金。如果您不明白本判决，请立即联系就业上诉委员会。如果您不同意此判决，您可以按照该判决结尾所写的说明，向俄勒冈州上诉法院提出司法复审申请。

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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