

EMPLOYMENT APPEALS BOARD DECISION
2019-EAB-0169

Affirmed
Disqualification

PROCEDURAL HISTORY: On November 21, 2018, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 115444). Claimant filed a timely request for hearing. On January 9, 2019 and January 22, 2019, ALJ R. Frank conducted a hearing, and on January 30, 2019 issued Order No. 19-UI-123666, affirming the Department's decision. On February 16, 2019, claimant filed an application for review with the Employment Appeals Board (EAB).

EAB considered the parties' arguments when reaching this decision to the extent they were based upon the hearing record. ORS 657.275(2); OAR 471-041-0090.

FINDINGS OF FACT: (1) Japanese Garden Society of Oregon, Inc. employed claimant from June 15, 2018 to October 29, 2018.

(2) The employer had a policy that prohibited workplace violence, and defined that term to include, among other things, threatening remarks, aggressive or hostile behavior creating reasonable fear of injury or emotional distress, and discussion of weapons. The employer gave claimant a copy of that policy upon hire, and claimant read and understood it.

(3) On October 27, 2018, claimant experienced stress during the workday due to some personal circumstances and his working conditions. He became visibly upset at work. Staff reported to the supervisor that claimant was shaking with rage, raising his voice, and using foul language. The supervisor offered claimant the choice of taking a break or going home for the day. Claimant recognized that he was too upset to work and opted to leave work for the day.

(4) After leaving work, claimant sat in his vehicle off-property and exchanged text messages with his mother. Shortly thereafter, claimant took a picture from his car, added "Push me the wrong way and I will slit your throat" followed by some Japanese characters to the picture, and posted it to his social media account. Exhibit 1. Claimant understood at the time he sent the post that coworkers were likely to view claimant's social media post.

(5) Claimant's coworkers almost immediately viewed claimant's post and reported it to the employer. The employer removed claimant from the work schedule until further notice. A supervisor sent claimant an email to that effect, and the following day, claimant responded to the supervisor that he was "checking myself in to get some mental help" and was not able to work until further notice. *Id.*

(6) On October 29, 2018, the employer discharged claimant for posting the threatening message to his social media account.

CONCLUSIONS AND REASONS: We agree with the ALJ that the employer discharged claimant for misconduct.

ORS 657.176(2)(a) requires a disqualification from unemployment insurance benefits if the employer discharged claimant for misconduct connected with work. OAR 471-030-0038(3)(a) (January 11, 2018) defines misconduct, in relevant part, as a willful or wantonly negligent violation of the standards of behavior which an employer has the right to expect of an employee, or an act or series of actions that amount to a willful or wantonly negligent disregard of an employer's interest. OAR 471-030-0038(1)(c) defines wanton negligence, in relevant part, as 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.

The employer had a workplace violence policy that prohibited employees from making threatening remarks, from aggressive or hostile behavior creating reasonable fear of injury or emotional distress, and from discussion of weapons. Claimant's social media post violated the employer's policy in all of those respects because it included a threat of physical violence, was aggressive and hostile and would reasonably cause others to fear injury or suffer emotional distress, and, by implication, the post referenced use of a knife or blade. Claimant knew or should have known that such a post would violate the employer's reasonable expectation that he refrain from doing so, and demonstrated conscious indifference to the consequences of his conduct by making the post anyway; the post therefore was wantonly negligent.

Although claimant's social media post was made off-duty to his personal social media account, it was still work-connected. Claimant knew that coworkers followed his social media account and were likely to read his post, and he made the post was made within a very short period of time after he left work because he was visibly in a rage and too upset over both personal and work-related matters to do his job.¹ Claimant's social media post was closely connected in time to his early departure from work, the tone of the English words of the post were logically connected to the "rage" claimant was visibly demonstrating prior to leaving work, and the English portion of the social media post, considered alone or in conjunction with the Japanese characters as translated by claimant in his written argument,

¹ Claimant argued that his post was not intended as a threat and was not connected to employment because he stated in Japanese characters, "I'm sorry I have few recent posts," and that the addition of that phrase "changes the tone of the post." Written argument at 2. However, the two phrases on the post appear unrelated to each other, making the message all the more disturbing. Nothing about the Japanese characters claimant added to the post changes the plain meaning of the phrase "Push me the wrong way and I will slit your throat," changes the context or timing of the post, or suggests that it was not connected to work or his rage and emotional upset while at work that day.

reasonably caused claimant's coworkers to experience fear or upset. Because claimant's social media post was connected to his employment and was likely to have an effect on the workplace, it was sufficiently work-connected.

Claimant's conduct cannot be excused as an isolated instance of poor judgment under OAR 471-030-0038(3)(b). Although it was comprised of only a single occurrence, some isolated conduct exceeds mere poor judgment, including conduct that is tantamount to unlawful conduct and conduct that causes an irreparable breach of trust or otherwise makes a continued employment relationship impossible. OAR 471-030-0038(1)(d)(D).

Claimant's conduct could be considered tantamount to harassment, which is defined in ORS 166.065(1)(c) to include subjecting another to alarm by conveying an electronic threat to inflict serious physical injury on that person . . . "which threat reasonably would be expected to cause alarm." It could also be considered tantamount to menacing, which is defined in ORS 163.190(1) to include intentionally attempting by word or conduct to place another person in fear of imminent serious physical injury.

Regardless whether claimant's conduct was not tantamount to unlawful conduct, it would still exceed mere poor judgment by causing an irreparable breach of trust or otherwise makes a continued employment relationship impossible. No reasonable employer would continue to employ an individual who responded to personal and professional upsets by visibly displaying rage in the workplace, and, after being allowed to leave work when upset, shortly thereafter posted a threatening picture to social media indicating that he would "slit the throat" of anyone who "push[ed]" him "the wrong way." No reasonable employer would be able to trust claimant in the workplace after that post, and no responsible employer in today's climate of workplace violence would bring an individual who had posted such a threat where coworkers could see it back to the workplace. For any one or all of those reasons, claimant's conduct exceeded mere poor judgment and cannot be excused just because it was isolated.

Claimant's conduct cannot be excused as a good faith error under OAR 471-030-0038(3)(b). Claimant neither sincerely believed, nor had any factual basis for believing, that he had not violated the employer's workplace violence policy when he made the social media post, nor that the employer would excuse such a violation. He did not act in good faith when he posted that he would slit the throat of anyone who pushed him the wrong way, and his conduct is not excusable on that basis.

For the foregoing reasons, the employer discharged claimant for work-connected misconduct. Claimant is disqualified from receiving unemployment insurance benefits because of this work separation until he qualifies for benefits under Department law.

DECISION: Order No. 19-UI-123666 is affirmed.

J. S. Cromwell and D. P. Hettle;
S. Alba, not participating.

DATE of Service: March 18, 2019

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 Asuntos Laborales. Si no está de acuerdo con esta decisión, puede presentar una Petición 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 ໄດ້ ໂດຍປະຕິບັດຕາມຄຳແນະນຳທີ່ບອກໄວ້ຢູ່ຕອນຫ້າຍຂອງຄຳຕັດສິນນີ້.

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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