

EMPLOYMENT APPEALS BOARD DECISION
2019-EAB-0362

Affirmed
No Disqualification

PROCEDURAL HISTORY: On March 13, 2019, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant, but not for misconduct (decision # 154306). Claimant filed a timely request for hearing. On April 5, 2019, ALJ Monroe conducted a hearing, and on April 12, 2019 issued Order No. 19-UI-128146, affirming the Department's decision. On April 15, 2019, the employer filed an application for review with the Employment Appeals Board (EAB)

FINDINGS OF FACT: (1) Klamath County School District employed claimant from October 22, 2018 until January 8, 2019, last as a substitute school bus assistant. Claimant also worked as a substitute in the employer's maintenance department.

(2) The employer expected employees to behave in ways that promoted a positive and productive learning environment for students and refrain from disrespectful, threatening and harassing behaviors. Claimant understood the employer's expectations as a matter of common sense. The employer did not consider that any behavior of claimant before November 7, 2018 violated the employer's expectations.

(3) On November 7, 2018, claimant was assisting the driver on a bus transporting students by monitoring students' behaviors. Claimant saw a 12-year-old student tapping on the bus window. Claimant told the student to stop tapping on the window, and the student indicated that he had been tapping to get the attention of a person outside the bus that he thought he knew. In response, claimant yelled at the student, "I told you to stop knocking on the window." Transcript at 10. Before the student could respond, claimant yelled, "Don't talk back. That's the last thing you wanna do." Transcript at 11. Claimant had previously warned the student for inappropriate behavior on the bus and, based on experience, claimant did not want the student to get "lippy" with him. Transcript a 24. By the substance of his comment, claimant meant to remind the student that he could issue a referral for inappropriate behavior on the bus if the student did not comply with his request.

(4) On or shortly after November 7, another adult who was on the bus notified the dispatcher of claimant's interaction with the student. The dispatcher reported what the adult witness had observed to the transportation supervisor after the supervisor returned from a vacation. The supervisor viewed a video and listened to audio of claimant's November 7 interaction with the student.

(5) Sometime during the week of November 11, 2018, the transportation supervisor met with claimant and went over the November 7 video and audio. The supervisor told claimant that he needed to think about whether he would allow claimant to continue assisting on buses after his interaction with the student. On approximately November 19, 2018, the supervisor told claimant that he was not going to allow claimant to assist on buses any longer. Thereafter, claimant did not receive offers of substitute work from the transportation department or the maintenance department.

(6) On January 8, 2019, in response to claimant's inquiry, a supervisor in the human resources department informed claimant that the employer was not going to give him further work in any department due his behavior during the November 7 interaction with the student on the bus. As of that day, the employer discharged claimant by notifying him that it would not allow him to perform any work. The employer discharged claimant because it thought that claimant had violated its policy by the aggressive and threatening manner in which he spoke to the student on November 7.

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. OAR 471-030-0038(3)(a) (December 23, 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. Isolated instances of poor judgment and good faith errors are not misconduct. OAR 471-030-0038(3)(b). The employer has the burden to show by a preponderance of the evidence that claimant engaged in misconduct. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

The issue is whether claimant violated the employer's expectations on November 7 by how he treated a student on the bus and, if so, whether that violation was excused from being considered misconduct as an isolated instance of poor judgment. The employer contended that claimant yelled at the student that day, and acted aggressively and threateningly. Transcript at 10, 29. Claimant denied yelling and thought that he "was just talking [to the student] in a slightly raised voice." Transcript at 25. The employer's account of the interaction is accepted as accurate for purposes of this decision. As such, claimant's behavior on November 7 likely was a wantonly negligent violation of the employer's expectations. It is next considered whether claimant's behavior was excused from constituting disqualifying misconduct.

A claimant's behavior that willfully or with wanton negligence violates the employer's standards will not be considered misconduct if it qualifies as an isolated instance of poor judgment under OAR 471-030-0038(3)(b). Behavior may be considered an isolated instance of poor judgment if, among other

things, it is a single or infrequent occurrence rather than a repeated act or pattern of other willful or wantonly negligent behavior. OAR 471-030-0038(1)(d)(A). However, even if the behavior at issue is single or infrequent, it will not be excused as an isolated instance of poor judgment if it exceeds “mere poor judgment” by, among other things, causing an irreparable breach of trust in the employment relationship or making a continued employment relationship impossible. OAR 471-030-0038(1)(d)(C).

Here, the employer had no concerns about claimant’s behavior before November 7, and had issued no disciplinary warnings to claimant for allegedly having violated any of the employer’s standards. Transcript at 13, 14, 28. On this record, it appears that claimant’s wantonly negligent behavior in violation of the employer’s standards on November 7 was a single or infrequent occurrence. Accordingly, claimant’s behavior meets the first prong to be excused as an isolated instance of poor judgment.

The next issue to be considered is whether claimant’s behavior on November 7 exceeded mere poor judgment. Although claimant yelled at the student, there was no indication of prolonged shouting or that claimant intended to elevate his voice other than as a way of getting the student’s attention and emphasizing that he did not want the student to argue back at him. That claimant wanted to silence the student quickly was understandable given claimant’s past experience with the student when reprimanding him. Notably, the employer did not show that claimant insulted, belittled, or harassed the student. Nor did the employer show that claimant directly threatened the student when he told the student not to talk back to him, or rule out by the weight of the evidence that claimant merely meant for the student to consider that claimant could issue a behavioral referral depending on the student’s response to claimant’s instruction. Given claimant’s past dealings with the student and the mitigating factors surrounding claimant’s interaction with the student, an objective employer would not have concluded that claimant’s behavior on November 7 indicated that the employer could not trust claimant in the future to interact appropriately with students. Because claimant’s behavior on November 7 meets this second prong of the test for an isolated instance of poor judgment, it is excused from constituting misconduct.

The employer did not show it discharged claimant for unexcused misconduct. Claimant is not disqualified from receiving unemployment insurance benefits.

DECISION: Order No. 19-UI-128146 is affirmed.

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

DATE of Service: May 17, 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 ໂດຍປະຕິບັດຕາມຄໍາແນະນໍາທີ່ບອກໄວ້ຢູ່ຕອນທ້າຍຂອງຄໍາຕັດສິນນີ້.

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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