

EMPLOYMENT APPEALS BOARD DECISION
2019-EAB-0395

Reversed
Disqualification

PROCEDURAL HISTORY: On March 14, 2019, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant, but not for misconduct (decision # 143829). The employer filed a timely request for hearing. On April 4, 2019, ALJ Seideman conducted a hearing, and on April 12, 2019, issued Order No. 19-UI-128076, affirming the Department's decision. On April 22, 2019, the employer filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Starks Firs Management Inc. employed claimant from June 17, 2018 until February 18, 2019 as a maintenance worker. The employer is a multi-family property management company.

(2) The employer expected claimant to refrain from threatening violence. Claimant understood the employer's policy as a matter of common sense.

(3) On Friday, February 15, 2019, claimant was working by himself at one of the properties managed by the employer. One of the employer's maintenance supervisors opened the door to the room where claimant was working and asked claimant what he was doing. Claimant responded that he was taking a break, and with his back turned to the supervisor, put something in his bag. The supervisor came in the room and "rubbed himself in [claimant's] back . . . and then he walked away, laughing." Transcript at 26. Claimant was "upset" by the supervisor's conduct. Transcript at 26. Claimant went to lunch and then returned to work. He did not see any other supervisors that day.

(4) Claimant was not scheduled to work on February 16 and 17, 2019, and was "bother[ed]" by what the supervisor did on February 15 during the "whole weekend." Transcript at 27. Claimant "had an issue" with sexual abuse as a child and felt that the supervisor's conduct "triggered something in [him]." Transcript at 27.

(5) On Monday, February 18, 2019, claimant reported to the employer's office earlier than normal to speak to a maintenance supervisor about what occurred on February 15. Claimant saw that there were

three maintenance supervisors in the office. Without stating what the supervisor did on February 15, claimant told one of the other maintenance supervisors that he “did not appreciate what [the supervisor] did.” Transcript at 28. Claimant also stated, “[K]eep the homosexual away from me. . . . [I]f he ever did that again, I – I would hurt him.” Transcript at 28. The supervisor told claimant to “calm down,” and assigned him work. Transcript at 21.

(6) After claimant left the employer’s office, he encountered the supervisor who had touched him on February 15 and began to yell at him. The supervisor was in a chair and claimant “backed him into a corner,” was “towering over him . . . in a very threatening manner,” and had his “right fist curled up.” Transcript at 7, 19, 22. Claimant told the supervisor that, “if he [saw] him on the street he was going to beat [him] up.” Transcript at 14. The supervisor “thought [claimant] was going to beat [him] up.” Transcript at 14. Two other maintenance supervisors separated claimant from the supervisor in the chair and told claimant to go home.

(7) Later on February 18, 2019, the head maintenance supervisor called claimant and discharged him from work for threatening his supervisor.

CONCLUSIONS AND REASONS: 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) (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. The employer carries the burden to establish claimant’s misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976). Isolated instances of poor judgment and good faith errors are not misconduct. OAR 471-030-0038(3)(b).

The order under review concluded that claimant’s conduct on February 18, 2019 was not a willful or wantonly negligent disregard of the employer’s interests because “[claimant] was reacting like most people would in a situation like that.” Order No. 19-UI-128076 at 3. The order reasoned, “Most anyone would be upset with [the supervisor’s behavior on February 15], and especially someone who had been molested as a child. The employer overlooked [the supervisor’s behavior] and found that claimant was the bad person.” Order No. 19-UI-128076 at 3. However, the record does not show that the employer “overlooked” the supervisor’s conduct where claimant did not report the supervisor’s conduct to the employer.

Despite the supervisor’s conduct on February 15, the employer had a right to expect employees to refrain from threatening physical violence at work. Claimant knew or should have known that expectation as a matter of common sense. The consistent testimony from the employer’s four witnesses shows that claimant threatened to harm the supervisor, and when he saw him shortly after, yelled at him, backed him in a corner and threatened him again with physical violence. Given the time between the February 15 incident and the morning of February 18, and claimant’s threat to “hurt” the supervisor if he saw him, the record also shows claimant was most likely conscious of his conduct during the altercation with the supervisor and made the threat after having had time to pause and reflect about the incident.

Claimant's willful disregard of the employer's expectation that he refrain from threatening violence at work may be excused from constituting misconduct if it was an isolated instance of poor judgment under OAR 471-0300038(3)(b). However, a single act of willful or wantonly negligent behavior cannot be excused as an isolated act of poor judgment if, among other things, it was tantamount to unlawful conduct or was the sort of behavior that caused an irreparable breach of trust in the employment relationship or otherwise made a continued employment relationship impossible. OAR 471-030-0038(1)(d)(D).

Claimant's conduct could 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. Claimant threatened to harm the supervisor, and the supervisor feared that claimant "was going to beat [him] up." Claimant's conduct also exceeded mere poor judgment by causing an irreparable breach of trust or otherwise making a continued employment relationship impossible. Claimant's decision to willfully approach and threaten the supervisor was the sort of behavior that a reasonable employer would conclude made a continued employment relationship impossible, thus exceeding poor judgment.

Claimant's conduct cannot be excused as a good faith error. Although claimant asserted that his conduct in threatening the supervisor was "justifiable" or "understandable," claimant did not show that he had a rational basis for believing that the employer would condone his threatening behavior toward the supervisor. Transcript at 24. Nor did he have a basis for believing that he had not threatened the supervisor under the circumstances described at the hearing.

The record shows the employer discharged claimant for misconduct. Claimant is disqualified from receiving unemployment insurance benefits because of his work separation.

DECISION: Order No. 19-UI-128076 is set aside, as outlined above.

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

DATE of Service: May 24, 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

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

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