

EMPLOYMENT APPEALS BOARD DECISION
2019-EAB-0551

Affirmed
Disqualification

PROCEDURAL HISTORY: On May 7, 2019, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 70842). Claimant filed a timely request for hearing. On June 4, 2019, ALJ Seideman conducted a hearing, and on June 7, 2019, issued Order No. 19-UI-131252, affirming the Department's decision. On June 14, 2019, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Applebee's Neighborhood Grill-Bar employed claimant as the area director of five restaurants in the Eugene –Springfield area from January 8, 2013¹ to April 16, 2019.

(2) The employer had an "Anti- Discrimination & Anti-Harassment Policy" that stated that it was the employer's policy to treat employees fairly and to provide a work environment free of discrimination. Exhibit 7. It stated that the employer maintained a "strict policy against sexual or other unlawful harassment, including verbal, physical and visual harassment," and that "sexual harassment" included sexual advances, jokes, comments "or other unwelcome verbal or physical contact of a sexual nature." Exhibit 7 at 1. The employer also had a separate "Managers...Code of Conduct" that mandated, among other things, that managers "respect [the] personal space with no inappropriate touching" of team members. Exhibit 8. Claimant had acknowledged in writing that he understood and agreed to abide by those employer policies. Claimant was aware of and understood the employer's "Anti- Discrimination & Anti-Harassment Policy" and "Managers...Code of Conduct."

(3) In early September 2018, the area market president (AMP) went on a tour of the five restaurants that claimant had authority over, with claimant present. The AMP observed that when claimant entered a

¹ We take notice of this fact, which is contained in Employment Department records. Any party that objects to our doing so must submit such objection to this office in writing, setting forth the basis of the objection in writing, within ten days of our mailing this decision. OAR 471-041-0090(3) (October 29, 2006). Unless such objection is received and sustained, the noticed fact will remain in the record.

restaurant, he would “put his arms out wide and kind of pulled his hands in and said bring it in here” in response to which employees, some of whom appeared uncomfortable, would come over and hug him. Transcript at 6. After the tour, the AMP concluded that claimant’s conduct was both a violation of its “Anti- Discrimination & Anti-Harassment” and “Managers...Code of Conduct” policies and unprofessional. The AMP had the employer’s human resources manager (HRM) prepare for claimant an “Accountability and Professionalism Plan” that prohibited claimant from, among other things, “touching, hugging or otherwise having undesired physical contact with employees,” and “approaching employees from behind or without forewarning and entering into employees’ personal spaces,” or risk further corrective action, up to and including termination. Exhibit 2. Claimant acknowledged the plan in writing on September 13, 2018.

(4) On April 11, 2019, the assistant manager of one of the five stores claimant had authority over resigned unexpectedly in writing, explaining that the work environment “ha[d] become an “unhealthy work environment for me.” Exhibit 4. The HRM contacted the employee and inquired about why he had resigned. The employee explained that claimant had recently “touched him personally,” which he “didn’t appreciate,” and that his experience had been shared by others. Transcript at 7.

(5) On April 12 and 13, 2019, the APM and HRM then met with the former assistant manager offsite who explained the incident in detail and gave them the name of a female employee who had experienced at least one similar encounter. The former assistant manager then prepared a formal sexual harassment complaint against claimant detailing his experience. He explained that “while [he] was going over some paperwork in the office,” claimant had approached him from behind and “aggressively grabbed and squeezed [his] butt cheek,” and that when he objected, claimant’s response to him was “oh shut up you know you liked it.” Exhibit 3. The APM and HRM then met with the female employee in question, who explained, while in tears, that at the beginning of March 2019, claimant had approached her from behind while she was ringing in an order and “poked [her] butt right in between [her] cheeks.” Exhibit 5. She explained that when she turned around obviously “shocked” and faced him, claimant said only “I expected you to move.” *Id.* Although she reported claimant’s conduct to the restaurant manager, she asked him not to report it to human resources because she was afraid of retaliation from claimant based on a prior experience with him. Transcript at 11-13.

(6) Based on the reports of incidents following the September warning, on April 13, 2019, the employer notified claimant that he was being suspended with pay based on reports of “inappropriate touch,” and that an investigation was being conducted. Transcript at 32.

(7) On April 14, 2019, the employer asked claimant to meet with the AMP and HRM offsite, which he agreed to do. On April 15, 2019, claimant met with them and had no response to their report inappropriate touching by the assistant manager but denied the report by the female employee. When asked, “is there hugging still going on?” claimant admitted that there was although he had attempted to explain to employees that it was inappropriate. Transcript at 34-35. He stated at that time that “he couldn’t live with the kind of arrangement that we had about the no touching. He just couldn’t do it.” Transcript at 14, 30.

(8) On April 16, 2019, the employer discharged claimant for “continued physical touching of employees” in violation of the employer’s policies prohibiting the same and the September 12, 2019 corrective action plan. Exhibit 1.

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. “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) (December 23, 2018). “[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 the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

The employer discharged claimant for “continued physical touching of employees” in violation of the employer’s policies prohibiting the same and the September 12, 2019 corrective action plan. The employer presented persuasive hearsay evidence that claimant had engaged in appropriate touching of both a male and female employee in 2019, months after receiving and acknowledging a detailed corrective action plan that specifically prohibited “touching, hugging or otherwise having undesired physical contact with employees,” and “approaching employees from behind or without forewarning and entering into employees’ personal spaces.” The reports of the assistant manager and the female employee interviewed by the AMP and HRM demonstrated that both occurred when claimant encountered them as described. Although claimant denied at hearing that those incidents occurred, he did not deny, when asked by the employer on April 15, 2019, that hugging of employees had continued, although he attempted to explain that when it did, he had encouraged *them* to discontinue such conduct. Claimant’s explanations were not persuasive. More likely than not, not only did the two encounters with the employees who wrote out complaints occur, but so did the continued hugging of employees expressly prohibited by the September 12, 2018 corrective action plan. The conduct to which claimant admitted, at the very least, demonstrated his indifference to the consequences of his actions for the employer under circumstances that demonstrated that he was conscious of his conduct and knew or should have known that his conduct probably violated the standards set forth in the employer’s corrective action plan. Claimant’s post-September 2018 conduct was at least wantonly negligent.

Claimant’s conduct cannot be excused as an isolated instance of poor judgment under OAR 471-030-0038(3)(b). For conduct to be considered an isolated instance of poor judgment, it must be a single or infrequent occurrence rather than a repeated act or pattern of other willful or wantonly negligent conduct. OAR 471-030-0038(1)(d)(A). Claimant’s wantonly negligent inappropriate touching of employees was not isolated. Claimant’s admitted instances of hugging employees, after being presented with the September 12, 2018 corrective action plan, demonstrated his conscious indifference to the employer’s interests in maintaining a harassment free workplace. Accordingly, claimant’s conduct between September 12, 2018 and April 12, 2019 does not fall within the exculpatory provisions of OAR 471-030-0038(3).

Nor can claimant's conduct be excused as the result of a good faith error in his understanding of the employer's expectations regarding touching employees. Claimant did not assert, and the record does not show, that he sincerely believed, or had a factual basis for believing, that the employer would condone or excuse his continued hugging or other inappropriate touching of employees after receiving the September 12, 2018 corrective action, which explicitly forbade such contact.

The employer discharged claimant for misconduct under ORS 657.176(2)(a). Claimant is disqualified from receiving unemployment insurance benefits until he has earned at least four times his weekly benefit amount from work in subject employment.

DECISION: Order No. 19-UI-131252 is affirmed.

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

DATE of Service: July 22, 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.

Please help us improve our service by completing an online customer service survey. To complete the survey, please go to <https://www.surveymonkey.com/s/5WQXNJH>. If you are unable to complete the survey online and wish to have a paper copy of the survey, please contact our office.



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 desisyong ito.

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 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 الإستئناف 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.

Employment Appeals Board - 875 Union Street NE | Salem, OR 97311
 Phone: (503) 378-2077 | 1-800-734-6949 | Fax: (503) 378-2129 | TDD: 711
www.Oregon.gov/Employ/eab

The Oregon Employment Department is an equal opportunity employer/program. Auxiliary aids and services are available upon request to individuals with disabilities. Language assistance is available to persons with limited English proficiency at no cost.

El Departamento de Empleo de Oregon es un programa que respeta la igualdad de oportunidades. Disponemos de servicios o ayudas auxiliares, formatos alternos y asistencia de idiomas para personas con discapacidades o conocimiento limitado del inglés, a pedido y sin costo.