

EMPLOYMENT APPEALS BOARD DECISION
2019-EAB-0616

Affirmed
No Disqualification

PROCEDURAL HISTORY: On April 22, 2019, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant but not for misconduct (decision # 155030). The employer filed a timely request for hearing. On June 10, 2019, ALJ S. Lee conducted a hearing, and on June 18, 2019 issued Order No. 19-UI-131861, affirming the Department's decision. On July 8, 2019, the employer filed an application for review with the Employment Appeals Board (EAB).

EAB considered the employer's written argument when reaching this decision.

FINDINGS OF FACT: (1) New Seasons Market LLC employed claimant from November 4, 2011 until March 10, 2019, last as a grocery lead.

(2) The employer prohibited remarks about other staff members or the employer that included harmful, false or misleading information or that might harm the staff members' reputations. The employer also expected claimant to follow supervisors' instructions. Claimant understood the expectations.

(3) On December 18, 2017, the employer issued a warning to claimant for stating in front of customers that some cheese samples had a "terrible smell." Transcript at 15. The employer thought claimant's comment was not collaborative and showed a lack of understanding. Transcript at 16.

(4) On October 22, 2018, claimant received a performance review in which he was told he had a negative style of communication and sometimes spoke in a "strident" or "impatient" tone with coworkers and could be condescending. Transcript at 15, 22. Claimant agreed that he did, and was working to improve his tone and communication style.

(5) Prior to March 3, 2019, claimant repeatedly complained to the store manager that a coworker was abusive to employees, including in a meeting about the coworker's behavior toward a female employee in which the female employee was sobbing and asking the coworker to stop. Claimant thought the

coworker had been abusive. The employer conducted an investigation about the coworker's behavior and moved the coworker to a different position at a different store without informing claimant.

(6) Around March 3, 2019, claimant learned that the operations manager, whom he considered a personal friend, had a new position, which claimant thought was to replace the coworker he thought was abusive. On March 3, claimant had a private conversation with the operations manager in which he congratulated the manager for getting "the sexual harasser's" job. Transcript at 7. The operations manager told claimant that calling the coworker a "sexual harasser" was serious and asked claimant if his facts were correct. Claimant stated, "[E]veryone knows about it." Transcript at 7. The operations manager reported claimant's comment to claimant's manager, and claimant's manager reported claimant's comment to the store manager and the human resources manager.

(7) On March 5, 2019, the store manager and the human resources manager called claimant to a meeting. Claimant admitted calling the coworker a sexual harasser, and reported that he had not personally witnessed the coworker's abusive and sexually harassing conduct, but he knew about other conduct because of the "rumor mill." Transcript at 8. After some discussion about the coworker, and the employer's investigation into complaints about the coworker, the managers told claimant that he likely would be disciplined for referring to the coworker as "the sexual harasser." The managers told claimant that he should not discuss the investigation into claimant's remark with anyone other than the store manager and the human resources manager. Transcript at 11.

(8) Shortly after leaving the meeting, claimant sent an email to the operations manager that stated, "I am beyond stunned that you would choose to report that conversation to [the store manager] instead of taking to me directly about it. This level of betrayal is unforgiveable." Transcript at 11-12. The manager considered the email retaliatory and threatening, and reported the email to the employer.

(9) On March 10, 2019, the employer discharged claimant for referring to the coworker as "the sexual harasser" and sending the email to the operations manager.

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. "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). Isolated instances of poor judgment are not misconduct. OAR 471-030-0038(3)(b). 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 in part based upon its conclusion that claimant's March 5th email to the operations manager violated the instruction he had been given to only discuss the investigation with

the store manager or the human resources manager, and that it was retaliatory and threatening. However, the email did not refer to the investigation, and claimant thought the prohibition against discussing the matter applied to individuals who were not with human resources or store management, not the operations manager. Transcript at 27. Nor did the language claimant used in the email threaten retaliation or any other action against the operations manager; objectively considered, expressing that he felt offended or betrayed was not retaliation or a threat. The preponderance of the evidence does not show that claimant intended to violate the managers' instruction or other policies by sending the email to the operations manager, nor that claimant was behaving with a conscious indifference to the consequences of his behavior.

The employer also discharged claimant in part for referring to a coworker as a "sexual harasser" in conversation with the operations manager. At all relevant times he either knew or reasonably should have known that characterizing the coworker as a sexual harasser was likely to harm the coworker's reputation and thereby violate the employer's policy. Even if claimant believed the characterization was accurate, claimant violated the employer's standards with at least wanton negligence when he referred to the coworker as a sexual harasser.

Although the reference to the coworker on March 3rd was wantonly negligent, isolated instances of poor judgment are not misconduct. OAR 471-030-0038(3)(b). The following standards apply to determine whether an "isolated instance of poor judgment" occurred:

- (A) The act must be isolated. The exercise of poor judgment must be a single or infrequent occurrence rather than a repeated act or pattern of other willful or wantonly negligent behavior.
- (B) The act must involve judgment. A judgment is an evaluation resulting from discernment and comparison. Every conscious decision to take an action (to act or not to act) in the context of an employment relationship is a judgment for purposes of OAR 471-030-0038(3).
- (C) The act must involve poor judgment. A decision to willfully violate an employer's reasonable standard of behavior is poor judgment. A conscious decision to take action that results in a wantonly negligent violation of an employer's reasonable standard of behavior is poor judgment. A conscious decision not to comply with an unreasonable employer policy is not misconduct.
- (D) Acts that violate the law, acts that are tantamount to unlawful conduct, acts that create irreparable breaches of trust in the employment relationship or otherwise make a continued employment relationship impossible exceed mere poor judgment and do not fall within the exculpatory provisions of OAR 471-030-0038(3).

OAR 471-030-0038(1)(d). The first question is whether claimant's March 3rd remark was isolated, and the preponderance of the evidence shows that it was. Claimant's violation of the employer's standards by referring to cheese as having a "terrible smell" was intended to address a problem, not violate policy, and did not demonstrated that he was indifferent to an employer expectation. Claimant's strident or condescending tone with others was also not willful or wantonly negligent conduct on claimant's part because although he thought it was "reasonably true" that he spoke in such tones, "It's something that . . . I've already been working on." Transcript at 22. Claimant's use of such tones when talking therefore was not done with intent to violate the employer's expectations, and his efforts to improve demonstrates

that he was not indifferent to the consequences of his actions. Claimant's March 3rd remark was therefore isolated. His decision to refer to a coworker as a "sexual harasser" also involved the exercise of judgment, and the judgment was a poor one.

The final question is whether claimant's conduct exceeded mere poor judgment. The circumstances under which claimant violated the employer's expectations suggest that the conduct did not exceed poor judgment. Mitigating factors include that claimant made the remark during a private conversation with an operations manager he considered a personal friend, and he made the remark while upset and frustrated about the person he thought had sexually harassed his coworkers, and he made the remark only once. Nor does claimant appear to have repeated the remark after the operations manager told him that such remarks were serious and questioned the facts on which claimant had based his remark. The record does not show that claimant engaged in gossip or speculation about the coworker with others or made the remark to others, or suggest that being told his remark was inappropriate and could not be repeated would not have resolved the situation short of ending the employment relationship. Objectively considered, a reasonable employer might have concluded that claimant's remark was not a breach of trust, and did not make a continued employment relationship impossible. His conduct therefore did not exceed poor judgment.

The employer discharged claimant for an isolated instance of poor judgment, and not misconduct. Claimant is not disqualified from receiving unemployment insurance benefits because of this separation.

DECISION: Order No. 19-UI-131861 is affirmed.

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

DATE of Service: August 14, 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 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 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 دستورالعمل موجود در پایان آن، از دادگاه تجدید نظر اورگان درخواست تجدید نظر کنید.

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