

EMPLOYMENT APPEALS BOARD DECISION
2019-EAB-0698

Affirmed
Disqualification

PROCEDURAL HISTORY: On June 14, 2019, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 130314). Claimant filed a timely request for hearing. On July 10, 2019, ALJ S. Lee conducted a hearing, and on July 18, 2019 issued Order No. 19-UI-133625, affirming the Department's decision. On July 25, 2019, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant submitted written argument to EAB. Claimant did not declare that they provided a copy of their argument to the opposing party or parties as required by OAR 471-041-0080(2)(a) (May 13, 2019). The argument also contained information that was not part of the hearing record, and did not show that factors or circumstances beyond claimant's reasonable control prevented them from offering the information during the hearing as required by OAR 471-041-0090 (May 13, 2019). EAB considered only information received into evidence at the hearing when reaching this decision. *See* ORS 657.275(2).

FINDINGS OF FACT: (1) Pelican Plaza Grocery & Deli employed claimant from March 2019 until May 28, 2019 as a cashier and clerk.

(2) The employer expected claimant to refrain from rude, disrespectful and discriminatory conduct and statements toward customers. Claimant understood the employer's expectation.

(3) Before May 28, 2019, the employer had not received complaints about claimant's customer service or given claimant any warnings.

(4) On May 28, 2019, the employer's manager received a telephone call from a customer stating that claimant had been "rude [and] inconsiderate" and said "very inappropriate things to [her]." Audio Record 8:24 to 8:34. The customer reported to the manager that she had asked claimant how she was doing, and claimant responded, "You can't talk to me like that." Audio Record at 9:01 to 9:11. The customer also reported that claimant acted "aggressive" and told her, "Go back to your lesbian lover

and, if you don't like the service, you can call management." Audio Record at 9:12 to 9:26. The customer described claimant as wearing a sweatshirt with "Ohio" on it during the encounter.

(5) Shortly after, the manager reviewed video from May 28 and recognized claimant interacting in an "aggressive" manner with a customer. Audio Record at 9:18. The video contained no audio. On the video, the manager saw a customer try to hand claimant money to pay for three canned items she was purchasing. Instead of taking the money from the customer, claimant pointed at the counter. The customer put the money on the counter. Claimant picked up the money, put it in the register and "kind of tossed" the customer's change back at the customer. Audio Record at 10:01 to 10:44.

(6) Another employee told the manager that she had personally seen the interaction the manager viewed on the video between claimant and a customer on May 28, and that claimant was "a little aggressive" with the customer. Audio Record at 13:19. The other employee was unable to hear what claimant and the customer stated during the incident because she was not working next to claimant.

(7) After reviewing the video, the manager decided to discharge claimant for having made a discriminatory remark to a customer, and treating her in a rude, disrespectful manner. The manager went to the store where claimant was still working and saw that claimant was wearing an "Ohio" sweatshirt. The manager told claimant the employer was discharging her. Claimant responded immediately, "You got my check?" and left the store without discussing the employer's reason for discharging her. The customer later sent the employer a written account of the incident with claimant on May 28, 2019 that confirmed what she stated when she called the manager on May 28.

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). Isolated instances of poor judgment and good faith errors 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 for making a discriminatory statement to a customer and treating the customer in a rude, disrespectful manner on May 28, 2019. The employer had the right to expect claimant to refrain from such conduct. Claimant understood that expectation.

Claimant testified that she "did not know anything" about the incident the manager saw on the video, and that she did not recall refusing to hand change to a customer, having made a statement referring to a customer's "lesbian lover," or having "any tense" interaction with a customer on the day the employer discharged her. Audio Record at 15:08 to 15:56; 16:23 to 16:57; 17:18 to 17:39; 17:45 to 17:54.

Claimant also alleged that it was a different person on the video the manager viewed, and denied that she had an “Ohio” sweatshirt. Audio Record at 24:23 to 24:56. However, the preponderance of the evidence from the employer outweighs claimant’s blanket denial and shows claimant engaged in the conduct described by the customer, and viewed by the manager and claimant’s coworker.

Claimant’s blanket denial of having “any tense” interaction with a customer on May 28 or owning an “Ohio” sweatshirt was less persuasive than the employer’s evidence to the contrary. It is implausible that the customer’s verbal and written complaints would be false where they detailed an interaction with claimant that matches what the manager saw in the video, and the coworker saw in the store. The record, including claimant’s testimony, did not provide any reason to doubt the credibility of the employer’s witnesses. Claimant, however, had clearly had a “tense” interaction with a customer on May 28, yet denied that “any tense” incident had occurred. Audio Record at 17:45 to 17:54. Thus, even though the video did not have audio, taking the evidence as a whole, it is more likely than not that the customer’s complaint provided an accurate account of the interaction between claimant and the customer, including what claimant stated to the customer on May 28. Claimant’s statement that referred to the customer’s “lesbian lover” was offensive and discriminatory, and her refusal to take money directly from the customer or return it to the customer’s hand was rude and disrespectful. Claimant knew that such comments and conduct violated the employer’s expectations regarding how to treat customers. Claimant’s conduct on May 28 was therefore a willful violation of those expectations.

However, claimant’s willful behavior is not misconduct if it was an isolated instance of poor judgment. 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).

To be excused as an isolated instance of poor judgment, the issue in this case is whether claimant's behavior on May 28, 2019 meets the requirements set out in subparts (A) and (D), above. With respect to subpart (A), the evidence did not show that claimant had ever before May 28, 2019 failed to comply with the employer's standards. Accordingly, claimant's behavior on May 28, 2019 was a single or infrequent occurrence. It meets the first requirement to qualify as an isolated instance of poor judgment.

However, claimant's behavior on May 28, 2019 may not be excused as an isolated instance of poor judgment if it exceeded mere poor judgment as set out in subpart (D). By deliberately making rude and discriminatory remarks to a customer, and refusing to exchange money with her, claimant engaged in conduct that the employer understandably did not want to have associated with it. Although claimant had not acted in such a manner before, a reasonable employer would objectively conclude, based on this single incident, that it could not trust claimant to refrain from the same type of behavior in the future or to conform her comments and conduct to generally-accepted social and workplace norms. Because claimant's conduct caused an irreparable breach of trust in the employment relationship, it is not excusable as an isolated instance of poor judgment.

Nor was claimant's behavior on May 28, 2019 excused from constituting misconduct as a good faith error under OAR 471-030-0038(3)(b). Claimant did not assert that she thought the employer would condone such conduct or that she behaved as she did because she misunderstood the employer's standards. For this reason, there is insufficient evidence in the record to conclude that claimant's behavior was the result of a good faith error.

The employer discharged claimant for misconduct. Claimant is disqualified from receiving unemployment insurance benefits.

DECISION: Order No. 19-UI-133625 is affirmed.

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

DATE of Service: August 28, 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 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 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 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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