

EMPLOYMENT APPEALS BOARD DECISION
2019-EAB-0887

Affirmed
Disqualification

PROCEDURAL HISTORY: On July 24, 2019, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 140944). Claimant filed a timely request for hearing. On August 21, 2019, ALJ Janzen conducted a hearing, and on August 27, 2019, issued Order No. 19-UI-135635, affirming the Department's decision. On September 13, 2019, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Fircrest Senior Living employed claimant in its residential memory-care facility from September 16, 2016 until July 10, 2019 as a life engagement activities director. Claimant often worked alone with the residents, engaging them in activities.

(2) The employer expected claimant to speak to the residents in a respectful manner and refrain from violating the residents' right to be free from verbal abuse. Claimant received training regarding these expectations at hire and continuously throughout her employment and understood the employer's expectations.

(3) Prior to July 4, 2019, claimant had not received any warnings from the employer.

(4) On July 4, 2019, claimant had taken one of the residents who she knew had dementia outside, into the facility parking lot, for a special event. The resident "walked off" the employer's premises and walked "down the road," away from the facility. Transcript at 7. Another employee found the resident and called the facility. Another employee picked up the resident in the employer's bus, and brought the resident back to the facility.

(5) Four of claimant's coworkers reported to the employer's assistant administrator that, when the resident arrived back at the facility and exited the bus, they heard claimant exclaim to the resident, "What the hell do you think you're doing? You're fucking going back inside." Transcript at 7. The coworkers also reported that they heard claimant tell the resident, as he was entering the facility, "Tough shit, you can't come out here anymore." Transcript at 7.

(6) On July 5, 2019, the employer suspended claimant until it investigated the reports regarding claimant's conduct on July 4.

(7) The employer reported what the coworkers stated about claimant's conduct on July 4 to the State of Oregon for verbal abuse. The employer did not receive information that the state had investigated the incident.

(8) On July 10, 2019, the employer discharged claimant because she spoke to a resident with dementia in an abusive, disrespectful manner on July 4, 2019.

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 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 employer discharged claimant because she spoke to a resident under her care in a disrespectful, abusive manner on July 4, 2019. Claimant understood the employer's policy and the resident's right to be free from verbal abuse.¹ Although claimant's testimony about what she stated to the resident on July 4, 2019 did not confirm her coworkers' accounts of her specific statements to the resident that day, the record nevertheless shows that claimant was disrespectful and abusive toward the resident. Claimant testified that she did not recall if she used the words, "hell," and "fucking," or "tough shit" toward the resident. Transcript at 15-17. However, claimant testified that she told the resident with dementia that she could not allow him to go outside again if he could not stay on site, and "thought" she used the word

¹ OAR 411-020-0002(1)(d)(A) defines verbal or emotional abuse as follows:

(1) "Abuse" means any of the following:

* * *

(d) Verbal or emotional abuse.

(A) Verbal or emotional abuse includes threatening significant physical harm, or threatening or causing significant emotional harm to an adult using:

(i) Derogatory or inappropriate names, insults, verbal assaults, profanity, or ridicule; or

(ii) Harassment, coercion, threats, intimidation, humiliation, mental cruelty, or inappropriate sexual comments.

(B) For the purposes of these rules:

(i) Conduct that may be considered verbal or emotional abuse includes, but is not limited to, the use of oral, written, or gestured communication that is directed to an adult or within their hearing distance, regardless of their ability to comprehend.

(ii) The emotional harm that may result from verbal or emotional abuse includes, but is not limited to, anguish, distress, fear, unreasonable emotional discomfort, loss of personal dignity, or loss of autonomy. (December 27, 2018).

“freaking” or “fricking.” Transcript at 15-16. Claimant’s harsh language and threat that she would not let the resident go outside again were coercive and intimidating; especially considering the resident’s presumably impaired cognitive functioning due to dementia. Claimant asserted implicitly that she did not make a conscious decision to violate the employer’s standards because she was “distraught,” “overheated,” and in “panic mode” on July 4 due to her fear of the resident’s safety. Transcript at 17, 19. However, the record shows that claimant’s statements were not a reaction to a sudden event, where claimant reacted unconsciously or lacked time to regain her composure after the initial stress of discovering the resident was lost. There was a period of time between when the resident “walked off” was found, and was brought back to the care facility. Moreover, claimant’s statements were not a single outburst because claimant made disrespectful statements to the resident both when he got off the bus and again as he was entering the facility. The preponderance of the evidence shows that claimant consciously chose to make abusive statements toward the resident, which she knew or should have known violated the standards of behavior which the employer had the right to expect of an employee. Claimant’s conduct therefore was, at best, wantonly negligent.

Claimant’s willful or wantonly negligent conduct on July 4, 2019 may be excused from misconduct that disqualifies her from unemployment benefits if it was an isolated instance of poor judgment. OAR 471-030-0038(3)(b). To be an isolated instance of poor judgment, 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.” OAR 471-030-0038(3)(b)(A). There is no dispute that claimant’s conduct on July 4 was isolated. She had not received prior warnings from the employer.

Although claimant’s conduct was isolated, OAR 471-030-0038(3)(b)(D) provides that 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). The record is insufficient to determine if claimant’s conduct violated the law or was tantamount to unlawful conduct, and the State of Oregon did not contact the employer regarding an investigation. However, the employer’s executive director testified that the employer could not continue to employ claimant because it could no longer trust her to be alone doing activities with the residents. Viewed objectively, claimant’s conduct on July 4 was sufficient to create an irreparable breach of trust in the employment relationship that made a continued relationship impossible. Claimant’s conduct therefore exceeded mere poor judgment, and does not fall within the exculpatory provisions of OAR 471-030-0038(3)(b).

Nor was claimant’s behavior on July 4 excusable as a good faith error under OAR 471-0300038(3)(b). The record does not show that claimant had a reasonable basis to believe the employer would excuse her use of derogatory, intimidating statements toward a resident with dementia. Moreover, it is not plausible that claimant sincerely, but mistakenly believed that the employer would condone her conduct.

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

DECISION: Order No. 19-UI-135635 is affirmed.

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

DATE of Service: October 21, 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 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.

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