

EMPLOYMENT APPEALS BOARD DECISION
2019-EAB-0970

Affirmed
Disqualification

PROCEDURAL HISTORY: On September 6, 2019, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 114314). Claimant filed a timely request for hearing. On October 1, 2019, ALJ Seideman conducted a hearing, and on October 4, 2019 issued Order No. 19-UI-137593, affirming the Department's decision. On October 8, 2019, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Hampton Inn & Suites employed claimant as a breakfast attendant from December 28, 2017 to July 25, 2019.

(2) The employer expected its staff members to refrain from displaying anger toward coworkers or subjecting a coworker to offensive physical contact, particularly in front of guests, while at work. Claimant understood the employer's expectations as a matter of common sense.

(3) Sometime in 2018, claimant engaged in a heated argument with a coworker over the condition of a floor; they used foul language during the argument. After the argument was resolved, the employer's general manager instructed claimant that whenever she had a disagreement with the coworker, she was to describe the disagreement to the front desk attendant and have the attendant describe it in the logbook. Then, when the general manager arrived at work, he would discuss the disagreement with her.

(4) The general manager and sales manager each spoke with claimant about controlling her temper after instances during which she lost her temper at work and often in front of guests. Both asked claimant to try to calm down while at work and refrain from having outbursts.

(5) On July 25, 2019, claimant arrived at work and became upset that she needed to clean the milk jugs before using them. She believed the coworker she had previously argued with was responsible for the condition of the milk jugs, and had left them in the same condition on previous occasions. Claimant reported the issue to the front desk attendant who noted it in the logbook.

(6) The front desk attendant notified the coworker of claimant's complaint. The coworker approached claimant, immediately denying that he had been responsible for the condition of the milk jugs. Claimant then engaged in an angry argument with the coworker in front of guests. Both were angry and used foul language. During the argument, claimant "took the palms of [her] hands...placed them on his chest...and [] extended [her] arms," shoving the coworker. Transcript at 20. She also hit and kicked at him, and "ripped [his] his nametag off." Transcript at 8. The coworker held his arms at his sides during the altercation and did not cause physical contact with claimant. At some point, another employee stepped between the two to separate them. Claimant then left the employer's hotel and went home.

(7) Later on July 25, 2019, the general manager discharged claimant because of her conduct that day.

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).

The employer had the right, as a matter of common sense, to expect claimant to refrain from displaying anger toward coworkers or subjecting a coworker to physical contact or assault. Moreover, the general manager and sales manager had both spoken to her in the past about controlling her temper with coworkers, particularly in front of guests. Claimant's conduct toward the coworker on July 25, 2019, in view of hotel guests, violated the employer's expectations in those respects, because regardless whether she initiated the exchange, she engaged with the coworker, yelled and used foul language in front of guests, and then aggravated the situation by placing her hands on him, thereby shoving him, and ripping off his nametag. Two employer witnesses additionally indicated that claimant had hit and kicked at the coworker during that incident. Claimant knew or should have known that engaging in such conduct would violate the employer's expectations, and by doing so, demonstrated a willful disregard of those expectations.

Claimant's conduct cannot be excused as an isolated instance of poor judgment under 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). Here, claimant's conduct in placing her hands on a coworker during an angry outburst and ripping off his nametag was arguably an isolated instance of poor judgment because her prior angry outbursts had never involved physical contact before. However, under the above standards, some acts, even if isolated, exceed mere poor judgment if the act violates the law, is tantamount to unlawful conduct, creates an irreparable breach of trust in the employment relationship or otherwise makes a continued employment relationship impossible. Claimant's July 25 conduct could be considered unlawful or tantamount to the crime of harassment, which is defined in ORS 166.065(1)(a)(A) to include intentionally subjecting another to "offensive physical contact."

Regardless of whether claimant's conduct was unlawful or tantamount to unlawful conduct, it would still exceed mere poor judgment by causing an irreparable breach of trust or otherwise making a continued employment relationship impossible. No reasonable employer would continue to employ an individual who responded to a professional upset by visibly displaying rage in the workplace and then placing her hands on the coworker involved and ripping off his nametag. No reasonable employer would be able to trust claimant in the workplace after such conduct, particularly if it occurred in plain view of its customers or guests. For those reasons, claimant's conduct exceeded mere poor judgment and cannot be excused even if it was isolated.

Claimant's conduct cannot be excused as a good faith error under OAR 471-030-0038(3)(b). Claimant neither sincerely believed, nor had any factual basis for believing, that she had not violated the employer's expectation that its staff members refrain from displaying anger toward a coworker and subjecting a coworker to offensive physical contact, particularly in front of guests, while at work. Nor did she believe or have reason to believe the employer would condone such behavior in the workplace.

For the foregoing reasons, the employer discharged claimant for misconduct. Claimant is disqualified from receiving unemployment insurance benefits because of this work separation until she requalifies for benefits under Department law.

DECISION: Order No. 19-UI-137593 is affirmed.

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

DATE of Service: November 12, 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

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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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