

EMPLOYMENT APPEALS BOARD DECISION
2019-EAB-1096

Reversed
Disqualification

PROCEDURAL HISTORY: On October 16, 2019, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that the employer discharged claimant for misconduct (decision # 82828). Claimant filed a timely request for hearing. On November 1, 2019, ALJ Monroe conducted a hearing, and on November 8, 2019, issued Order No. 19-UI-139525, concluding that the employer discharged claimant, but not for misconduct. On November 15, 2019, the employer filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Boring Auto Wrecking LLC employed claimant from August 27, 2018 until September 20, 2019 as an automobile dismantler.

(2) The employer expected employees to refrain from creating a hostile or unpleasant working environment for other employees. The employer also expected claimant to complete his assigned tasks. Claimant understood the employer's expectations as a matter of common sense.

(3) On July 9, 2019, the employer told claimant to remove air bags from each vehicle that he dismantled. Claimant did not want to spend time removing air bags because the employer paid him on a piece rate basis, per dismantled car. The employer did not initially offer to pay claimant more even though it would take additional time to remove the air bags from each car. Claimant refused to remove air bags from cars on July 9 "in protest" of the new task. Transcript at 28. The employer gave claimant a warning for failing to follow instructions. Claimant began removing air bags.

(4) The employer had an online time management system used by its employees to record their time. Employees could also use the system to submit expense reimbursement requests. The system had a comment section where employees could leave comments. Managers were able to read the comments.

(5) Since early September 2019, claimant had been asking the regional manager if the employer would reimburse him for tools claimant used for his job that had been misplaced or stolen. The manager told claimant that the employer would not pay claimant for tools that had been lost or stolen. Claimant

continued to make requests for reimbursement for lost or stolen tools. The reimbursement request conversation occurred in part in the comment section of the employer's time management system.

(6) On September 19, 2019, the store manager told claimant he would no longer have to remove tires from the wheels of the cars he dismantled. Claimant was pleased because it would take less time to dismantle each car.

(7) The morning of September 20, 2019, the store manager told claimant that he had been wrong, and that claimant would still have to remove the tires from the cars' wheels. Claimant had a dry erase board next to his workstation that all the employees could see. In response to the manager's news that morning, claimant wrote, "Stupid or fearful of change." Transcript at 10. Claimant circled the word, "stupid," wrote "mostly," at the bottom of the board, and drew an arrow from that word to the word, "stupid." Transcript at 10. The store manager read claimant's board.

(8) During his lunch on September 20, 2019, claimant wrote in the time management system about the denied reimbursement request from earlier that month, "Pay it. Pay it or pay for it." Transcript at 9. Claimant also wrote, "Terrible, mean, spineless people, worms." Transcript at 9-10. Claimant also wrote, "It's unbelievable how much you guys don't care and what terrible people you are. Keep it up." Transcript at 10. Claimant wrote the comments to "garnish attention" to his dissatisfaction with the employer's refusal to pay for lost or stolen tools. Transcript at 26. The store manager read the comments.

(9) On September 20, 2019, the employer discharged claimant for creating a hostile working environment by making "threatening" statements through the employer's time management system. Transcript at 7.

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 order under review concluded that claimant's conduct in writing "unprofessional communications" in the employer's time management system was at least wantonly negligent, but was not misconduct because it was an isolated instance of poor judgment.¹ In so concluding, the order reasoned that claimant

¹ Order No. 19-UI-139525 at 3.

had not previously violated the employer's expectations for professional conduct.² However, the record shows that claimant's conduct on September 20, 2019 was not isolated, and therefore was not excusable as an isolated instance of poor judgment.

Claimant knew or should have known as a matter of common sense that stating the employer would "pay for it," and calling his superiors "terrible," "spineless," and "worms" in any communication that his managers and coworkers might read was a willful violation of the employer's policy against creating a hostile and unpleasant work environment. Claimant intentionally wrote the comments in the time management system to "get attention" to his dissatisfaction with the employer's decision not to reimburse him for lost or stolen tools, even though he understood that writing the comments there "wasn't the right . . . way to go about" complaining to the employer. Transcript at 24. Claimant's conduct in writing offensive comments in the time management system was a willful violation of the employer's reasonable expectation that he refrain from creating a hostile work environment.

To qualify as an isolated instance of poor judgment, an act must be "isolated," as defined by OAR 471-030-0038(1)(d)(A). As OAR 471-030-0038(1)(d)(A) provides, "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." The record contains evidence of two other incidents of claimant's willful or wantonly negligent violations of the employer's reasonable expectations. First, the order under review did not address claimant's other conduct on September 20, when he wrote another insulting statement, calling the employer "stupid," on the board near his workstation. Claimant's conduct when he wrote that the employer was "stupid" on his board was at least wantonly negligent. Claimant testified that he knew that writing an insult directed toward the employer on the board was inappropriate and a violation of the employer's expectation that he refrain from creating a hostile work environment. Transcript at 25-26. Although that conduct occurred on the same day as the time management system incident that led to claimant's discharge, writing the comment on the board was a separate instance. Claimant's conduct in each instance on September 20 was motivated by a different underlying conflict, rather than being a continuing reaction to the same conflict. One incident involved claimant's reaction to the employer's reimbursement request denial; one incident involved claimant's reaction to having to continue processing tires.³

Second, claimant engaged in a prior incident of misconduct on July 9, 2019. On that occasion, claimant refused to follow the employer's instructions that he remove airbags from cars as "a mild protest" to having to complete an extra task for no additional pay. Transcript at 29. Claimant testified that he knew his conduct was a violation of the employer's expectations. Transcript at 29. His insubordination was a willful violation of the employer's reasonable expectation that he complete his assigned tasks. Based on

² Order No. 19-UI-139525 at 3.

³ Cf. *Perez v. Employment Department*, 164 Or App 356, 992 P2d 460 (1999) (when a claimant willfully refused to comply with his supervisor's instruction on one day and on the next day willfully engaged in a second vulgar outburst when the same supervisor rebuked him for his behavior on the previous day, claimant's behavior on both days was a single isolated instance of poor judgment because each day's behavior was motivated by the supervisor's behavior on the first day and was a continuation of claimant's reaction to it); cf. *Waters v. Employment Division*, 125 Or App 61, 865 P2d 368 (1993) (when a claimant left several separate "harassing and abusive" messages on a coworker's answering machine following a conflict over work schedules, claimant's behavior, although comprising technically separate acts, was a single occurrence of poor judgment because all the messages were motivated by the same underlying conflict and each subsequent message was a continuation of claimant's reaction to the same conflict).

the two other willful or wantonly negligent violations of the employer's expectations, the record shows the final incident was part of a pattern of willful or wantonly negligent behavior, and was not therefore isolated. Because it was not isolated, it was not excusable as an isolated instance of poor judgment.

Nor can claimant's conduct be excused as the result of a good faith error in his understanding of the employer's expectations regarding his workplace conduct. Claimant did not assert or show that he believed, or had a factual basis for believing, the employer would condone his conduct in writing blatantly insulting statements in the employer's time management system, where his managers could read them.

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

DECISION: Order No. 19-UI-139525 is set aside, as outlined above.

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

DATE of Service: December 18, 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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