EO: 700
BYE: 202042

State of Oregon
Employment Appeals Board
875 Union St. N.E.
Salem, OR 97311

258
DS 005.00

EMPLOYMENT APPEALS BOARD DECISION
2020-EAB-0093

Reversed
No Disqualification

PROCEDURAL HISTORY: On November 21, 2019, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct and was disqualified from receiving benefits effective October 6, 2019 (decision # 135119). Claimant filed a timely request for hearing. On January 15, 2020, ALJ Lease conducted a hearing, and on January 17, 2020, issued Order No. 20-UI-142930, affirming the Department's decision. On February 1, 2020, claimant filed an application for review with the Employment Appeals Board (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) Safeway Stores, Inc. employed claimant as a food clerk from October 4, 2001 to October 11, 2019.

(2) Claimant had a mental disability that caused him to be "slow . . . to understand things," to think things were "funny" that other people did not find to be funny, and interfered with his comprehension of words, finances, and events. Transcript at 19-20. Claimant lived with his sister, who managed his finances, medical appointments, and worker's compensation claim.

(3) The employer had a "zero tolerance" policy prohibiting sexual harassment. Transcript at 5. Claimant was aware of and generally understood the employer's expectation that employees refrain committing any form of sexual harassment.

(4) In March 2018, claimant was working with a female coworker. The coworker had a ponytail and kept "flipping" it at claimant, striking him in the face. Transcript at 14. Claimant then flipped the coworker's ponytail back at her, and suggested he would put something in her shirt pocket. Claimant did not do so, nor did he touch her in any way other than by flipping her ponytail back at her. The employer learned of the incident and suspended claimant for violating its policy against sexual harassment.

(5) On or about October 4, 2019, claimant entered the employer's breakroom during a break. He saw a female coworker who had been his friend for a long time. The coworker was wearing a t-shirt that the employer had distributed to employees that had the words, "Score Big," on the front and the number "1" on the back. Transcript at 16. Claimant asked the coworker, "How - did you score big by reaching out and grabbing a teat?" Transcript at 16. The employer learned of claimant's question and interviewed him about the incident, during which claimant admitted to asking the question. On October 11, 2019, the employer discharged claimant for asking the question of the coworker on October 4, 2019.

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 claimant's misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

As a preliminary matter, the testimony of the employer's witness and claimant differed on important issues. For example, the employer's witness presented hearsay testimony that in March 2018, claimant was suspended for "suggesting to a female [coworker] that you were going to put an item down the back of her shirt and then you attempted to pull . . . the 'back of the pants.'" Transcript at 6. During the investigation of the March 2018 incident, claimant denied that he made that statement, but admitted to flipping the coworker's ponytail back at her. *Cf.* Transcript at 14. The employer's witness also testified that he "believed" there was a video of the incident, which neither he nor claimant had reviewed. Transcript at 7, 15. Finally, the witness testified that claimant stated in his final interview in October that he had discussed women's bodies with coworkers at other times, which claimant denied. Transcript at 10, 16. The dates of those alleged incidents were unknown to the employer and no one had ever complained about such comments. Transcript at 10. Viewed objectively, the evidence on those issues was no more than equally balanced between the parties. Where the evidence is no more than equally balanced, the party with the burden of persuasion - here, the employer - has failed to satisfy its evidentiary burden. Consequently, on these disputed matters, we based our findings on claimant's evidence.

Order No. 20-UI-142930 concluded that the employer discharged claimant for misconduct based on claimant's admission to making the October 4 statement and that claimant's conduct was not excusable as an isolated instance of poor judgment, reasoning as follows:

> At hearing, while [claimant] acknowledged making the statement for which he was discharged, he generally denied engaging in any other inappropriate conduct. These general denials were not persuasive. For example, I am not persuaded that the employer's witness had a dishonest motive for testifying that [claimant] also acknowledged discussing customers' bodies and breasts with other coworkers . . . Further, [claimant] had previously been suspended for engaging in inappropriate conduct related to touching a female coworker while joking with her about putting something down her shirt.

Order No. 20-UI-142930 at 3. However, the order's conclusion is not supported by the record.

The employer discharged claimant for making what it considered to be a lewd statement to a coworker about a t-shirt she was wearing on October 4, 2019. Claimant was aware of and generally understood the employer's "zero tolerance" policy against sexual harassment, and the record shows that claimant admitted to making the statement in question. Claimant knew or should have known as a matter of common sense that making a comment which could be considered offensive to a woman was at least a wantonly negligent violation of a standard of behavior the employer had the right to expect of him.

However, the preponderance of the evidence in the record shows that claimant's October 4 conduct is excusable as 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).

Here, the employer failed to meet its burden to show that the March 2018 incident was either a willful or wantonly negligent violation of the employer's "zero tolerance" policy against sexual harassment. The credible evidence shows that claimant admitted that he only flipped the coworker's ponytail back at her and suggested he would put something in her shirt pocket, although he never did, in response to the coworker's conduct in flipping her ponytail at his face, while they were "joking around." Transcript at 6. Because the employer failed to show that the March 2018 incident constituted a conscious violation of a known employer expectation, or that the alleged comments about women's bodies claimant reportedly made to coworkers after that time ever occurred, claimant's conduct on October 4 was an isolated incident of poor judgment.

However, some acts, even if isolated, such as those which 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). Claimant's October 4 comment to his coworker did not exceed mere poor judgment because it was not unlawful, tantamount to unlawful conduct and, viewed objectively, was not so egregious that it created an irreparable breach of trust in the employment relationship or otherwise made a continued employment relationship impossible.

The employer discharged claimant for an isolated instance of poor judgment, which is not misconduct, and claimant is not disqualified from receiving unemployment insurance benefits on the basis of his work separation.

DECISION: Order No. 20-UI-142930 is set aside, as outlined above.

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

DATE of Service: <u>March 10, 2020</u>

NOTE: This decision reverses an order that denied benefits. Please note that payment of benefits, if any are owed, may take approximately a week for the Department to complete.

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 – 本判决会影响您的失业救济金。 如果您不明白本判决， 请立即联系就业上诉委员会。 如果您不同意此判决，您可以按照该判决结尾所写的说明，向俄勒冈州上诉法院提出司法复审申请。

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 ໄດ້ ໂດຍປະຕິບັດຕາມຄຳແນະນຳທີ່ບອກໄວ້ຢູ່ຕອນທ້າຍຂອງຄຳຕັດສິນນີ້.

Arabic

هذا القرار قد يؤثر على منحة البطالة الخاصة بك، إذا لم تفهم هذا القرار، إتصل بمجلس منازعات العمل فورا، 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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