

EMPLOYMENT APPEALS BOARD DECISION
2020-EAB-0181

Affirmed
No Disqualification

PROCEDURAL HISTORY: On December 16, 2019, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant, but not for misconduct (decision # 84456). The employer filed a timely request for hearing. On February 5, 2020, ALJ Dorr conducted a hearing, and on February 6, 2020, issued Order No. 20-UI-143987, affirming the Department's decision. On February 21, 2020, the employer filed an application for review with the Employment Appeals Board (EAB).

EAB did not consider the employer's written argument when reaching this decision because they did not include a statement declaring 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).

FINDINGS OF FACT: (1) O'Reilly Auto Parts employed claimant from December 2, 2013 until November 20, 2019, last as a store manager at its store in Dallas, Oregon.

(2) The employer expected its team members to follow basic principles of good conduct and to engage in responsible behavior with coworkers and customers. Claimant understood this expectation as a matter of common sense. The employer also expected claimant to report to work in a timely manner. Claimant understood this expectation. The employer also expected claimant, as a manager, to receive all results required for a new hire's position before beginning new hire paperwork.

(3) On June 14 and 19, 2014, claimant reported to work late. The employer gave claimant a verbal warning for being tardy to work. Exhibit 1 at 5.

(4) On May 8, 2019, claimant began new hire paperwork for a delivery employee without verifying first that the employee had passed their pre-employment drug test. Exhibit 1 at 4. In the past, the computer program claimant used to prepare new hire paperwork alerted claimant to "call risk management" if a prospective employee failed to pass a pre-employment drug test. Audio Record at 19:20. On May 8, the computer program claimant used did not alert him to call risk management or otherwise show that the

new hire had failed to pass their drug test. Claimant did not know the employer expected him to look in a different computer program to verify the drug test result before beginning new hire paperwork. On May 14, 2019, the employer gave claimant a written warning for violating its expectations on May 8, 2019. Exhibit 1 at 4. The May 14 warning was the first warning claimant received since 2014.

(5) During October and November 2019, claimant was taking a medication that affected his moods and mental health. Other incidents also affected his mood and mental health on November 14, 2019. On October 24, 2019, a customer stole claimant's car from the employer's parking lot. The car was a "total loss," and claimant had to purchase another vehicle. Exhibit 1 at 9. The morning of November 14, 2019, a customer was "screaming in [claimant's] face" about returning an item to the store. Exhibit 1 at 9. Claimant assisted the customer and the customer left the store "happy." Exhibit 1 at 9. After lunch, as claimant was returning to the store, a woman "flipped [claimant] off" for no apparent reason. Exhibit 1 at 9.

(6) Claimant entered the store, went into an employee area and stated to a coworker, "I need to get out of this fucking store before I start killing people." Exhibit 1 at 2. Claimant did not intend his statement to be a threat to the coworker or anyone else. He was speaking in a conversational tone, and was not directing his statement toward anyone. Although claimant was in an employee area of the store, there was no wall separating the employee area from the rest of the store, and a customer who was shopping with her client overheard claimant's statement. Claimant did not see the customer and her client. The customer and her client immediately left the store. The customer reported the incident to the employer on November 15, 2019 and stated that she would not return the employer's Dallas store. The employer investigated the matter and claimant admitted to making the statement, and acknowledged that it was an inappropriate statement to make at work.

(7) On November 20, 2019, the employer discharged claimant for violating its conduct expectations when he made the November 14, 2019 statement to a coworker, within earshot of others in the store.

CONCLUSIONS AND REASONS: The employer discharged claimant for an isolated instance of poor judgment, and 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).

The employer expected claimant to follow common sense principles of good conduct while at work. Claimant violated that expectation on November 14, 2019 by making a statement that both used foul language and referred to "killing people" in the employer's store. Claimant admitted making the statement and knowing that it was inappropriate. Although claimant was using a medication at that time

that affected his moods and mental health, the record does not show that claimant was unable to control his conduct at the time. Claimant's act of making a statement of a threatening nature on November 14 was, more likely than not, a willful or wantonly negligent violation of the standards of behavior the employer had the right to expect of him.

Isolated instances of poor judgment are not misconduct. OAR 471-030-0038(3)(b). The following standards apply to determine whether claimant's conduct on November 14, 2019 was an "isolated instance of poor judgment," and not misconduct:

(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).

Claimant's conduct on November 14 was isolated. Claimant had two prior incidents for which he received warnings. The first was for tardiness in June 2014. The record does not establish that the tardiness was due to claimant's willful or wantonly negligent disregard of the employer's interests. However, even assuming that conduct was willful or wantonly negligent, it was too remote in time to establish a pattern of other willful or wantonly negligent conduct, and the final incident on November 14 was not a repeated act involving tardiness. Claimant's conduct in the May 8, 2019, incident, likewise, does not appear to have involved willful or wantonly negligent conduct on claimant's part. Although claimant violated the employer's expectations in failing to check the new hire's drug test results, the record shows that claimant did not know or have reason to know that his conduct would probably be considered a violation of the employer's expectations. That incident was not willful or wantonly negligent, and, therefore, it did not make his November 14 conduct a repeated act or part of a pattern of other willful or wantonly negligent conduct. For those reasons, we conclude that claimant's conduct was isolated.

Claimant's act on November 14 involved judgment, as he decided to "vent" to a coworker while in the workplace, using foul and violent language. Claimant's judgment to willfully or with wanton negligence violate the employer's expectations was an exercise of poor judgment. However, although claimant used foul and violent language, it did not violate the law, and was not tantamount to a law violation.

The relevant statute is ORS 163.190, which provides that a person commits the crime of menacing, a Class A misdemeanor, if by word or conduct the person intentionally attempts to place another person in fear of imminent serious physical injury. In this case, claimant expressed his exasperation and frustration using the violent phrase that he needed to leave work before he would "start killing people." However, although the phrase implied violence, the record fails to show claimant intentionally attempted to place the coworker or the customers who heard the statement in fear of imminent serious physical injury. The record therefore fails to show that claimant's conduct was unlawful, or tantamount to unlawful conduct.

Nor did claimant's conduct create an irreparable breach of trust in the employment relationship, given the mitigating factors. Claimant had recently been a crime victim, had been "screamed at," "flipped off," and was having difficulty controlling his mood due to medication. Moreover, the record does not show claimant intended to harm anyone. Nor did the employer assert, or the record show, that claimant's conduct otherwise made a continued employment relationship impossible. The record therefore fails to establish that claimant's conduct exceeded mere poor judgment.

In conclusion, the record shows that the employer discharged claimant for an isolated instance of poor judgment, and not misconduct. Claimant is not disqualified from receiving benefits based on his work separation from the employer.

DECISION: Order No. 20-UI-143987 is affirmed.

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

DATE of Service: March 30, 2020

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 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 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.

Employment Appeals Board - 875 Union Street NE | Salem, OR 97311
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