

EMPLOYMENT APPEALS BOARD DECISION
2020-EAB-0245

Modified
Disqualification Effective December 22, 2019

PROCEDURAL HISTORY: On January 29, 2020, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct, disqualifying claimant from receiving unemployment insurance benefits effective December 15, 2019 (decision # 154320). Claimant filed a timely request for hearing. On March 9, 2020, ALJ Murdock conducted a hearing, and on March 11, 2020 issued Order No. 20-UI-146024, modifying decision # 154320 by concluding that the employer discharged claimant for misconduct on December 22, 2019, disqualifying claimant from receiving benefits effective December 20, 2019.¹ On March 20, 2020, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) The Ultimate Auto Detail employed claimant from 2014 until December 22, 2019 as an auto detailer.

(2) The employer's owner expected claimant to refrain from behaving in a "combative," rude or disruptive manner in the workplace. Transcript at 5. Claimant understood this expectation as a matter of common sense.

(3) On June 10, 2019, claimant became upset with the employer's owner, and "completely blew up, threw a radio across the room, . . .totally got in [the owner's] face," and yelled at the owner and told him he "did not know how to run [his] business properly." Transcript at 7. The incident occurred in the employer's shop, during the workday, in front of another employee. On June 11, 2019, the owner gave claimant a written warning for his conduct on June 11, stating that claimant was not permitted to speak to the owner in that manner, and sent claimant home for the rest of the day.

(4) Before September 16, 2019, claimant failed to detail a customer's vehicle properly. The customer brought their vehicle back to the employer's business, and the owner had to redo the detail work and refund part of the customer's money. The same day, claimant told a coworker, "I know why the car

¹ Order No. 20-UI-146024 incorrectly states the disqualification date was Friday, December 20 2019. Because the work separation occurred on December 22, 2019, the effective date of the disqualification was Sunday, December 22, 2019.

looked like shit...Because [the owner's] an asshole today and I don't really care." Transcript at 12. Claimant made the statements within earshot of customers. The employer gave claimant a written warning for poor work quality. In October 2019, a customer told the owner about overhearing claimant complaining about the owner in the employer's shop on September 16.

(5) On a daily basis, when the owner tried to explain work that he expected claimant to perform on vehicles, claimant would "turn and walk away." Transcript at 10. Claimant would sometimes throw power tools, unplug tools while other employees were using them, and otherwise mistreat employer property. A coworker confronted claimant about his "poor attitude" at work, and claimant told the coworker, "You don't want problems with me." Transcript at 13. When the coworker asked claimant what he meant by the statement, claimant responded, "You'll find out." Transcript at 13.

(6) On December 22, 2019, the owner asked claimant to look at a vehicle claimant had detailed so the owner could show claimant some improvements he expected claimant to make when he detailed vehicles. Claimant told the owner he did not "know what [he was] looking at," and asked the owner if he could "still see." Transcript at 6. Claimant then turned up the radio volume "so loud that [the owner] really couldn't hear anything," and the owner had to turn the volume back down. Transcript at 6.

(7) On December 22, 2019, the owner discharged claimant for engaging in rude conduct toward the owner at work.

CONCLUSIONS AND REASONS: The employer discharged claimant for misconduct. Order No. 20-UI-146024 is modified to change the date the disqualification is effective from December 20, 2019 to December 22, 2019.

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). Good faith errors and isolated instances of poor judgment are not misconduct. OAR 471-030-0038(3)(b). The employer carries 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).

The employer discharged claimant for behaving in a rude manner toward the owner on December 22, 2019. The employer had the right to expect claimant to refrain from engaging in combative, rude conduct toward him and others while at work. The employer reminded claimant of that expectation and issued him a warning on June 11, 2019 for a violation of that policy after he "blew up" at the owner on June 10, 2019. Claimant understood the employer's expectations from prior warnings and as a matter of common sense.

Claimant's testimony conflicted with the testimony from the employer's witnesses at hearing. At hearing, claimant asserted that he had a "very good working relationship" with the owner, "always" treated people courteously and professionally at work, and that the employer's testimony regarding the final incident on December 22, 2019 and the prior incidents leading to warnings on June 11 and September 16 was "fabricated and fictitious." Transcript at 17, 15, 20. Claimant denied having received any warnings and that those incidents ever occurred. Transcript at 17-20. Claimant asserted further that the employer discharged him because the owner replaced him with another employee in July 2019, but waited until December 2019 to discharge him so that claimant could train the other employee. Transcript at 19.

However, the employer's testimony was more persuasive than claimant's blanket denials. The owner's testimony was detailed, consistent, and logical and the record contains no reason to disbelieve the employer's testimony. Moreover, the testimony from claimant's coworker about the September 16 incident and claimant's "poor attitude" at work corroborated the owner's testimony. It is implausible that the owner and an employee would invent multiple incidents and testify consistently about the details of those incidents unless the incidents occurred as the witnesses alleged. The testimony from the owner and employee regarding claimant's conduct was therefore more persuasive than claimant's testimony that those incidents never occurred. We conclude, therefore, that it is more likely than not that claimant behaved in a rude, even insubordinate, manner toward the owner on December 22. In doing so, claimant consciously violated the employer's expectations and claimant's behavior was a willful violation of the employer's interest regarding workplace conduct.

The next issue is whether claimant's conduct on December 22 was an isolated instance of poor judgment, and not misconduct. *See* 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).

Although claimant's conduct on December 22 involved poor judgment and probably did not exceed mere poor judgment, the record shows that it was not an isolated instance of poor judgment because it was not isolated. *See* OAR 471-030-0038(1)(d)(A). Rather, claimant's December 22 conduct was a repeated act and part of a pattern of other willful or wantonly negligent behavior in violation of the employer's standards. OAR 471-030-0038(1)(d)(A). On June 10, 2019, claimant engaged in conduct that constituted a willful violation of the employer's expectations regarding workplace conduct when he "got in [the owner's] face," yelled at him, and threw a radio. Claimant knew or should have known as a matter of common sense that such conduct was a willful violation of the employer's expectations. Because claimant repeated that willful behavior on December 22 by making a rude comment to the owner, it may not be excused as an isolated instance of poor judgment. Moreover, based on claimant's September 16 conduct, and his preceding intentional act of performing substandard work, claimant's conduct on December 22 was not isolated because it was part of a pattern of willful or wantonly negligent behavior.

Nor can claimant's conduct be excused as a good faith error in his understanding of the employer's expectations. There is no reasonable view of the facts that would support the conclusion that claimant's conduct was the result of a good faith error when he rudely questioned whether the owner could "still see" when the owner attempted to discuss claimant's work performance with him on December 22.

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

DECISION: Order No. 20-UI-146024 is modified, as outlined above.

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

DATE of Service: April 22, 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 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 ໄດ້ ໂດຍປະຕິບັດຕາມຄໍາແນະນໍາທີ່ບອກໄວ້ຢູ່ຕອນຫ້າຍຂອງຄໍາຕັດສິນນີ້.

Arabic

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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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