

EMPLOYMENT APPEALS BOARD DECISION
2020-EAB-0411

Reversed
No Disqualification

PROCEDURAL HISTORY: On April 9, 2020, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that the employer discharged claimant for misconduct and that claimant was disqualified from receiving unemployment insurance benefits effective March 1, 2020 (decision # 112641). Claimant filed a timely request for hearing. On May 12, 2020, ALJ Schmidt conducted a hearing, and on May 14, 2020, issued Order No. 20-UI-149771, affirming the Department's decision. On May 22, 2020, claimant filed an application for review with the Employment Appeals Board (EAB).

EAB considered claimant's written argument in reaching this decision.

FINDINGS OF FACT: (1) Baxter Auto Parts Inc. employed claimant as an auto parts counter specialist from May 10, 2019 until March 4, 2020.

(2) The employer's conduct guidelines provided that employees refrain from engaging in insubordination, and "rude, discourteous or un-businesslike behavior." Exhibit 1. Claimant understood the employer's expectations.

(3) On March 3, 2020, the employer transferred a different store manager to manage the store where claimant worked. The store manager was claimant's direct supervisor.

(4) Prior to March 4, 2020, claimant received no warnings or other discipline from the employer.

(5) On March 3, 2020, the manager arrived at work for her first day at the new location. As she entered the store, she asked claimant about another employee, and claimant told her he was inside the store. Claimant shook hands with the manager, and attempted to introduce a long-term customer to her by calling him over to where claimant was standing. The customer was a Black man. The customer walked up and offered his hand toward the manager. The manager did not shake hands with the customer, and continued into the store where she greeted a number of employees. Claimant considered the manager's conduct toward the Black man to be "racial" and "horrible." Transcript at 32. The customer was offended by how the manager treated him. Claimant told the customer he would discuss the incident with the manager.

(6) On March 4, 2020, claimant told the manager he wanted to discuss an incident that occurred on March 3. In the manager's office, claimant told the manager that a Black customer complained to him because, when claimant had tried to introduce the customer to the manager on March 3, the manager was "disrespectful" toward the customer and refused to shake his hand. Transcript at 14. Claimant expected that the manager would provide an explanation for her conduct. Instead, the manager denied that the incident had occurred, which angered claimant. The manager asked claimant to "back off," and to "drop it" several times when claimant repeated his observations from March 3. Transcript at 14, 17. Claimant followed the manager out of the office to where another employee was working and said in an "aggressive" manner to the manager, "I don't wanna do your job," and told the coworker he did not want to do the manager's job. Transcript at 51. The coworker observed that claimant was "right in [the manager's] face" and told claimant to "calm down." Transcript at 52, 27. Claimant returned to work. Claimant did not threaten the manager in any way during his exchange with her.

(7) On March 4, after the incident with claimant, the manager heard someone use the word "bitch" in the store. Transcript at 23. She did not see the person talking. Claimant also heard a coworker who was shopping in the store repeating the word, "bitch," at the store that day. Transcript at 33.

(8) After the exchange with claimant, the manager called the employer's human resources representative and told her she did not believe there was another option other than discharging claimant.

(9) On March 4, 2020, the manager told claimant she was discharging him for insubordination due to his "aggressive" behavior toward her and refusing to "let things go" earlier that day. Transcript at 23.

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). In a discharge case, the employer has the burden to establish misconduct by a preponderance of evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

Order No. 20-UI-149771 concluded that the employer discharged claimant for misconduct. The order found as fact that claimant called the manager a “bitch,” and that such conduct was a wantonly negligent violation of the employer’s reasonable expectations that prompted the employer to discharge claimant.¹ The order further concluded that claimant’s conduct in calling the manager a “bitch” was not an isolated instance of poor judgment because his conduct earlier on March 4 of “aggressively confront[ing] the manager,” and “pursuing her despite her repeated requests to discuss the [March 3 customer] issue later,” created a pattern of confrontational behavior, and was not therefore an isolated instance.² The record does not support the order’s conclusions and reasoning.

The record shows that the incident that prompted the employer to discharge claimant was claimant’s failure to stop pursuing the manager and repeating a customer complaint in an “aggressive” manner after the manager told claimant to “drop it,” and “back off.” Claimant denied having been “upset” when he spoke with the manager. Transcript at 32. However, the testimony from the manager and claimant’s coworker, who testified that claimant was “aggressive,” “right in [the manager’s face,” “really upset,” “wasn’t acting his normal self,” and “let it get the best of him,” outweighed claimant’s testimony that he was not “upset” or aggressive. Transcript at 27, 52. Claimant knew or should have known as a matter of common sense that persisting with his complaint with the manager in an aggressive manner was discourteous and 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 March 4 interaction with the manager was 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.

¹ Order No. 20-UI-149771 at 2, 3.

² Order No. 20-UI-149771 at 4.

(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).

The record shows that claimant's conduct while explaining the customer complaint to the manager was an isolated act and not, as the order reasoned, part of a pattern of willful or wantonly negligent conduct. Although the manager alleged that she overheard claimant tell an employee from another store that she was a "bitch," the weight of the evidence does not support that assertion. Transcript at 24. The manager did not see claimant call her a "bitch," but rather, overheard someone "one wall away" use the word, "bitch." Transcript at 25. Claimant not only denied having called the manager a "bitch," but also provided a persuasive explanation for what the manager overheard. Transcript at 32-33, 39. Claimant testified that he heard another employee use the word, "bitch," repeatedly on March 4. Transcript at 32-33, 39. In sum, the record does not show by a preponderance of the evidence that claimant engaged in any conduct other than the argument with the manager about the customer complaint that could be construed as a willful or wantonly negligent disregard of the employer's expectations. That conduct was isolated.

Although claimant made a conscious decision to act in an aggressive manner toward the manager, and that act involved poor judgment, the record does not show that his conduct, viewed objectively, violated the law, was tantamount to unlawful conduct, or was the type of conduct to create an irreparable breach of trust in the employment relationship or otherwise make a continued employment relationship impossible. Based on the testimony from claimant and the customer who complained about the manager, claimant complained in an attempt to promote a workplace and business free from discrimination. In becoming upset, even perhaps raising his voice, and pursuing the complaint with the manager after being told to stop, claimant did not engage in conduct that was illegal or tantamount to unlawful conduct.

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-149771 is set aside, as outlined above.

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

DATE of Service: June 26, 2020

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.

Please help us improve our service by completing an online customer service survey. To complete the survey, please go to <https://www.surveygizmo.com/s3/5552642/EAB-Customer-Service-Survey>. You can access the survey using a computer, tablet, or smartphone. If you are unable to complete the survey online and need a paper copy of the survey, please contact our office.



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 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.

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