

EMPLOYMENT APPEALS BOARD DECISION
2021-EAB-0160

Affirmed
Disqualification

PROCEDURAL HISTORY: On November 2, 2020, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant was discharged for misconduct and was disqualified from receiving unemployment insurance benefits effective August 2, 2020 (decision # 104512). Claimant filed a timely request for hearing. On February 16, 2020, ALJ Micheletti conducted a hearing, and on February 23, 2021 issued Order No. 21-UI-161465, affirming decision # 104512. On March 3, 2021, claimant filed an application for review with the Employment Appeals Board (EAB).

WRITTEN ARGUMENT: Claimant did not declare that she provided a copy of her 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 her 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) The Kroger Co. employed claimant as a contact center agent from July 22, 2018 until August 3, 2020. Claimant fielded calls and provided technical support by telephone for the employer's grocery stores and gas stations.

(2) The employer expected claimant to treat all callers with courtesy and professionalism. This expectation was one of the employer's "core values." Transcript at 5. Violation of the employer's expectation could result in discharge. Claimant was aware of and understood the employer's expectation as a matter of common sense.

(3) On July 27, 2020, claimant received a call from a caller who was an associate at one of the employer's gas stations. The caller called claimant for assistance because some of the gas station's pumps had malfunctioned. The caller began listing the steps he took to troubleshoot the problem but claimant interrupted the caller and loudly instructed him to "calm down." Transcript at 22. The

caller then asked to speak to claimant's manager to which claimant replied, "You're an idiot." Transcript at 24. The caller then asked if claimant was going to "quit being inappropriate" to which claimant responded, "Are you gonna quit being a fucking dick?" Transcript at 25.

(4) The caller persisted in asking for the name and telephone number of claimant's manager. Claimant provided the caller her own name and personal telephone number and represented that the name and number she provided was the name and number of her manager. The caller then asked for claimant's name. Claimant gave the caller her first name but told the caller her last name was the last name of a coworker. The caller then asked, "So now are you gonna diagnose and go over what to do or are you gonna keep being rude to me?" to which claimant replied, "I'm gonna keep being rude to you." Transcript at 26. Claimant then informed the caller that she would transfer his call and stated that the caller "should feel lucky" that claimant offered to do that. Transcript at 27. Claimant transferred the caller to a number that was not in service and the call ended.

(5) Minutes later, the caller called claimant's personal telephone seeking to speak to claimant's manager. Claimant answered and she and the caller had another conversation. Claimant held herself out as the manager and the caller initially thought he was speaking to claimant's manager. But, after some discussion, the caller "connected the dots" as to claimant's identity and the call became "agitated on . . . both ends." Transcript at 10. Claimant used more foul language and concluded the second call by telling the caller, "Not doing it, that shit's fucking crazy," and, "I'm fucking done with this day." Transcript at 10.

(6) In late July 2020, during a routine audit of call recordings, the employer became aware of claimant's conduct during the two calls on July 27, 2020.¹

(7) On August 3, 2020, the employer held a meeting with claimant about the July 27, 2020 calls. The employer did not play audio from the calls but mentioned that claimant had acted unprofessionally and used foul language. Claimant denied using foul language directed at the caller, and stated that she was working from home on July 27, 2020, and had likely directed the language to a person she lived with who was in the room. The employer read aloud some of claimant's statements from the calls and informed claimant that she had misrepresented the name and telephone number of her manager and her own name. Claimant "didn't argue any further at that point." Transcript at 11. On August 3, 2020, the employer discharged claimant for violating their expectation that she treat callers with professionalism and courtesy.

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) (September 22, 2020). "[W]antonly negligent" means indifference to the consequences of an act or series of actions, or a

¹ The employer's call recording application recorded the first call for quality assurance purposes. The employer's call recording application recorded the second call that took place on claimant's personal telephone accidentally because claimant took the second call while having her work telephone line engaged.

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). Isolated instances of poor judgment and good faith errors are not misconduct. OAR 471-030-0038(3)(b).

The employer discharged claimant because of her conduct during two July 27, 2020 telephone calls with another employee. Claimant was subject to the reasonable employer expectation, which the employer held as a “core value,” that she treat all callers with courtesy and professionalism. As a contact center agent whose job was to field calls, claimant was aware of this standard of behavior as a matter of common sense. Claimant violated the employer’s expectation during the July 27, 2020 calls with at least wanton negligence. Claimant was discourteous toward the caller by directing foul language at him and calling him names. Claimant’s conduct during the calls was unprofessional in that, when asked to provide her manager’s information to the caller, claimant falsely represented that her name and her telephone number was the name and number of her manager. Claimant also acted unprofessionally when asked to provide her own name by falsely stating to the caller that her last name was the last name of a coworker. Claimant engaged in additional discourteous and unprofessional conduct in the second call by holding herself out as her manager and directing more foul language at the caller. Claimant was conscious of her rude and unprofessional conduct and knew or should have known that it would result in a breach of the employer’s expectation.

Isolated instances of poor judgment are not misconduct. 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).

Applying these standards, claimant's conduct was not an isolated instance of poor judgment because the conduct was not isolated and because it exceeded mere poor judgment. Claimant's conduct was not isolated because she violated the employer's expectation during two separate calls with the caller on July 27, 2020. On the first call, claimant directed foul language at the caller, called him names, and misrepresented the name and number of her manager and her own last name. On the second call, claimant held herself out as her manager until the caller "connected the dots" as to claimant's identity and directed more foul language at the caller. Thus, claimant's conduct was a repeated act or pattern and not an isolated instance of poor judgment.

Claimant's conduct was also not an isolated instance of poor judgment because her actions exceeded mere poor judgment. Claimant's conduct involved deception and a failure to accept accountability for her actions. Claimant engaged in deception by misrepresenting that her own name and number was the name and number of her manager, falsely stating that the last name of a coworker was her own last name thereby potentially drawing an innocent third party into her misconduct, and holding herself out as the manager during the second call. Moreover, on August 3, 2020, when the employer confronted claimant about her behavior during the calls, claimant denied responsibility and claimed that her foul language had likely been directed to someone else in the room. Only after the employer read claimant's statements from the calls aloud did claimant cease denying responsibility. The record therefore supports that, viewed objectively, claimant's conduct exceeded mere poor judgment because her behavior created an irreparable breach of trust that made a continued employment relationship impossible.

The employer discharged claimant for misconduct. Claimant is disqualified from receiving unemployment insurance benefits effective August 2, 2020.

DECISION: Order No. 21-UI-161465 is affirmed.

S. Alba and D. P. Hettle.

DATE of Service: April 9, 2021

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.

NOTE: This decision denies payment of your Unemployment Insurance (UI) benefits.

However, you may be eligible for Pandemic Unemployment Assistance (PUA) benefits for the period you are not eligible for other benefits as long as you are unable to work, unavailable for work, or unemployed due to the COVID-19 public health emergency. PUA is a new unemployment benefits program available through the Oregon Employment Department in response to the COVID-19 pandemic.

Visit <https://unemployment.oregon.gov> for more information, to apply for PUA, or to contact the Oregon Employment Department using the “Contact Us” form. You can also apply for PUA by calling 1-833-410-1004, but please be aware that the PUA staff cannot answer questions about this decision that denies payment of regular Unemployment Insurance (UI) benefits.

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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www.Oregon.gov/Employ/eab

The Oregon Employment Department is an equal opportunity employer/program. Auxiliary aids and services are available upon request to individuals with disabilities. Language assistance is available to persons with limited English proficiency at no cost.

El Departamento de Empleo de Oregon es un programa que respeta la igualdad de oportunidades. Disponemos de servicios o ayudas auxiliares, formatos alternos y asistencia de idiomas para personas con discapacidades o conocimiento limitado del inglés, a pedido y sin costo.