

EMPLOYMENT APPEALS BOARD DECISION
2021-EAB-0224

Affirmed
Disqualification

PROCEDURAL HISTORY: On January 27, 2021, 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 October 4, 2020 (decision # 70432). Claimant filed a timely request for hearing. On March 9, 2021, ALJ Scott conducted a hearing and issued Order No. 21-UI-162366, affirming decision # 70432. On March 27, 2021, claimant filed an application for review with the Employment Appeals Board (EAB).

WRITTEN ARGUMENT: Claimant did not declare that he provided a copy of his 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 him 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) Waste Management of Oregon, Inc. employed claimant as a utility worker from July 5, 2017 until October 9, 2020.

(2) The employer had a zero tolerance policy for workplace violence and expected employees to refrain from acts of violence or behavior that could lead to workplace violence. Claimant received a copy of the employer's policy at hire and received annual trainings on the policy. Claimant was aware of and understood the employer's zero tolerance policy for workplace violence.

(3) One of claimant's coworkers had a reputation for having "a mouth on him," and claimant and the coworker disliked each other. Transcript at 14. On October 9, 2020, the coworker was unloading garbage carts from a truck using a forklift on the employer's premises. The coworker deposited two stacks of carts in one of the rows. Claimant disagreed with where the coworker placed the stacks because claimant had been organizing similar carts in other rows a short distance away. Claimant told the coworker that he had deposited the carts in the wrong row, which made the coworker angry.

Transcript at 18-19. The coworker began using foul language toward claimant. Claimant told the coworker, "I was just trying to direct you." Transcript at 19. The coworker replied, "[M]ove out of the fucking way. I'm going to run you the fucking ass over." Transcript at 19. The coworker did not move the forklift toward claimant or otherwise attempt to run claimant over with the forklift. Claimant became angry, walked over to the coworker seated in the forklift, and punched him in the face, causing the coworker to have a "bloody nose and fat lip." Transcript at 8.

(4) The coworker got off the forklift, walked away from claimant and called the department supervisor. He reported that he was "punched" by claimant, which caused the supervisor to rush back to the area to determine what happened. Transcript at 5. While on his way, he encountered claimant and tried to talk to him. However, claimant was upset and only stated, "'f you.' 'F' this job. . . . I don't need this. I'm not putting up with it. I told ya I was going to get him and I did. . . . I'm done. I don't need this." Transcript at 6. A short time later, the supervisor spoke with claimant again and told claimant he had to discharge him for fighting. Claimant did not deny that he punched the coworker and never told the supervisor or any management employee that he had punched the coworker because he felt threatened by him.

(5) On October 9, 2020, the employer discharged claimant for punching his coworker in violation of the employer's policy against workplace violence.

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). 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 had the right to expect claimant to refrain from engaging in violence in the workplace. Claimant acknowledged that he was aware of that expectation. Transcript at 22. At hearing, claimant admitted that he punched the coworker in the face while he was on the forklift and did not dispute that he caused him a "bloody nose and fat lip." Transcript at 20-21. Claimant also asserted at hearing that he punched the coworker when he did because he thought his life was threatened. Transcript at 20-21. However, the record fails to show that claimant's life was threatened, that the coworker attempted to injure claimant, or that claimant was defending himself when he struck the coworker. Before claimant left work on October 9, 2020, he never told the supervisor or any management employee that he had punched the coworker because he felt threatened by the statements the coworker made to him while on the forklift. The weight of the evidence indicates that claimant punched the coworker in the face out of anger because the coworker refused to put the carts where claimant told him to put them, used foul language toward claimant, and told claimant he was going to run claimant over without actually attempting to do so. More likely than not, claimant willfully violated the employer's policy against workplace violence.

Claimant's October 9, 2020 conduct is not excusable as an isolated instance of poor judgment under 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, even if claimant's exercise of poor judgment was isolated, it was tantamount to unlawful conduct, which exceeds mere poor judgment and does not fall within the exculpatory provisions of OAR 471-030-0038(3)(b). Under ORS 163.160(1)(a), a person commits the crime of assault in the fourth degree if the person intentionally, knowingly or recklessly causes physical injury to another. Here, claimant intentionally injured his coworker by punching him in the face hard enough to cause him a "bloody nose and fat lip." Claimant's decision to use physical force toward his coworker was tantamount to assault, and therefore exceeded mere poor judgment and cannot be excused under OAR 471-030-0038(1)(d)(D).

Claimant's conduct also cannot be excused as a good faith error under OAR 471-030-0038(3)(b). Claimant did not assert, and the record does not show, that he had a sincere belief, or rational basis for believing, that the employer would condone striking a coworker out of anger or frustration. Claimant's conduct therefore was not the result of a good faith error in his understanding of the employer's expectations.

The employer discharged claimant for misconduct, disqualifying claimant from receiving unemployment insurance benefits effective October 4, 2020 and until he earns at least four times his weekly benefit amount from work in subject employment.

DECISION: Order No. 21-UI-162366 is affirmed.

S. Alba and D. P. Hettle.

DATE of Service: May 3, 2021

NOTE: This decision affirms a denial of 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.

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.surveymzmo.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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