

EMPLOYMENT APPEALS BOARD DECISION
2021-EAB-0398

Affirmed
No Disqualification

PROCEDURAL HISTORY: On March 22, 2021, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant was discharged but not for misconduct and was not disqualified from receiving unemployment insurance benefits (decision # 95847). The employer filed a timely request for hearing. On May 11, 2021, ALJ Snyder conducted a hearing, and on May 14, 2021 issued Order No. 21-UI-166901, affirming decision # 95847. On May 21, 2021, the employer filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACTS: (1) Auto Zoners LLC employed claimant from June 12, 2019 until July 16, 2020 as a part sales manager.

(2) The employer expected their management employees to refrain from sharing their store passwords with non-management employees. The employer also expected their employees to refrain from using foul language in the presence of coworkers or customers. Claimant was aware of and understood these expectations.

(3) Claimant has posttraumatic stress disorder (PTSD). In April or May 2020, claimant experienced a PTSD episode while working a long shift for the employer. Claimant “just needed a moment to grieve,” and gave his password to a non-management employee so that employee could complete a transaction. Audio Record at 22:40. Shortly thereafter, claimant’s supervisor warned claimant not to share his password. After receiving this warning, claimant did not share his password again.

(4) Also in April or May 2020, one of claimant’s coworkers overheard him using foul language at work. Claimant’s supervisor warned claimant to refrain from using foul language at work. Thereafter, claimant “worked really hard” to avoid using foul language at work, and “it was something that [he] had a conscious effort on.” Audio Record at 24:23.

(5) In May or June 2020, the employer began an investigation into claimant’s conduct including regarding the instance of sharing his password, and the coworker overhearing claimant use foul language. On July 16, 2020, the employer discharged claimant for violating their expectations regarding

claimant's sharing of his password and his use of foul language. The employer also discharged claimant based on their conclusion that claimant had "talk[ed] down to" coworkers and customers. Audio Record at 16:05.

CONCLUSIONS AND REASONS: The employer discharged claimant, 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) (September 22, 2020). "[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).

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).

The employer discharged claimant because of one incident when claimant shared his password, and another incident when claimant was overheard using foul language. The employer also discharged

claimant based on their conclusion that claimant had engaged in misconduct by “talking down to” coworkers and customers. Audio Record at 16:05.

With respect to “talking down” to customers and coworkers as a reason for the discharge, the employer did not establish that they ever conveyed to claimant what the employer’s standard of behavior was regarding their expectation that claimant not “talk down” to coworkers and customers. Claimant testified that he had never been “warned about speaking disrespectfully or talking down to people,” and that “in fact, many of the employees came to me for support and understanding with their personal problems.” Audio Record at 23:38. The employer also failed to offer evidence of a specific instance showing that claimant had “talked down” to anyone. Thus, the employer did not offer evidence sufficient to show that claimant violated a reasonable employer expectation regarding how claimant communicated with coworkers or customers, or that he did so willfully or with wanton negligence. Therefore, claimant was not discharged for misconduct based on this reason.

To the extent claimant was discharged for sharing his password with a coworker, claimant also was not discharged for misconduct. The record shows that claimant understood the employer’s expectation that he not share his password and that claimant violated this expectation on one occasion. However, the preponderance of evidence indicates that claimant did not breach this employer expectation willfully or with wanton negligence. The record reflects that on the occasion claimant shared his password, he was having a PTSD episode while working a long shift and “just needed a moment to grieve,” so he gave the password to a non-management employee so that employee could complete a transaction. Audio Record at 22:40. In light of the evidence that claimant was experiencing a PTSD episode and therefore was unlikely to have been acting with deliberateness or intent, it is more likely than not that claimant’s violation of the employer’s expectation was not willful. It is also more likely than not that, due to the PTSD episode, claimant was not acting with indifference to the consequences of his actions at the time he shared his password, and therefore did not violate the employer’s expectation with wanton negligence. Thus, the employer did not offer evidence sufficient to show by a preponderance of evidence that claimant violated this expectation willfully or with wanton negligence. Therefore, claimant was not discharged for misconduct based on this reason.

Finally, claimant was not discharged for misconduct with respect to the employer’s decision to discharge claimant for his use of foul language. The record shows that claimant understood the employer’s expectation that he not use foul language in the presence of coworkers or customers, and that claimant violated this expectation. Thus, the record supports that claimant violated the employer’s expectation regarding use of foul language with at least wanton negligence. Nevertheless, claimant’s conduct was not misconduct because the record indicates claimant’s use of foul language was an isolated instance of poor judgement.

Applying the standards set forth under OAR 471-030-0038(1)(d), it is more likely than not that claimant’s use of foul language was no more than an infrequent occurrence. The record shows that the employer warned claimant about his use of foul language in April or May 2020 and that thereafter claimant “worked really hard to bring it back and it was something that [he] had a conscious effort on.” Audio Record at 24:23. The employer did not offer evidence bearing on the frequency with which claimant used foul language or whether he continued to do so after receiving the warning. Given the state of the record, the preponderance of evidence supports that claimant’s use of foul language was an infrequent occurrence rather than a repeated act or pattern. The preponderance of evidence further

supports that claimant's use of foul language was an act of poor judgment because it was an act of discernment that resulted in a violation of the employer's standard of behavior. Further, the use of foul language did not exceed mere poor judgment because it did not violate the law or create an irreparable breach of trust. Thus, the record shows that claimant's use of foul language was an isolated instance of poor judgment, which is not misconduct. Therefore, claimant was not discharged for misconduct based on this reason.

For the foregoing reasons, the employer discharged claimant, but not for misconduct. Claimant is not disqualified from receiving benefits based upon this work separation.

DECISION: Order No. 21-UI-166901 is affirmed.

D. Hettle and A. Steger-Bentz;
S. Alba, not participating.

DATE of Service: June 28, 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.

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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 الإستئناف 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
 Phone: (503) 378-2077 | 1-800-734-6949 | Fax: (503) 378-2129 | TDD: 711
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