

EMPLOYMENT APPEALS BOARD DECISION
2021-EAB-0654

Affirmed
Disqualification

PROCEDURAL HISTORY: On December 31, 2020, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that the employer discharged claimant for misconduct, disqualifying claimant from receiving unemployment insurance benefits effective October 18, 2020 (decision # 102146). Claimant filed a timely request for hearing. On July 23, 2021, ALJ Mott conducted a hearing, and on July 26, 2021 issued Order No. 21-UI-171035 affirming decision # 102146. On August 14, 2021, claimant filed an application for review with the Employment Appeals Board (EAB).

WRITTEN ARGUMENT: Claimant's August 31, 2021 argument 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.¹ Under ORS 657.275(2) and OAR 471-041-0090 (May 13, 2019), EAB considered only information received into evidence at the hearing when reaching this decision. EAB considered claimant's argument to the extent it was based on the record.

FINDINGS OF FACT: (1) Fred Meyer Stores, Inc. employed claimant as a service deli clerk from September 20, 2017 until October 22, 2020.

(2) The employer had a policy that prohibited violence in the workplace and stated that any employee violation of the policy would result in discharge without warning. The employer's policy was a "zero tolerance" policy that expressly included an employee's threatening statements to another, even when only intended as a "joke." Transcript at 7, 12. The employer provided claimant a copy of the policy during his employment orientation on September 21, 2017. Claimant understood the policy.

¹ Claimant's August 31, 2021 written argument contained duplicative argument from his August 14, 2021 written argument. However, unlike the August 14, 2021 written argument, claimant served the August 31, 2021 written argument on the opposing party as required by OAR 471-041-0080(2)(a) (May 13, 2019).

(3) On November 19, 2019, a customer complained to claimant's supervisor that claimant had been disrespectful by acting "aggressive[ly]" towards the customer while using foul language in the customer's presence. Transcript at 28. The employer suspended claimant for 10 days for the incident and, on December 10, 2019, issued claimant a written warning that addressed the November 19, 2019 incident. The warning restated the workplace violence policy and advised claimant that any future instances of "disrespect" toward a customer or another employee would result in claimant's discharge. Transcript at 9, 13-14. Claimant disagreed with the employer that he had been disrespectful to the customer, but signed an acknowledgment that he had received the warning.

(4) On October 19, 2020, claimant was putting away a set of tongs when claimant's supervisor asked claimant if he had helped a customer at the deli counter. Claimant responded by telling the supervisor "no," and to "shut up or I'll stab you in the face with these tongs." Transcript at 5. The supervisor felt "threatened" by claimant's statement. Transcript at 13. An assistant manager overheard claimant's response and reported it to the employer's human resources manager. Claimant told the human resources manager that he made the statements to the supervisor because the supervisor had raised his voice towards claimant when asking about the customer. The employer suspended claimant for the incident.

(5) On October 22, 2020, the employer discharged claimant for violating the employer's workplace violence policy on October 19, 2021.

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 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) (September 22, 2020). 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 record shows that the employer had a "zero tolerance" workplace violence policy that the employer disclosed to claimant at hire, and that the employer later reinforced to claimant when the employer provided claimant the December 10, 2019 written warning. The employer's workplace violence policy was reasonable because a workplace free of violence and violent threats promotes employee workplace harmony and a hospitable environment for customers to patronize. To the extent the employer's policy extended to threatening comments intended as jokes, this too was reasonable, as it is in the employer's business interest to strictly enforce nonviolence in the workplace regardless of the subjective intent of an individual in making a threat. The preponderance of the evidence shows that claimant was conscious of his actions in threatening to stab his supervisor in the face and knew or should have known that his words were not only disrespectful and "beyond the pale," but also a violation of the employer's workplace violence policy. Transcript at 25. Claimant's conduct therefore was, at best, wantonly negligent, his testimony suggesting that he was being "facetious" in making the threat is irrelevant under the terms of the employer's reasonable policy and expectations. Transcript at 21.

However, it is necessary to determine if claimant's conduct was an isolated instance of poor judgment and therefore not misconduct. The record shows that claimant's actions on October 19, 2020 were the first time he had violated the employer's workplace violence policy by threatening a coworker. In that sense, claimant's actions on October 19, 2020 were isolated. However, claimant's threat of physical violence was not just to a coworker, but a supervisor, and the threat was exacerbated by the contemporaneous insubordinate conduct claimant engaged in by telling the supervisor that "no" he had not helped a customer, and to "shut up." Furthermore, claimant's comment made the supervisor feel threatened, and occurred in front of at least one additional coworker, potentially undermining workplace harmony and contributing to a "hostile work environment" had claimant remained employed. Transcript at 13. In light of the context in which claimant's actions occurred, including the fact that claimant had been given a final warning in December 2019 where the employer expressly reminded him about the workplace violence policy and the employer's expectations regarding "disrespect," claimant's October 19, 2020 violation of the employer's workplace violence policy exceeded mere poor judgment because it created an irreparable breach of trust in the employment relationship and made a continued employment relationship impossible.

Likewise, claimant's verbal threat to his supervisor on October 19, 2020 was not a good faith error. OAR 471-030-0038(3)(b). Claimant knew or should have known that his threatening words violated the employer's workplace violence policy and the record does not show that claimant could have reasonably

believed that the employer would condone his behavior. Accordingly, claimant was discharged for misconduct and is disqualified from receiving unemployment insurance benefits based on the separation.

DECISION: Order No. 21-UI-171035 is affirmed.

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

DATE of Service: September 17, 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 weeks ending September 4, 2021 and prior as long as you were not eligible for other benefits during that time, and were unable to work, unavailable for work, or unemployed due to the COVID-19 public health emergency. PUA was an unemployment benefits program available through the Oregon Employment Department in response to the COVID-19 pandemic. The program ended on September 4, 2021.

Visit <https://unemployment.oregon.gov> for more information, or to contact the Oregon Employment Department using the “Contact Us” form. You can also call 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.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 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.

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