

EMPLOYMENT APPEALS BOARD DECISION
2021-EAB-0707

Affirmed
No Disqualification

PROCEDURAL HISTORY: On March 25, 2021, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that the employer discharged claimant, but not for misconduct, which did not disqualify claimant from receiving unemployment insurance benefits (decision # 104713). The employer filed a timely request for hearing. On July 14, 2021 and August 16, 2021, ALJ Wyatt conducted a hearing, and on August 27, 2021 issued Order No. 21-UI-173604, affirming decision # 104713. On August 30, 2021, the employer filed an application for review with the Employment Appeals Board (EAB).

WRITTEN ARGUMENT: EAB considered claimant's written argument when reaching this decision.

EVIDENTIARY MATTER: At the July 14, 2021 hearing, the ALJ admitted Exhibit 1 into evidence, consisting of a July 2, 2021 letter from the employer's representative and two February 2021 letters from the employer to claimant, totaling five pages. However, the documents were later marked separately as Exhibits 1 and 4. July 14, 2021 Audio Record at 8:50–10:55. As a clerical matter, EAB consolidated the documents and re-marked them as Exhibit 1. Additionally, Exhibit 2 consists of a video clip depicting the final incident that led to claimant's discharge.

FINDINGS OF FACT: (1) Jackson County employed claimant as a juvenile justice specialist from June 13, 2016 until February 22, 2021. Claimant was responsible for supervising youth detained at a youth correctional facility.

(2) The employer maintained a policy regarding the use of force against detained youths. In relevant part, the policy provided that, unless a youth poses an immediate threat, employees should attempt to de-

escalate them before using physical force to exert control. Claimant received use-of-force training while working for the employer.

(3) On February 3, 2020, the employer issued claimant a written reprimand in connection with an incident which occurred on January 29, 2020. In that incident, claimant escorted a youth from the gymnasium to a detention area after the youth was involved in an argument. The employer issued the reprimand because claimant did not notify his coworker who had been supervising the youths in the gym at the time, and because he restrained the youth when the employer's protocols did not call for it.

(4) On April 30, 2020, the employer issued claimant a written reprimand for unauthorized use of leave.

(5) On February 4, 2021, claimant was interacting with an upset youth who needed to be escorted back to her room. In an effort to de-escalate the youth and convince her to comply and return to her room, claimant spoke to her for approximately 25 minutes. When the youth finally entered her room, she began to close the door to the room herself. The youth had a history of slamming doors when she was upset, and claimant was concerned that she would slam the door in this instance, because the doors did not securely close when slammed shut. Additionally, per the employer's policy, employees were supposed to close the door to a youth's room in such circumstances, rather than permitting the youth to close the door herself, in order to ensure that the door was secured. When the youth refused to let go of the door and allow claimant to close it for her, claimant physically pushed her into the room and onto her bed. In response, the youth attempted to kick claimant away from her, which prompted claimant and three other employees to physically restrain the youth.

(6) After the incident on February 4, 2021, claimant's supervisor directed claimant to complete an incident report for the incident by the end of his shift, per the employer's policy. Claimant advised her that he would attempt to do so, but that he might not have enough time. The supervisor told claimant to complete it by the end of the shift if possible, or at the beginning of his next shift otherwise. Claimant completed the report during the following shift.

(7) On February 22, 2021, the employer discharged claimant for excessive use of force during the February 4, 2021 incident, and for failing to complete the incident report by the end of his February 4, 2021 shift.

CONCLUSIONS AND REASONS: Claimant was discharged, but 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) (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 employer discharged claimant both because of his use of force during the incident on February 4, 2021, and because of his failure to complete the corresponding incident report by the end of his shift that day. To the extent that the employer discharged claimant as a result of failing to timely complete the incident report, the employer has not met their burden to show that the failure was misconduct. At hearing, claimant testified that he did not complete the incident report by the end of his February 4, 2021 shift because, despite making an effort to do so, he did not have enough time to do so; and that his supervisor had told him that he could finish the report the following morning if he was unable to complete it that day. August 16, 2021 Transcript at 15–16. By contrast, the employer’s witness, who was not claimant’s supervisor and not directly involved in the February 4, 2021 incident, testified that the supervisor had told her that she had not granted claimant permission to complete the report the next day. July 14, 2021 Transcript at 13. Because claimant’s testimony regarding the conversation with his supervisor firsthand, his testimony is afforded more weight than the employer’s hearsay. Accordingly, the record shows that claimant was granted permission by his supervisor to finish the report the following day if he was unable to complete it by the end of his shift. For that reason, claimant’s failure to complete the report by the end of his February 4, 2021 shift was not a violation of the employer’s standards of behavior, and therefore not misconduct.

To the extent that the employer discharged claimant because of his conduct during the February 4, 2021 incident, the employer has also not met their burden to show that he was discharged for misconduct. The video of the incident, admitted into the hearing record, is 40 seconds long. In the video, the youth

appears to let go of the door and back away from it less than a second before claimant pushed her into the room. Exhibit 2 at 0:13 to 0:16. Thus, based on the video evidence available, the youth may have been starting to comply at the time that claimant pushed her into the room. At hearing, however, claimant testified that he had been talking to the youth for “25 minutes or more” prior to calling a “code yellow” to indicate that she had been acting out; that he and a coworker continued to talk to the youth for a short period of time prior to the beginning of the video; that he generally understood that he should take less than ten minutes to attempt to de-escalate a youth; and that at the time that he pushed the youth into her room, he felt that further attempts to de-escalate the situation would not be successful. August 16, 2021 Transcript at 18–19.

Even if claimant reasonably believed that further talking to the youth would be unproductive, however, it is not clear from the record that simply allowing her to close the door—even if she slammed it shut—would not have been an effective method of de-escalating her and avoiding the use of force. Claimant did not, for instance, offer evidence that the youth would have been unlikely to remain in her room if the door bounced back open after being slammed shut. Therefore, the record shows that claimant could have avoided the use of force by simply allowing the youth to close her own door. Because he did not do so, he violated the employer’s standards of behavior by not further attempting to de-escalate the youth before resorting to use of force.

At hearing, claimant cited the employer’s policy requiring him to close the door as a motivating factor for his actions. August 16, 2021 Transcript at 12. However, the employer’s witness testified that the reason for the policy was to ensure that the door was secured right after it was closed, and that the security of the door was not at issue because claimant was standing right by the door. July 14, 2021 Transcript at 12. Claimant’s testimony above suggests that he made a calculated, if ill-advised, consideration of whether to use force before doing so, based in part on an overly-narrow understanding of the employer’s policy. The record therefore shows that claimant did not violate the employer’s standards of behavior deliberately or with indifference to the consequences of his actions. For that reason, the employer has not met their burden to show that claimant’s use of force on February 4, 2021 was a willful or wantonly negligent violation of their standards of behavior, and not a good faith error.

Further, even if claimant’s use of force was wantonly negligent, the record shows that the incident was an isolated instance of poor judgment. The employer offered two prior instances of written reprimands that they issued to claimant. Regarding the January 29, 2020 incident, the employer did not offer sufficient evidence to show that claimant’s actions rose above mere negligence. Regarding the unauthorized use of leave in April 2020, the employer did not offer sufficient evidence to show that claimant’s actions were the result of negligence at all. Even if the January 29, 2020 incident amounted to a willful or wantonly negligent violation of the employer’s standards of behavior, the incident on February 4, 2021 would still be an isolated instance of poor judgment. This is because of the length of time that passed between January 29, 2020 and February 4, 2021 was too long to demonstrate a pattern of behavior, and the record does not contain evidence to show that claimant’s conduct exceeded mere judgment by, for instance, violating the law, creating an irreparable breach of trust, or otherwise making a continued employment relationship possible. Therefore, claimant’s use of force on February 4, 2021 was, at worst, an isolated instance of poor judgment.

For the above reasons, claimant was discharged, but not for misconduct, and is not disqualified from receiving unemployment insurance benefits based on the work separation.

DECISION: Order No. 21-UI-173604 is affirmed.

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

DATE of Service: October 6, 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 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.

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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