

EMPLOYMENT APPEALS BOARD DECISION
2021-EAB-0731

Affirmed
Disqualification

PROCEDURAL HISTORY: On July 16, 2021, 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 June 20, 2021 based on the work separation (decision # 143657). Claimant filed a timely request for hearing. On August 25, 2021, ALJ Micheletti conducted a hearing interpreted in Vietnamese, and on August 27, 2021 issued Order No. 21-UI-173548, affirming decision # 143657. On September 9, 2021, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Pierce Pacific Mfg. Inc. employed claimant from October 2006 until June 22, 2021 as a welder.

(2) The employer has a “zero tolerance” professional conduct and harassment policy that prohibited their employees from harassing and threatening coworkers. Transcript at 14. The employer advised their employees in trainings and meetings that they would not tolerate harassment toward other employees. Claimant understood the employer’s policy.

(3) On March 29, 2021, claimant became upset with a supervisor. Claimant argued with the supervisor and “flipped off” the supervisor. Transcript at 14. Claimant’s conduct was visible on surveillance video seen by the employer’s human resources manager. The employer gave claimant a written warning for his March 29, 2021 conduct and informed him that it had “zero tolerance” for any type of harassment or bullying in the workplace.

(4) On June 22, 2021, claimant got into an argument with a coworker at work after he became upset that the employee had moved a partition in claimant’s workspace while claimant was on a break. During the argument, claimant called the other employee a “faggot” and asked him if he “wanted to fight.” Transcript at 12, 13. The employee immediately reported the incident to management. Soon after, claimant and his union representative met with the human resources manager and another manager. During the meeting, claimant admitted to the employer’s representatives that he had called the employee

a “faggot” and asked him if he wanted to fight. The employer suspended claimant for the rest of the day while it investigated the incident further.

(5) Also on June 22, 2021, the human resources manager spoke with the other employee involved in the incident, and witnesses to the incident. The employee told the manager that claimant called him a “faggot,” and asked the coworker if he wanted to fight. All of the other witnesses to the incident told the manager that claimant initiated the argument and was “shouting names” towards the employee. Transcript at 14. The human resources manager viewed video of the incident, which showed that claimant and the other employee were arguing. The manager observed on the video that claimant got up from his seat and approached the other employee with claimant’s arms “flailing” and exhibiting body language that showed he was arguing. The other employee did not move.

(6) Later on June 22, 2021, the human resources manager called claimant back to the office and told claimant that the employer was discharging him that day for violating the employer’s policy regarding professional conduct and harassment in the workplace.

CONCLUSIONS AND REASONS: Claimant was discharged 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). 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 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 for violating its professional conduct and harassment policy on June 22, 2021. The employer reasonably expected employees to treat each other in a professional manner, including refraining from calling each other names showing a bias against gender identity or sexual orientation, and from using abusive language that might provoke a violent response in the workplace. Claimant understood the employer's expectations against such conduct from anti-harassment training and as a matter of common sense. The preponderance of the evidence shows that claimant willfully violated the employer's expectations when he called a coworker a "faggot" and asked him if he wanted to fight during an argument at work on June 22, 2021.

Claimant's conduct on June 22, 2021 cannot be excused from constituting misconduct as an isolated instance of poor judgment under OAR 471-030-0038(3)(b) because it was not an isolated act. Claimant violated the employer's policy against harassment on March 29, 2021 when he "flipped off" a supervisor at work. Because claimant willfully violated the employer's policy against harassment on March 29, 2021, claimant's conduct on June 22, 2021 was a repeated act of harassment in the workplace, and was not isolated.

Claimant's conduct was also not excusable as an isolated instance of poor judgment because his conduct exceeded mere poor judgment. Claimant's conduct in calling the other employee a "faggot," approaching him in an angry manner, and asking if he wanted to fight could be considered tantamount to harassment, which is defined in ORS 166.065(1)(a)(B) to include harassing another person by "[p]ublicly insulting such other person by abusive words or gestures in a manner intended and likely to provoke a violent response." Claimant's conduct also exceeded mere poor judgment by causing an irreparable breach of trust or otherwise making a continued employment relationship possible. No reasonable employer would continue to employ an individual who responded to a minor workplace disagreement by calling a coworker a name showing bias against sexual orientation and explicitly provoking them to engage in a fight at work. No reasonable employer trying to promote an unbiased and safe working environment for their employees would allow an employee who engaged in claimant's conduct to continue to work. For these reasons, claimant's conduct exceeded mere poor judgment and cannot be excused as an isolated instance of poor judgment.

Claimant's conduct cannot be excused as a good faith error. Claimant asserted at hearing that he would often "jokingly" call the other employee names, and that they just got "heated" when claimant asked the employee if he wanted to fight. Transcript at 20, 21. However, the record shows that claimant was angry and arguing with the employee, and not joking, when he called him a "faggot." Moreover, the record does not show that claimant reasonably believed, or had a factual basis for believing, that the employer would condone claimant provoking a fight or calling a coworker a bias-based name. It was not an instance of merely using foul language while joking with a coworker.

The employer discharged claimant for misconduct. Claimant is disqualified from receiving unemployment insurance benefits based on his work separation.

DECISION: Order No. 21-UI-173548 is affirmed.

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

DATE of Service: October 15, 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.

Please help us improve our service by completing an online customer service survey. To complete the survey, please go to <https://www.surveymoz.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 ໂດຍປະຕິບັດຕາມຄໍາແນະນໍາທີ່ບອກໄວ້ຢູ່ຕອນຫ້າຍຂອງຄໍາຕັດສິນນີ້.

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
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.