

EMPLOYMENT APPEALS BOARD DECISION
2021-EAB-0786

Affirmed
No Disqualification

PROCEDURAL HISTORY: On June 10, 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 # 82423). The employer filed a timely request for hearing. On September 24, 2021, ALJ Kaneshiro conducted a hearing, and on September 28, 2021 issued Order No. 21-UI-175725, affirming decision # 82423. On September 30, 2021, the employer filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) C & K Market Inc. employed claimant as a barbeque server from June 26, 2020 until May 18, 2021.

(2) The employer had a professionalism policy under which they expected claimant to refrain from directing foul language at customers. Claimant knew and understood that expectation.

(3) On May 6, 2021, claimant was serving barbeque to customers on the sidewalk outside the employer's store. While claimant was serving others, a customer pulled up on a motorcycle. The customer inquired whether he could pay for a serving of barbeque with cash outside the store. Claimant informed the customer that, due to COVID-19 precautions, the customer was required to pay inside the store. In response, the customer stated "[w]ell that's fucking bullshit you're telling me" and "are you . . . a fucking asshole or . . . am I just wrong." Transcript at 18-19. The customer then walked toward claimant, stated "I don't fucking like your attitude," and spat in claimant's direction. Most of the spit landed in another customer's food, but claimant felt some droplets of saliva hit his face. In response, claimant stated "dude, what the fuck was that" and "you better get out of here before I go[] get my manager, [and] have him call the fucking cops." Transcript at 19. The customer then got on his motorcycle and rode off.

(4) On May 8, 2021, the employer suspended claimant for the May 6, 2021 incident with the customer on the motorcycle. On May 18, 2021, the employer discharged claimant for his conduct on May 6, 2021.

CONCLUSIONS AND REASONS: The employer discharged claimant, 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) (December 23, 2018). “[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 record shows that claimant violated the employer’s expectation that he refrain from directing foul language at customers when, on May 6, 2021, he directed foul language at the customer on the motorcycle. Claimant knew and understood the employer’s professionalism policy and the expectation that he not direct foul language at customers. However, the record indicates that on May 6, 2021, claimant, after being insulted and spat at by the customer, said to the customer “dude, what the fuck was that” and “you better get out of here before I go[] get my manager, [and] have him call the fucking cops.” Transcript at 19. This evidence is sufficient to conclude that, with indifference to the consequences of his actions, claimant consciously directed foul language at the customer, which claimant knew or should have known would probably result in violation of the employer’s expectations. As such, claimant’s conduct constituted a wantonly negligent violation of the standards of behavior the employer had a right to expect.

Nevertheless, claimant’s conduct was not misconduct because the record shows it was an isolated instance of poor judgment. 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).

Applying these standards, the record shows that claimant's violation of the employer's policy regarding the use of foul language toward customers was an isolated instance of poor judgment. Claimant's conduct was an isolated act. Other than the one instance on May 6, 2021, the record is devoid of evidence of claimant having directed foul language at customers or otherwise having engaged in any willful or wantonly negligent violation of an employer expectation. Claimant's use of foul language was an act of poor judgment in that claimant's conduct was a conscious decision that resulted in a violation of the employer's standard of behavior. Claimant's conduct did not exceed mere poor judgment because it did not violate the law and was not tantamount to unlawful conduct. Nor, given the context of the situation, did claimant's conduct constitute an irreparable breach of trust or otherwise make a continued employment relationship impossible because claimant directed foul language at the customer only after the customer had insulted, cursed, and spat at claimant. Given the mitigating circumstances that claimant's use of foul language was provoked by the customer's conduct, the record does not establish that claimant's conduct exceeded mere poor judgment.

Accordingly, the employer discharged claimant for an isolated instance of poor judgment, and not misconduct. For that reason, claimant is not disqualified from receiving unemployment insurance benefits on the basis of this work separation.

DECISION: Order No. 21-UI-175725 is affirmed.

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

DATE of Service: November 4, 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

ទោរទៅ – តម្រូវការនេះមិនមែនជាភារកិច្ចរបស់រដ្ឋទេ បើសិនជាលោកអ្នកមិនបានបំពេញតម្រូវការនេះទេ រដ្ឋអាចដាក់ពាក្យប្តឹងសុំឲ្យមានការពិនិត្យរឿងក្តីឡើងវិញជាមួយតុលាការឧទ្ធរណ៍រដ្ឋ Oregon ដោយអនុវត្តតាមសេចក្តីណែនាំដែលសរសេរនៅខាងចុងបញ្ចប់នៃសេចក្តីសម្រេចនេះ។

Arabic

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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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