

EMPLOYMENT APPEALS BOARD DECISION
2021-EAB-0805

Reversed
Disqualification

PROCEDURAL HISTORY: On May 27, 2021, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that the employer discharged claimant, but not for misconduct, and that claimant was not disqualified from receiving unemployment insurance benefits based on the work separation (decision # 63440). The employer filed a timely request for hearing. On September 16, 2021, ALJ Micheletti conducted a hearing, and on September 24, 2021 issued Order No. 21-UI-175595, affirming decision # 63440. On October 1, 2021, the employer filed an application for review with the Employment Appeals Board (EAB).

WRITTEN ARGUMENT: The employer and claimant submitted written arguments to EAB. Neither the employer nor claimant declared that they provided copies of their arguments to the opposing party or parties as required by OAR 471-041-0080(2)(a) (May 13, 2019). The arguments also contained information that was not part of the hearing record, and did not show that factors or circumstances beyond the parties' reasonable control prevented them from offering the information during the hearing as required by OAR 471-041-0090 (May 13, 2019). EAB considered only information received into evidence at the hearing when reaching this decision. *See* ORS 657.275(2).

FINDINGS OF FACT: (1) Chiddix Enterprises, a general contractor, employed claimant as a carpenter from 2017 until April 13, 2021.

(2) The employer expected their employees to refrain from reporting to work under the influence of intoxicants, leaving work during a shift without authorization, or threatening to harm coworkers. Claimant understood the employer's expectations.

(3) In early March 2021, someone working with claimant at a jobsite told the employer that claimant appeared to be under the influence of alcohol at work one day. Claimant learned of the report and suspected a particular coworker had reported his alleged conduct to the employer.

(4) On April 12, 2021, claimant reported to work at a commercial jobsite. It was the first time claimant had worked with the coworker he suspected had reported him for allegedly being under the influence of alcohol at work in early March 2021. Claimant confronted the coworker by asking him if he was the person who made the report, which the coworker denied. Claimant suspected that the coworker was lying, but did not want to discuss the matter further. The coworker approached claimant ten to fifteen time times over the next few hours, each time insisting that he had not reported claimant to the employer. Claimant became frustrated because he did not want to discuss the matter further, and believed the coworker was repeatedly lying to him. Claimant attempted to speak with the employer's owner about the matter and to inform him that he felt unable to continue working with the coworker that day. Claimant left work when there appeared to be no more work to complete other than cleaning up the jobsite. Claimant did not stay to clean the jobsite because he was frustrated with when the coworker continued to insist that he had not reported claimant.

(5) After claimant left the jobsite on April 12, 2021, two employees contacted the employer's general manager and reported that claimant had left work and that before claimant left, they had observed him acting as though he might be "impaired" because he was "incoherent, slurring words" and engaging in "erratic behavior." Transcript at 13.

(6) Later on April 12, 2021, claimant learned that someone had reported him to the employer that day for allegedly being under the influence of intoxicants at work. Claimant believed it was the same employee who he believed had reported him for similar conduct in March 2021. At approximately 6:30 p.m., claimant called a different coworker to ask if he knew who had contacted the general manager about him that day. Claimant told him, "I swear to God if this guy's talking crap about me again I'm gonna kill him." Transcript at 31-32. Claimant ended the call and the employee called the employee that claimant had threatened and told him what claimant had stated. Claimant was no longer willing to work with the employee he believed had reported him to the employer twice.

(7) The wife of the employee claimant threatened called the employer's general contractor "hysterically" and expressed that she was "fearful for her life" because her husband had told her that claimant threatened to kill him. Transcript at 6.

(8) The general manager spoke with the employer's owner about claimant's threatening statement. The owner and the general manager decided the employer did not want to employ someone who would call and threaten the life of another employee regardless of whether they were capable of harming the other employee.

(9) Claimant had never previously engaged in threatening or violent behavior while working for the employer.

(10) The next morning, on April 13, 2021, the employer discharged claimant for stating to an employee that he would "kill" another employee, for allegedly being under the influence of intoxicants at work on April 12, 2021, and for leaving work before the jobsite was cleaned on April 12, 2021. Transcript at 12.

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 and good faith errors are not misconduct. OAR 471-030-0038(3)(b).

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 order under review concluded that claimant was discharged for being under the influence of intoxicants, leaving work without permission, and threatening violence toward a coworker, all on April 12, 2021. Order No. 21-UI-175595 at 4. The order concluded that the employer failed to meet their burden to show that claimant violated their policy against reporting to work under the influence of intoxicants, and that to the extent claimant left work without permission on April 12, 2021, his violation of the employer’s expectations was a good faith error. Order No. 21-UI-175595 at 4. These portions of the order under review are supported by the record.

The employer discharged claimant in part for being under the influence of intoxicants at work on April 12, 2012. However, claimant testified that he was not under the influence of alcohol or drugs while at work on April 12, 2021. Transcript at 33. The preponderance of the evidence in the record does not show otherwise. The employer's witness at hearing did not have firsthand knowledge regarding claimant's conduct at work on April 12, 2021, and the employer did not ask claimant to be tested for drugs or alcohol on April 12, 2021. To the extent the employer discharged claimant for being impaired by intoxicants at work on April 12, 2021, the record does not support that claimant was impaired.

The employer also discharged claimant in part because he left work before the work site was cleaned up on April 12, 2021. To the extent the employer discharged claimant for this reason, the record does not show that claimant was indifferent to the consequences of his actions, or that he knew or should have known such an act would violate the employer's expectations. Claimant worked until he had completed his personal tasks on the job site, but did not stay to clean the site. Given claimant's frustration with his coworker throughout the day and his failed attempts to contact the owner about his frustration, the record does not show that claimant knew the employer expected him to continue working to clean the jobsite, rather than leave work to avoid further confrontations with the coworker. The record shows that, at worst, claimant's conduct was a good faith error and not a willful or wantonly negligent violation of the employer's standards of behavior. Because claimant's conduct was no more than a good faith error, claimant's conduct was not misconduct.

However, to the extent the employer discharged claimant for violating their expectation that employees not threaten violence toward other employees, the record does not support the order's conclusion that claimant's statement that he would "kill" his coworker was an isolated instance of poor judgment, and not misconduct. *See* Order No. 21-UI-175595 at 4. In so concluding, the order reasoned that because claimant testified credibly that he did not intend to threaten to harm his coworker and made the statement indirectly to a third party rather than directly to the coworker, making the statement was an isolated instance of poor judgment. Order No. 21-UI-175595 at 4.

It was undisputed that claimant told a coworker that he would "kill" another coworker if claimant learned that that coworker reported claimant's April 12, 2021 conduct at work to the employer. Claimant testified that by this statement, he did not mean he would physically harm the other employee, but meant that he was not willing to work on the same jobsite with the employee in the future. Transcript at 32. Even assuming claimant did not intend to harm the other employee, the employer's expectation that claimant not threaten other employees was reasonable, and claimant violated that expectation.

A single act of willful or wantonly negligent behavior cannot be excused as an isolated instance of poor judgment if, among other things, it was tantamount to unlawful conduct or was the sort of behavior that caused an irreparable breach of trust in the employment relationship or otherwise made a continued employment relationship impossible. OAR 471-030-0038(1)(d)(D). Claimant's statement that he would kill another employee if the employee had reported claimant for allegedly being intoxicated at work was the sort of behavior that a reasonable employer would conclude made a continued employment relationship impossible, thus exceeding poor judgment. Under the circumstances, the employer could not know for certain, and should not be tasked with having to determine, if claimant intended to harm his coworker. It was not a situation where nobody took claimant's statement seriously, as was shown by the person who heard the statement immediately reporting it to the employee who was the subject of the threat, and the reaction of that person's spouse. Moreover, refusing to work with another employee

under the circumstances would more likely than not also have made a continued employment relationship impossible. Therefore, claimant's threat to kill the coworker was not an isolated instance of poor judgment.

Claimant's conduct cannot be excused as a good faith error. The record does not show that claimant had a rational basis for believing that the employer would condone his threatening another employee. Nor did he have a basis for believing that he had not threatened the other employee under the circumstances described at the hearing.

For the above reasons, claimant was discharged claimant for misconduct and is disqualified from receiving unemployment insurance benefits effective April 11, 2021.

DECISION: Order No. 21-UI-175595 is set aside, as outlined above.

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

DATE of Service: November 8, 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 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.

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