

EMPLOYMENT APPEALS BOARD DECISION
2021-EAB-0844

Reversed
No Disqualification

PROCEDURAL HISTORY: On July 8, 2021, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that the employer discharged claimant for misconduct and claimant was disqualified from receiving unemployment insurance benefits effective June 6, 2021 (decision # 92927). Claimant filed a timely request for hearing. On September 27, 2021, ALJ L. Lee conducted a hearing, and on October 5, 2021 issued Order No. 21-UI-176441, affirming decision # 92927. On October 16, 2021, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Safeway Stores, Inc. employed claimant as a food clerk from December 2019 to June 8, 2021.

(2) On November 20, 2020, claimant and a coworker engaged in a verbal argument where each thought the other had been rude. The employer decided against the issuance of a written warning to either individual. The employer had both individuals re-sign their receipt of a copy of the employer's "Courtesy, Dignity, and Respect" (CDR) policy which, among other provisions, required employees to conduct themselves professionally and refrain from disrespectful behavior to customers, other employees, and vendors, including harassing or discriminatory conduct or actions "based on classifications protected under the law." Exhibit 1 at E-3.

(3) On March 18, 2021, claimant was issued a written "last and final warning" for violating the CDR policy when she yelled at the assistant store director in front of coworkers and customers while in the front end of the employer's store. Claimant disagreed with the employer's decision to take disciplinary action against her, but she understood it was a final warning.

(4) On May 19, 2021, the store director told claimant that he had to cut her hours for the next two weeks. Because this conversation took place near the store's "bread wall," and because claimant believed the rest of the conversation "was gonna not be so good" due to her "agitation" at having her hours cut,

claimant asked the store director to continue the conversation in his office. Transcript at 9-10, 29. The store director agreed to continue the conversation in the store's backroom instead.

(5) During the conversation over claimant's hours, a nearby store vendor approached claimant and the store director to walk past them. The approaching store vendor made claimant "really anxious" because she recognized him as the person she believed had committed a criminal offense against her 18 years earlier. Transcript at 29. Referring to the store vendor, claimant told the store director "she did not want to speak in front of that faggot" because she did not want the store vendor to be aware of any of "[her] business" and she wanted the store director to briefly discontinue the conversation. Transcript at 9, 29. Although the store director had tolerated employees using foul language in the backroom away from customers, he reacted with "shock" to claimant's comment because, as opposed to general foul language, claimant had directed the homophobic slur toward the store vendor. Transcript at 9, 29. The store director told claimant she could not speak that way and that she needed to calm down or go home. Claimant agreed to calm down and continued working.

(6) Claimant had never previously directed foul language or a discriminatory slur toward an individual while working for the employer. With the exception of the store director with whom claimant was speaking, neither the store vendor, nor any customers or other coworkers heard claimant's use of the slur.

(7) The employer investigated the circumstances surrounding claimant's conduct on May 19, 2021. On June 8, 2021, the employer discharged claimant for being a repeat violator of the employer's CDR policy based upon her use of the homophobic slur toward the store vendor on May 19, 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) (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 CDR policy that addressed the employer's expectation that employees act professionally at all times and treat customers, other employees, and vendors with respect, which included not making discriminatory comments toward an individual "based on classifications protected under the law." Claimant was aware of this policy.

The preponderance of the evidence shows that claimant violated the CDR policy, and hence the employer's reasonable expectation, when, on May 19, 2021, she uttered a homophobic slur to the store director. The record shows that claimant was conscious of her actions when she uttered the slur to the store director and that she should have known that the discriminatory word she used was a violation of the employer's reasonable expectation for employee conduct. Furthermore, it is irrelevant that neither the individual to whom claimant's discriminatory reference was directed, nor any other customers, actually heard claimant make the slur. The record demonstrates that the store director, who is claimant's coworker, heard claimant make the derogatory reference and this was sufficient to show a CDR policy violation.

However, it is necessary to determine if claimant's conduct was an isolated instance of poor judgment and therefore not misconduct. Conduct is "isolated" if it is a single or infrequent. Regarding whether it was an isolated act, the record shows that on March 18, 2021, claimant had previously violated the employer's CDR policy by yelling at, and being disrespectful to, an assistant store director. However, this prior CDR policy violation was qualitatively different than the circumstances surrounding her May 19, 2021 utterance of the homophobic slur to the store director because the March 18, 2021 incident "was witnessed by customers and other employees" at the time and, thus, the public nature of the CDR violation was a focal point of the disciplinary action that followed. Exhibit 1 at E-1. Conversely, claimant's May 19, 2021 homophobic slur was only heard by the store director and only occurred after claimant unsuccessfully attempted to have the store director continue the hour-reduction conversation in his office, it occurred in the context of a reaction to the presence of a vendor claimant believed committed a crime against her, and the record shows that claimant had never directed any foul language toward another individual while working for the employer. As for the November 20, 2020 incident

where claimant and a coworker engaged in a verbal argument, the record shows that the employer did not deem this incident to be a violation of the CDR policy that warranted a disciplinary response. Rather than a written warning, the employer directed claimant and her coworker to re-sign the CDR policy. Thus, given the infrequent and qualitative difference between the March 18, 2021 incident and the May 19, 2021 incident, and in light of the fact that claimant did not violate the CDR policy on November 20, 2020, the record supports the conclusion that claimant's May 19, 2021 slur was an isolated act.

Claimant's May 19, 2019 slur was also an act that involved poor judgment. Specifically, because claimant's May 19, 2019 homophobic slur was a conscious action on her part reflecting an indifference to the consequences of her words, and made under circumstances where she should have known she had violated the employer's reasonable expectations, it follows that her homophobic slur was an act that involved poor judgment.

Moreover, when considered in context, the record shows that claimant's homophobic slur neither created an irreparable breach of trust in her relationship with the employer, nor made a continued employment relationship impossible. Here, claimant tried to have a private conversation about her hour reduction with the store director in the store director's office because she knew it "was gonna not be so good," but the store director insisted on having the conversation in the backroom. Claimant's effort in this regard reflects a concern for the perceptions of customers and other coworkers at seeing an "agitated" employee talking to her supervisor and her attempt to try to address that concern by having the meeting behind closed doors, only to be prevented by the store director's insistence that the meeting occur in the backroom. In other words, claimant's actions preceding her use of the foul and discriminatory language reflected a concern for the interests of the employer, and supports that her conduct did not amount to an irreparable breach of trust or make a continued employment relationship impossible.

Furthermore, until May 19, 2021, the record shows that claimant had never directed any foul language toward another individual while working for the employer. Likewise, the record shows that in making the discriminatory utterance, claimant had no discriminatory intent. Specifically, the record shows that claimant's comment came after she became "really anxious" at the nearby presence of the store vendor, an individual claimant believed had committed a serious criminal offense against her 18 years earlier. When asked why she would have chosen the slur as opposed to other derogatory words, claimant credibly testified that she did not know, that she did not have any problem with homosexuals in general, and that, as far as she knew, the store vendor was not a homosexual. Transcript at 37. Under these circumstances, the record does not support the conclusion that an irreparable breach of trust in claimant's relationship with the employer was created. Rather, the preponderance of the evidence supports that claimant's conduct on May 19, 2021 was an isolated instance of poor judgment. As such, claimant is not disqualified from receiving unemployment insurance benefits.

DECISION: Order No. 21-UI-176441 is set aside, as outlined above.

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

DATE of Service: November 23, 2021

NOTE: This decision reverses an order that denied benefits. Please note that payment of benefits, if any are owed, may take approximately a week for the Department to complete.

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.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.

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.