

EMPLOYMENT APPEALS BOARD DECISION
2021-EAB-0979

Affirmed
Disqualification

PROCEDURAL HISTORY: On September 28, 2021, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant was discharged, but not for misconduct, and was not disqualified from receiving unemployment insurance benefits based on the work separation (decision # 83026). The employer filed a timely request for hearing. On November 2, 2021, ALJ Roberts conducted a hearing, and on November 4, 2021 issued Order No. 21-UI-178957, reversing decision # 83026 by concluding that claimant was discharged for misconduct and was disqualified from receiving benefits effective August 29, 2021. On November 10, 2021, claimant filed an application for review with the Employment Appeals Board (EAB).

WRITTEN ARGUMENT: Claimant did not declare that he provided a copy of his argument to the opposing party or parties as required by OAR 471-041-0080(2)(a) (May 13, 2019). The argument also contained information that was not part of the hearing record, and did not show that factors or circumstances beyond claimant's reasonable control prevented him 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) Ron Tonkin Gresham Hyundai employed claimant as a technician at their auto dealership from June 20, 2017 until September 3, 2021.

(2) The employer's policy forbid employees from creating a "harassing work environment." Transcript at 10. Claimant knew or had reason to know about this policy.

(3) In 2019, the employer suspended claimant from work after claimant called the dealership's service writer a "bitch." Transcript at 15-16.

(4) In August 2021, claimant developed a serious health condition that began to cause him stress and feel "lightheaded" during the workday. Transcript at 17. Around that time, other employees noticed that claimant had been acting differently than usual.

(5) On September 3, 2021, claimant and the dealership's service writer became involved in a disagreement over paperwork that the service writer had directed claimant to complete. As a result of the disagreement, claimant again called the service writer a "bitch." Transcript at 7. When the service writer told claimant that she would report him to the general manager—who was Black—for having called her a "bitch," claimant responded that he "didn't care . . . what that 'N' word thinks about [claimant][.]" Transcript at 22.

(6) Later on September 3, 2021, the general manager learned that claimant had used the slur in reference to him, and discharged claimant that day due to the severity of the language that claimant had used. The employer had never had any disciplinary issues with claimant other than the incident on September 3, 2021 and the suspension in 2019.

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). "[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 due to his use of a racial slur, shortly after claimant had called a female coworker a “bitch” during an incident on September 3, 2021. At hearing, the report of claimant’s use of the slur was made by the employer’s service manager, who testified that while he had not witnessed the incident directly, he was informed of what had happened by the service writer who was involved in the incident. Transcript at 21–22. Claimant was unable to recall whether or not he had actually used the slur in question, and testified that “. . . things were said in the moment, but it was just because I was upset. I didn’t mean anything that I said.” Transcript at 12. Claimant also testified that he would have been surprised to learn that he used the slur in question, and that he did not think it would have been acceptable to use the slur in reference to his Black manager. Transcript at 14, 20. However, claimant did not refute the assertion that he had actually used the slur on September 3, 2021. Therefore, while the record lacks a first-person account as to whether claimant actually used the slur, the only definitive evidence in the record shows that claimant did use it as alleged. Further, claimant’s testimony that he was aware that the use of such language was not acceptable shows that claimant either willfully, or with wanton negligence, violated the employer’s standards of behavior.

Claimant’s conduct cannot be excused as an isolated instance of poor judgment because his use of the slur exceeded mere poor judgment by making a continued employment relationship impossible. The Court of Appeals has developed a non-exclusive list of both aggravating and mitigating factors to consider when determining whether particular conduct is sufficiently severe to make a continuing employment relationship impossible. Mitigating factors include expressed remorse, the relative mildness of the behavior, the lack of intent to harass or annoy, and an exemplary work history; aggravating factors include anger that is disproportional to the provocation, verbal threats of physical harm, persistence in pursuing the argument beyond a brief period, obscenity or vulgarity that is not “mild,” and repeated use of insulting vulgarity after an explicit warning to stop. *Double K Kleaning Service, Inc. v. Employment Dept.*, 191 Or App 374, 379, 82 P3d 642 (2003). Here, while claimant testified at hearing that he “didn’t mean” what he said, there is no indication in the record that he expressed any sort of remorse for his behavior at the time that it occurred. Additionally, the slur in question cannot reasonably be considered “mild”—its use is generally accepted to be highly offensive—and claimant used it completely unprovoked in reference to a person who was not involved in the dispute that led to it. Also, while claimant suggested that he had been upset and feeling unwell due to his recent medical concern, claimant did not show that he was unable to control his actions as a result of that condition. Under the circumstances, no reasonable employer would consider it possible to continue to employ claimant after his use of that word in reference to his manager (or any other person). Therefore, claimant’s conduct was not an isolated instance of poor judgment.

For the above reasons, claimant was discharged for misconduct, and is disqualified from receiving unemployment insurance benefits effective August 29, 2021.

DECISION: Order No. 21-UI-178957 is affirmed.

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

DATE of Service: December 17, 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 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.

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