

EMPLOYMENT APPEALS BOARD DECISION
2021-EAB-1054

Affirmed
No Disqualification

PROCEDURAL HISTORY: On October 28, 2021, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that the employer discharged claimant for misconduct, disqualifying claimant from receiving unemployment insurance benefits effective September 26, 2021 (decision # 111603). Claimant filed a timely request for hearing. On November 22, 2021, ALJ Ramey conducted a hearing, and on November 30, 2021 issued Order No. 21-UI-180719, reversing decision # 111603 by concluding that claimant's discharge was not for misconduct, and did not disqualify claimant from receiving benefits based on the work separation. On December 7, 2021, the employer filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Cinders Café/Worden Truck Stop employed claimant as a cook from July 20, 2021 to October 5, 2021.

(2) The employer expected their employees to be courteous to coworkers and customers and to refrain from verbally harassing them. Claimant was aware of the employer's expectations.

(3) The employer had video and audio recording systems on their premises that allowed them to review the conduct and conversations that occurred in their restaurant.

(4) On or about September 15, 2021, the employer received a report about a disagreement between claimant and a male server over a restaurant order for which the server "rang in the wrong thing." Transcript at 44-45. Claimant reportedly used foul language toward the server when the server requested that claimant correct the food order. The owner did not review an audio or video recording of that incident.

(5) On or about September 17, 2021, the employer received complaints from two servers about claimant using foul language toward the servers in separate incidents when they asked claimant to correct their

food orders. The employer did not receive “specifics” from the servers about what claimant reportedly said to them and did not review an audio or video recording of those incidents. Transcript at 24.

(6) On September 19, 2021, the owner met with claimant about the complaints from the servers on September 15, 2021 and September 17, 2021, and verbally warned claimant against engaging in similar conduct in the future. During the meeting with the owner, claimant did not admit to using foul language when speaking to the servers who made the complaints.

(7) On October 1, 2021, the employer received a written statement from a server and a report from a customer stating that claimant used foul language toward the server when she asked claimant to correct food orders. The server reported that she returned some food to claimant in the kitchen after the customer complained that the food was cold. After the food was reheated and returned to the customer, the customer then complained that other food they had ordered was also not prepared as requested and was cold. When the server returned the food to the kitchen and spoke to claimant again about correcting the order, claimant responded “loudly” that it was not his “fucking fault” that the order was taken wrong, and also stated, “I’m sick and tired of this bullshit.” Transcript at 10. The employer’s owner reviewed the audio and video recording of that incident which showed that claimant responded loudly and “in an aggressive manner” to the server when she brought the food back to the kitchen the second time. Transcript at 20.

(8) On October 5, 2021, the employer discharged claimant for verbal harassment of the server on October 1, 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).

The employer discharged claimant for verbally harassing his coworker on October 1, 2021. Claimant was aware of the employer’s expectation that employees be courteous to coworkers and refrain from verbally harassing them. Transcript at 36-37. The preponderance of the evidence shows that claimant violated the employer’s expectations on October 1, 2021 when he loudly responded to the server that it was not his “fucking fault” that the order was taken wrong, and also stated, “I’m sick and tired of this bullshit.” At hearing, claimant denied that he used “any profanity” or “verbally” harassed anyone on October 1, 2021. Transcript at 33, 36. The server’s written statement alleging that claimant used foul language toward her was hearsay. However, the server’s written statement was corroborated by the

owner's non-hearsay testimony that he reviewed the audio and video recording of the October 1, 2021 incident showing that claimant responded to the server loudly and "in an aggressive manner" when she brought the food back to the kitchen. Transcript at 20. Taken together with the owner's testimony, the server's statement, and the allegations it contained, outweighed claimant's denials at hearing. That evidence is sufficient to establish that on October 1, 2021, claimant consciously violated the employer's expectations regarding behavior toward coworkers by loudly stating to the server that it was not his "fucking fault" that the order was taken wrong and, "I'm sick and tired of this bullshit." Claimant knew or should have known his conduct probably violated the employer's expectations. More likely than not, claimant's October 1, 2021 conduct was at least a wantonly negligent violation of those expectations.

Nevertheless, the record fails to show that claimant's October 1, 2021 conduct constituted misconduct, rather than 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 although claimant was given a verbal warning on September 19, 2021 about the complaints that had been made by the servers on September 15, 2021 and September 17, 2021, it fails to show that claimant engaged in the conduct for which he was warned. The record does not show that the servers in question provided statements to the employer that described claimant's conduct in detail, or that the owner reviewed the audio and video recordings of those incidents to corroborate the servers' complaints. Claimant testified that he had a disagreement with the server on September 15, 2021, but did not admit to conduct that would have violated the employer's expectations on that date. Transcript at 48. Claimant also denied that he violated the employer's expectations regarding the reported complaints on September 17, 2021. Transcript at 39. For these reasons, the evidence as to whether claimant's reported violations of the employer's expectations on

September 15, 2021 and September 17, 2021 was either willful or wantonly negligent is at best equally balanced. Where the evidence is no more than equally balanced, the party with the burden of persuasion - here, the employer - has failed to satisfy their evidentiary burden. The record therefore does not show that the incidents that reportedly occurred prior to October 1, 2021 constituted incidents of willful or wantonly negligent behavior. Accordingly, claimant's wantonly negligent conduct on October 1, 2021 was an isolated act of poor judgment.

An isolated instance of poor judgment can constitute misconduct if it exceeds mere poor judgment. Here, the record does not show that claimant's conduct on October 1, 2021 exceeded mere poor judgment because it did not violate the law and was not tantamount to unlawful conduct. Nor, viewed objectively, was claimant's brief emotional outburst so egregious that it created an irreparable breach of trust or otherwise make a continued employment relationship impossible. The record therefore fails to establish that claimant's conduct exceeded mere poor judgment.

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

DECISION: Order No. 21-UI-180719 is affirmed.

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

DATE of Service: January 14, 2022

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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