

EMPLOYMENT APPEALS BOARD DECISION
2022-EAB-0775

Affirmed
Disqualification

PROCEDURAL HISTORY: On April 14, 2022, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that the employer discharged claimant but not for misconduct, and claimant was not disqualified from receiving unemployment insurance benefits based on the work separation (decision # 123341). The employer filed a timely request for hearing. On June 28, 2022, ALJ Demarest conducted a hearing, and on June 29, 2022 issued Order No. 22-UI-197112, reversing decision # 123341 by concluding that claimant was discharged for misconduct and was disqualified from receiving unemployment insurance benefits effective March 13, 2022. On July 11, 2022, claimant filed a timely application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Claimant worked for Amazon.Com Services Inc. from September 21, 2019 to March 17, 2022. Claimant worked as a sortation associate.

(2) The employer had a code of conduct that contained a policy against harassment. Claimant was aware that the employer did not accept harassment in the workplace.

(3) On November 10, 2021, claimant received a warning for allegedly harassing a co-worker. The co-worker stated that claimant said "Next time move, bitch."

(4) On February 6, 2022, claimant came out of a break room as other workers were returning to work and proceeded to walk directly down an aisle, crossed another aisle against the flow of foot traffic, and bumped into a co-worker. The individual that claimant bumped was the co-worker that had previously reported claimant for cursing at them. This co-worker believed that the bump was intentional and reported claimant to Human Resources (H.R.).

(5) H.R. conducted an investigation into the bumping incident. They spoke with the co-worker who claimant bumped, another witness, and reviewed video footage. H.R. determined that claimant had intentionally bumped into this co-worker.

(6) On March 17, 2022, the employer discharged claimant for violating its harassment policy by intentionally bumping into the co-worker.

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

The record shows that on February 6, 2022, claimant intentionally bumped into another co-worker. At hearing, claimant and the employer disagreed about the details of the incident. The employer testified that claimant followed the co-worker and then crossed against the flow of foot traffic to bump into them. Transcript at 6-7. Claimant testified that he accidentally bumped into an entirely different co-worker. Transcript at 42-43. The employer’s witness was not present at the incident, but personally viewed the video footage of the incident. Transcript at 39. Considering that claimant needed to cross aisles against the flow of traffic, that there were multiple witnesses to the event who reported it to the employer, and that the employer’s witness personally watched the video footage, the record shows, more likely than not, that claimant intentionally bumped into his co-worker. Intentionally bumping into a co-worker violated the employer’s anti-harassment policy, and claimant did so with at least wanton negligence. The employer had previously made claimant aware of the anti-harassment policy, and claimant understood that this policy was in place. Claimant knew or should have known that intentionally bumping into another individual would violate this policy. Claimant therefore knew or should have known that he was violating a reasonable employer expectation.

This incident also exceeded mere poor judgment and was tantamount to unlawful conduct. 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 this standard, the record shows that claimant's violation of the employer's expectations exceeded mere poor judgment. Claimant's conduct arguably violated the law and was at least tantamount to criminal harassment. Under ORS 166.065(1)(a)(A), a person commits the crime of harassment if the person intentionally harasses or annoys another person by subjecting them to offensive physical contact. Bumping into someone is an offensive physical contact. Claimant's actions, following his co-worker and crossing aisles of traffic to bump into them, reveal that this was an intentional act. Further, the nature of claimant's action, claimant's lack of alternative motivations, and the individual targeted, all show that this contact was more likely than not intended to harass or annoy. Consequently, claimant's action of intentionally bumping into his co-worker was tantamount to unlawful conduct under ORS 166.065(1)(a)(A).

For these reasons, claimant's conduct cannot be excused as an isolated instance of poor judgment or a good faith error. Claimant was discharged for misconduct, and is disqualified from receiving unemployment benefits based on his work separation from the employer.

DECISION: Order No. 22-UI-197112 is affirmed.

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

DATE of Service: October 12, 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 ໄດ້ໂດຍປະຕິບັດຕາມຄໍາແນະນໍາທີ່ບອກໄວ້ຢູ່ຕອນທ້າຍຂອງຄໍາຕັດສິນນີ້.

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.

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