

EMPLOYMENT APPEALS BOARD DECISION
2022-EAB-0888

Reversed
No Disqualification

PROCEDURAL HISTORY: On June 7, 2022, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant was suspended from work, but not for misconduct, and was not disqualified from receiving unemployment insurance benefits based on the suspension from work (decision # 80849). The employer filed a timely request for hearing. On August 3, 2022, ALJ Scott conducted a hearing and issued Order No. 22-UI-199679, reversing decision # 80849 by concluding that claimant was discharged for misconduct and therefore disqualified from receiving unemployment insurance benefits effective May 8, 2022. On August 6, 2022, claimant filed an application for review with the Employment Appeals Board (EAB).

WRITTEN ARGUMENT: EAB did not consider claimant's written argument when reaching this decision because he did not include a statement declaring 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).

FINDINGS OF FACT: (1) Brightwood Corporation employed claimant as a forklift operator at their lumber mill from December 4, 2017 until May 12, 2022.

(2) The employer maintained a policy which required employees "to conduct themselves in a manner that another person or group of persons will not interpret as offensive." Exhibit 1 at 7. This policy was contained within the employer's handbook, which they provided to claimant when he was hired.

(3) On July 24, 2019, claimant told his lead worker to "fuck off" in front of other employees when the lead worker gave claimant work instructions. Exhibit 1 at 8. Claimant did not intend for the statement to be received seriously, as claimant and the lead worker were friends and they would both "flip each other crap all the time." Transcript at 27. However, the lead worker believed claimant to be serious and took offense. On July 25, 2019, when claimant's supervisor spoke to him about the incident the previous day, claimant became "self-defensive and argumentative" and used foul language towards the supervisor. Exhibit 1 at 8. In response, the supervisor told claimant that he needed to "work on his language." Exhibit 1 at 8.

(4) On or around October 23, 2019, another employee was concerned about the safety of a load of material that claimant was carrying, although claimant was not actually acting in an unsafe manner. As a result, claimant “got really aggravated” with the other employee. Transcript at 14. The plant manager spoke to claimant about the incident and advised him to get a supervisor or manager involved in the future, rather than arguing with another coworker. Claimant admitted to the manager that he did not have “the best people skills” but was “really. . . trying and want[ed] to do the best job” for the employer. Exhibit 1 at 11.

(5) On May 10, 2022, claimant became frustrated and upset about a situation at work that resulted, in part, from inadequate personnel coverage in one of the areas that claimant was assigned to work. Claimant subsequently went to speak to his supervisor about the matter and request his help. The supervisor “kept on interrupting” claimant as claimant tried to explain the situation, told claimant that “it’s not a big deal,” and that claimant could handle the matter by himself. Transcript at 25. In response, claimant became “severely frustrated” and used foul language towards the supervisor, such as stating that it was “fucked up” how the supervisor was treating him. Transcript at 26.

(6) Because of how claimant spoke to him, the supervisor sent claimant home for the day and told him not to return to work until he heard from management or human resources. Claimant became more upset at these instructions, and told the supervisor that he should fire claimant, or else claimant would transfer to a different department or “go elsewhere.” Transcript at 27. Claimant then went home and did not return to work.

(7) On May 12, 2022, the employer discharged claimant due to “insubordination” in connection with the events of May 10, 2022. Exhibit 1 at 5.

CONCLUSIONS AND REASONS: Claimant was discharged, 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 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 behavior on May 10, 2022, in which he became upset and used foul language during an interaction with his supervisor. The order under review concluded that this constituted misconduct because the employer had previously warned him about similar conduct; and because it was not an isolated instance of poor judgment, as "there was a pattern of claimant losing his temper and using profanity." Order No. 22-UI-199679 at 4–5. The record does not support this conclusion.

As a preliminary matter, while the parties generally agreed about the events that led the employer to discharge claimant, they offered differing accounts of some details. Notably, the employer's witness (claimant's supervisor) testified that during their interaction on May 10, 2022, claimant called him a "bitch" and a "motherfucker." Transcript at 7. Claimant denied this, testifying that while he did use foul language during their interaction, he did not use those epithets, but instead voiced his frustration by telling the supervisor that it was "fucked up" how he was being treated, and similar. Transcript at 26. In considering these conflicting accounts, the order under review determined that the employer's witness was more credible because while "claimant's unemployment insurance benefits are at stake; [the supervisor] has no apparent compelling reason to lie under oath." Order No. 22-UI-199679 at 3. The order under review further reasoned that "it is likely that, in his agitated state, which claimant does not deny, he was so agitated that he does not specifically recall using those terms when addressing [his supervisor]." Order No. 22-UI-199679 at 3. This credibility determination is not supported by substantial reason.

As stated above, the burden of proof in a discharge case lies with the employer. Thus, when the evidence on a particular point is equally balanced, the employer has failed to meet their burden of proof. Here, neither party offered evidence to corroborate their version of events. While the order under review suggested that claimant "likely" did not recall the specifics of what he said in his "agitated state," such an assertion without supporting evidence is conjecture. Claimant's testimony at hearing was generally internally consistent, and he offered his statements regarding this interaction without apparent hesitation or uncertainty.

Further, the assertion that claimant was more likely to testify falsely because his eligibility for benefits was at stake is inherently problematic. Even aside from the conflict that this assertion presents with the established burden of proof in discharge cases, the assertion also rests upon the mistaken assumption that an employer's witness would be unmotivated by material concerns. In fact, the record explicitly shows that the employer held such a concern in this case, as the employer unsuccessfully sought a relief of charges for their account in connection with the payment of claimant's benefits. *See* Exhibit 1 at 3; ORS 657.471. Even if the employer's witness did not personally face a material loss were claimant to prevail at hearing, his employer did; and it is reasonable to presume that the employer's witness sought to protect the employer's interest.

In sum, the record does not show that claimant's testimony was inherently suspect because of the heightened emotional state he might have been in during the events of May 10, 2022, or that claimant was more likely to testify falsely based on the respective parties' material interests in the outcome. The evidence on this point is therefore equally balanced. As the employer bears the burden of proof, the record shows that, more likely than not, claimant's testimony was more accurate, and the facts have been found accordingly.

The record shows that claimant was aware of the employer's expectations regarding interactions with other employees, as claimant had received a copy of the employer's handbook, and as the employer had previously warned claimant about violations of those expectations. The record also shows that claimant had reason to know that his behavior on May 10, 2022, in which he used foul language while upset with his supervisor, would constitute a violation of those expectations by potentially offending the person to whom he was speaking. Therefore, claimant violated the employer's expectations with at least wanton negligence.

However, that violation was an isolated instance of poor judgment. Contrary to the conclusion reached by the order under review, claimant's conduct was isolated. The order under review suggested that the "pattern of claimant losing his temper and using profanity" meant that the conduct could not be considered isolated. However, the previous incidents occurred nearly three years before the incident that led the employer to discharge claimant. The record does not show that claimant committed any other willful or wantonly negligent violations of the employer's expectations between October 2019 and May 2022. OAR 471-030-0038(1)(d)(A) does not require that an instance of willful or wantonly negligent behavior be *unique* in order to be considered an isolated instance of poor judgment—only that it be *isolated*. In the context of claimant's approximately four-and-a-half year tenure with the employer, the recurrence of behavior that claimant had not previously engaged in for the past two and a half years is reasonably construed as "isolated." Therefore, for purposes of this analysis, claimant's behavior was isolated.

Further, as discussed above, the employer did not meet their burden of proof to show that claimant called the supervisor names (such as "bitch" or "motherfucker") during their interaction on May 10, 2022. Neither did claimant's conduct violate the law or create an irreparable breach of trust with the employer. Therefore, claimant's conduct, while a violation of the employer's expectations, did not exceed mere poor judgment. As such, claimant's conduct on May 10, 2022 was an isolated instance of poor judgment and therefore not misconduct.

For the above reasons, claimant was discharged, but not for misconduct, and is not disqualified from receiving unemployment insurance benefits based on the work separation.

DECISION: Order No. 22-UI-199679 is set aside, as outlined above.

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

DATE of Service: November 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 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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