

EMPLOYMENT APPEALS BOARD DECISION
2022-EAB-0909

Reversed
No Disqualification

PROCEDURAL HISTORY: On May 20, 2021, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that the employer discharged claimant, but not for misconduct, and that claimant was not disqualified from receiving benefits based on the work separation (decision # 111013). The employer filed a timely request for hearing. On August 17, 2022, ALJ Amesbury conducted a hearing, and on August 19, 2022 issued Order No. 22-UI-200887, reversing decision # 111013 by concluding that claimant was discharged for misconduct, disqualifying claimant from receiving benefits effective April 11, 2021. On August 23, 2022, 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) Wal Mart Associates, Inc. employed claimant as a maintenance worker at one of their retail stores from December 2018 until April 17, 2021. Claimant was approximately 70 years old at the time he separated from the employer.

(2) The employer maintained a policy that, among other things, required employees to behave respectfully towards others and refrain from using or threatening to use violence toward others. Claimant was aware of and understood the employer's policy.

(3) Shortly after claimant began working for the employer, claimant was involved in an incident in which a coworker was "rude" toward claimant, who responded by raising his voice at the coworker. Transcript at 41. The employer warned claimant about violating their policy as a result of that incident.

(4) On or around April 10, 2021, the same coworker who had previously been “rude” told claimant that claimant had not finished cleaning the bathrooms faster because claimant was “old and slow.” Transcript at 40. Claimant responded by verbally protesting the coworker’s insult. A member of the employer’s management team viewed security footage of the incident and determined that claimant had “threatened” the coworker with a “weapon in his hand.” Transcript at 20. The employer began an investigation of the incident.

(5) On April 17, 2021, an assistant manager approached claimant and told him that she felt the restrooms had not been cleaned inadequately, and asked him to clean them. Claimant, who had cleaned the restrooms about 90 minutes prior, responded by stating that the “bathrooms are normally standing tall, but after an hour and a half of. . . customer use, they look like a Vietnam battlefield.” Transcript at 29. The person in charge felt that claimant was “yelling” at her when he responded. Transcript at 10. Afterwards, the store’s asset protection manager stepped between the two and told claimant, “You don’t talk to assistant managers like that.” Transcript at 28.

(6) On April 17, 2021, the employer discharged claimant based on the incident earlier that day.

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 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 during an interaction with a member of management who told him that the restrooms had been inadequately cleaned. The order under review concluded that this constituted misconduct because claimant's violation of the employer's policy was "willful" and was not an isolated instance of poor judgment because, among other factors, it was "too serious to overlook." Order No. 22-UI-200887 at 5. The record does not support this conclusion.

As a preliminary matter, the conclusion reached by the order under review is premised in part on a determination that the testimony of the assistant manager involved in the final incident was more likely accurate than claimant's. In particular, the order under review determined that the assistant manager's version of events, in which claimant "leaned over [her] and yelled in her face" during the incident, was more accurate than claimant's version, in which he "calmly explained to her the reasons [the bathrooms] were no longer clean." Order no. 22-U-200887 at 4. The order under review premised this on the fact that the asset protection manager intervened between the two despite the fact "neither claimant nor [the employer's witness] saw [the asset protection manager] anywhere around when their interaction began," suggesting that "their interaction was so loud that [the asset protection manager] could hear it from some distance away, and it was so alarming that he hurried to intervene and place himself between them." Order No. 22-U-200887 at 4. Such an inference is too speculative to be supported by substantial evidence. In fact, the evidence regarding the details of the final incident is, at best, evenly balanced. Thus, the employer has not met their burden to show that events occurred as their witness described.

Even if the record did show that claimant acted as the employer's witness described, the employer would not have met their burden to show that claimant's behavior constituted misconduct. The record shows that claimant was aware of the employer's policies requiring employees to behave respectfully towards others, and that claimant had been previously warned about violating this policy. Therefore, claimant's conduct would have violated the employer's policy with indifference to the consequences of his actions, and his actions therefore would have been, at best, wantonly negligent. However, claimant's actions would have constituted an isolated instance of poor judgment, and not misconduct.

Claimant's actions during the final incident were isolated. The employer alleged that about a week before the final incident, claimant had threatened another employee with a weapon in his hand. Claimant clarified at hearing that the "weapon" he was alleged to have wielded was a screwdriver. Transcript at 27. Claimant also denied threatening another employee, and explained that the only incident he recalled in that timeframe was an interaction with another employee who had insulted claimant as being "old and slow." Transcript at 40. Given that the employer's account of the incident was based entirely hearsay based on security footage of the incident, claimant's firsthand account is given more weight. Furthermore, even if claimant did have a screwdriver in his hand during the incident, it is entirely

plausible that, as a maintenance worker, he was merely gesturing with the object already in his hand, and was not using it in a threatening manner. The employer therefore failed to show that the incident occurring about a week before the final incident constituted a willful or wantonly negligent disregard of the employer's standards of behavior.

Likewise, even though claimant was warned for a previous violation of the employer's policy shortly after he was hired, the record does not contain enough information to show what claimant actually did that led to the warning, and therefore does not show, by a preponderance of the evidence, that claimant violated the employer's policy willfully or with wanton negligence. And even if the record did show that, a single incident occurring a year or two before the final incident is insufficient to show that claimant's actions during the final incident was a repeated act or part of a pattern of willful or wantonly negligent behavior, and not an infrequent occurrence. Thus, to the extent that claimant's conduct during the final incident was willful or wantonly negligent, it was also isolated.

Finally, the employer has not met their burden to show that claimant's conduct during the final incident exceeded mere poor judgment. In order for conduct to exceed mere poor judgment, it must violate the law or be tantamount to unlawful conduct, create an irreparable breach of trust in the employment relationship, or otherwise make a continued employment relationship impossible. The record does not show that claimant's interaction with the assistant manager on April 17, 2021 either violated the law or was tantamount to unlawful conduct, or so egregious that it created an irreparable breach of trust in the employment relationship. Nor does it show that claimant's conduct otherwise made a continued employment relationship impossible. Thus, even if claimant's conduct during the final incident was as the employer described, it was still an isolated instance of poor judgment, and 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-200887 is set aside, as outlined above.

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

DATE of Service: November 29, 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.

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.

Please help us improve our service by completing an online customer service survey. To complete the survey, please go to <https://www.surveygizmo.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 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 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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