

EMPLOYMENT APPEALS BOARD DECISION
2022-EAB-1122

Affirmed
Disqualification

PROCEDURAL HISTORY: On August 23, 2022, 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 unemployment insurance benefits based on the work separation (decision # 123139). The employer filed a timely request for hearing. On October 19, 2022, ALJ Goodrich conducted a hearing, and on October 21, 2022, issued Order No. 22-UI-205667, reversing decision # 123139, and concluding that claimant was discharged for misconduct and was disqualified from receiving benefits effective July 31, 2022. On November 8, 2022, claimant filed an application for review with the Employment Appeals Board (EAB).

WRITTEN ARGUMENT: EAB considered claimant's written argument to the extent it was based on the hearing record. Claimant asserted that the hearing proceedings were unfair or the ALJ was biased. EAB reviewed the hearing record in its entirety, which shows that the ALJ inquired fully into the matters at issue and gave all parties reasonable opportunity for a fair hearing as required by ORS 657.270(3) and (4) and OAR 471-040-0025(1) (August 1, 2004). Claimant objected to the admission of pages 25 through 44 of Exhibit 1 because they were irrelevant. OAR 471-040-0025(5) provides in pertinent part: "Irrelevant, immaterial, or unduly repetitious evidence shall be excluded but erroneous rulings on evidence shall not preclude the administrative law judge from entering a decision unless shown to have substantially prejudiced the rights of a party. All other evidence of a type commonly relied upon by reasonably prudent persons in conduct of serious affairs shall be admissible." This evidence was properly admitted for its relevance in determining whether claimant's conduct could be excepted from the definition of "misconduct" as an isolated instance of poor judgment. Accordingly, the ALJ did not err in admitting pages 25 through 44 of Exhibit 1.

FINDINGS OF FACT: (1) Selco Credit Union employed claimant as a mortgage loan officer from August 2015 until August 4, 2022.

(2) The employer expected that their employees would comply with all laws prohibiting discrimination against anyone using the credit union's services, and that they would communicate with other employees in a professional manner. Claimant understood these expectations and the requirements of anti-discrimination laws related to mortgage lending.

(3) Claimant repeatedly complained about the employer's process for distributing leads to loan officers, which claimant felt disadvantaged him in the quality of the leads he received. In April 2021, claimant intentionally delayed responding to a loan application for two weeks because of the small amount involved and his displeasure at its assignment to him.

(4) On July 27, 2022, a customer requested assistance in applying for a mortgage loan and requested to communicate with a loan officer in Spanish. This lead was assigned to claimant in an email, which made no mention of the amount or other details of the potential loan. Claimant replied, "[I]t's not going to happen. I do not speak Spanish and I'm not going to learn it to appease those who move here and refuse to learn English. See if the next person in the 'rotation' wants to take it on." Exhibit 1 at 46.

(5) Upon receiving claimant's reply, the coworker who assigned the lead to claimant replied that she was offended by his response and copied their supervisor on the exchange. Claimant replied to this email with further complaints about how the employer decided which loan offer is given a lead, but made no attempt to apologize for, or otherwise reconsider, his initial response.

(6) In July 2022, claimant was taking prescribed medication which he believed caused him anxiety, irritability, and moodiness, and factored into his conduct on July 27, 2022.

(7) On August 4, 2022, the employer discharged claimant for unlawfully discriminating against one of their customers by his conduct on July 27, 2022.

CONCLUSIONS AND REASONS: The employer discharged claimant for misconduct.

ORS 657.176(2)(a) requires a disqualification from unemployment insurance benefits if the employer discharged claimant for misconduct connected with work. OAR 471-030-0038(3)(a) (September 22, 2020) defines misconduct, in relevant part, as a willful or wantonly negligent violation of the standards of behavior which an employer has the right to expect of an employee, or an act or series of actions that amount to a willful or wantonly negligent disregard of an employer's interest. OAR 471-030-0038(1)(c) defines wanton negligence, in relevant part, as 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. The employer has the burden to prove misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

The employer had the right to expect claimant would not engage in discrimination against their customers and that he would communicate in a professional manner with other employees. Claimant willfully refused to assist a customer with her mortgage application based on his assumption that the customer moved to the United States from another country and preferred to communicate in Spanish regarding a loan application. Claimant admitted that this refusal violated the employer's expectations.

Transcript at 49. Claimant contended that side effects from his prescribed medication were “a factor in this incident.” Transcript at 50. However, claimant did not allege that the medications prevented him from being conscious of his conduct or its probable consequences, nor that his refusal to serve the customer for his stated reasons was not willful. He also contended that the refusal was a “culmination of frustration with . . . [a] biased referral system.” Transcript at 50. While the record demonstrates claimant had a history of complaining about the employer’s method of determining which loan officer was assigned a particular lead, these complaints had to do with the amount of the potential loan and likelihood of the loan being approved. In the lead at issue, claimant was only informed that the customer wished to apply for a loan to purchase a home in central Oregon, but had no other information on the amount of the loan or the customer’s creditworthiness. More likely than not, claimant refused to assist the customer not because of the quality of the lead, but because of the reason he stated in the email: that the customer moved “here,” spoke Spanish, and “refuse[d] to learn English.” Claimant’s statement of the refusal in these terms to a coworker was objectively offensive and unprofessional, and he failed to apologize or attempt to rectify the situation upon learning of the coworker’s reaction. Claimant’s actions constituted a willful violation of the standards of behavior which an employer has the right to expect of an employee, and are properly characterized as misconduct.

However, isolated instances of poor judgment are not misconduct. OAR 471-030-0038(3)(b). 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). ORS 659A.421 provides in relevant part:

(3) (a) A person whose business includes engaging in residential real estate related transactions may not discriminate against any person in making a transaction available, or in the terms or conditions of the transaction, because of race, color, religion, sex, sexual orientation, gender identity, national origin, marital status, familial status or source of income.

(b) As used in this subsection, “residential real estate related transaction” means any of the following:

(A) The making or purchasing of loans or providing other financial assistance[.]

* * *

(9) Any violation of this section is an unlawful practice.

Claimant’s business involved the making of loans related to residential real estate transactions and subjected him to the provisions of ORS 659A.421(3). Claimant’s refusal to assist a customer because he believed, based on her preference to communicate in Spanish, that she was not originally from the United States, constituted discrimination against her because of her assumed national origin, likely in violation of ORS 659A.421(3). This is true even if the customer was unaware of the discrimination. Claimant’s conduct violated the law or was at least tantamount to unlawful conduct, and therefore cannot be excused under OAR 471-030-0038(3). Accordingly, the employer has proven that they discharged claimant for misconduct.

Therefore, the employer discharged claimant for misconduct and he is disqualified from receiving benefits effective July 31, 2022.

DECISION: Order No. 22-UI-205667 is affirmed.

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

DATE of Service: January 10, 2023

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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