

EMPLOYMENT APPEALS BOARD DECISION
2022-EAB-1138

Reversed
No Disqualification

PROCEDURAL HISTORY: On August 29, 2022, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that the employer discharged claimant for misconduct, disqualifying claimant from receiving benefits effective July 24, 2022 (decision # 72437). Claimant filed a timely request for hearing. On October 24, 2022, ALJ Clemons conducted a hearing, and on October 28, 2022 issued Order No. 22-UI-206175, affirming decision # 72437. On November 16, 2022, claimant filed an application for review with the Employment Appeals Board (EAB).

WRITTEN ARGUMENT: Claimant's argument 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. Under ORS 657.275(2) and OAR 471-041-0090 (May 13, 2019), EAB considered only information received into evidence at the hearing when reaching this decision. EAB considered claimant's argument to the extent it was based on the record.

FINDINGS OF FACT: (1) Glisan Care Center Inc. employed claimant as a cook at their residential facility from July 3, 2019 until July 27, 2022.

(2) The employer expected that their employees would not interact with residents in an offensive manner or commit abuse against them.

(3) On May 27, 2022, claimant received a written warning for failing to follow the employer's procedures regarding infection control. Claimant had not received any other discipline in the year preceding his separation, and had never been disciplined for interacting inappropriately with residents.

(4) On July 25, 2022, claimant learned that a resident had obtained food from outside the facility and believed that the resident would therefore not require his regular meal from the facility. This resident had often visited claimant in the kitchen and the two had joked around using language that could be considered foul or objectionable to others. Since claimant believed the resident would not be expecting

his regular meal, claimant took this opportunity to play a joke on the resident. Claimant drew on an empty food container in which the resident's meal would normally be served and had it delivered to the resident empty. On the container, claimant had drawn a character from an animated television show with his middle finger extended, and wrote one of that character's catchphrases: "Suck it." Transcript at 5. Claimant believed that the resident would find this joke funny.

(5) Upon receiving the empty container with the drawing, the resident became upset. The employer immediately suspended claimant from work pending further investigation. The resident filed a formal complaint of abuse against claimant and the facility.

(6) Claimant immediately attempted to apologize to the resident, but the resident rejected the apology. Claimant also apologized to the employer and submitted a letter of apology during his suspension.

(7) On July 27, 2022, the employer discharged claimant because they believed his conduct on July 25, 2022 constituted abuse of the resident involved.

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). "[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 order under review concluded that claimant willfully violated the employer's reasonable expectations, and that his conduct could not be excused as an isolated instance of poor judgment because it created an irreparable breach of trust in the employment relationship. Order No. 22-UI-206175 at 4. The record does not support these conclusions.

The employer reasonably expected that their employees would not interact with residents in an offensive manner or abuse them. Claimant's failure to send food to the resident was based on claimant's knowledge that the resident had obtained outside food for his meal, and claimant reasonably assumed he would therefore not want his regular meal. Claimant's failure to send food to the resident, under these circumstances, did not violate the employer's expectations because it was the result of an honest misunderstanding of the resident's desires, and did not constitute abuse. However, claimant's drawing on the container was objectively offensive. Claimant was conscious of his conduct in drawing and sending it to the resident and knew or should have known that others viewing it could be offended by it. Though claimant honestly believed, based on their relationship and previous use of language similar to what was depicted in the drawing, that the resident would find the drawing funny rather than offensive, claimant acted with indifference to the latter possibility. In fact, the resident found the drawing offensive and made a complaint against the employer as a result. Claimant's actions therefore amounted to a wantonly negligent violation of the employer's standards of behavior.

The employer testified that claimant had never been disciplined with regard to his interactions with residents. Claimant was disciplined by the employer once in the year preceding his discharge for what the employer's witness stated involved "following policies and procedures related to infection control." Transcript at 11. The record does not contain sufficient evidence to show what occurred in this previous incident, and the employer therefore has not proven that it constituted a willful or wantonly negligent violation of their standards of behavior. Thus, the events of July 25, 2022 constituted an isolated act of willful or wantonly negligent behavior.

Claimant's drawing involved making a judgment, and his choice of potentially offensive words and imagery demonstrated a conscious decision to take action that resulted in a wantonly negligent violation of the employer's reasonable standards of behavior. Claimant's actions therefore involved poor judgment.

At hearing, the employer's witness contended that claimant's actions exceeded mere poor judgment because they legally constituted abuse of the resident, for which the employer believed they would be

cited and fined. Transcript at 27. The duty of a facility such as the employer to report abuse is governed by ORS 124.060¹. ORS 124.050 defines the terms used in that statute, in relevant part:

(1) “Abuse” means one or more of the following:

* * *

(b) Neglect.

* * *

(f) Verbal abuse.

* * *

(7) “Neglect” means failure to provide basic care or services that are necessary to maintain the health or safety of an elderly person.

* * *

(10) “Services” includes but is not limited to the provision of food, clothing, medicine, housing, medical services, assistance with bathing or personal hygiene or any other service essential to the well-being of an elderly person.

* * *

(13) “Verbal abuse” means to threaten significant physical or emotional harm to an elderly person or a person with a disability through the use of:

(a) Derogatory or inappropriate names, insults, verbal assaults, profanity or ridicule; or

(b) Harassment, coercion, threats, intimidation, humiliation, mental cruelty or inappropriate sexual comments.

Claimant’s failure to send food to the resident did not constitute neglect, as defined under the statute, because the resident had other food, and upon complaining about receiving the empty container, likely would have received other food from the facility if the resident desired. Similarly, claimant’s drawing did not constitute verbal abuse, as defined by the statute, because while it could objectively be considered profane, claimant reasonably believed that by the resident’s prior use of such language that the resident would not find it profane, and under the circumstances, it was not reasonable to interpret it as a threat of harm. Therefore, more likely than not, claimant’s conduct did not meet the relevant legal definition of “abuse,” and did not rise to the level of triggering a duty to report the conduct to regulatory

¹ While the record does not specify what type of residential facility is operated by the employer, it can be reasonably inferred that the residents are elderly or disabled and the statute is therefore applicable.

authorities under ORS 124.060. As a result, claimant's actions were not a violation of law or tantamount to unlawful conduct.

A determination of whether a claimant's conduct caused a breach of trust is objective, not subjective, and the employer cannot unilaterally announce a breach of trust if a reasonable employer in the same situation would not. *Callaway v. Employment Dep't.*, 225 Or App 650, 202 P3d 196 (2009). The employer abandoned their usual progressive discipline policy in this instance in favor of immediately discharging claimant because the affected resident "felt very mentally abused." Transcript at 14. The employer's conclusion that claimant abused the resident and therefore could not be trusted to continue in the employment was based on the subjective feelings of the resident. More likely than not, a reasonable employer in the same situation would not have concluded that claimant's actions objectively constituted abuse or made a continuing employment relationship impossible. Claimant was immediately contrite upon learning of the resident's reaction and offered apologies to the resident and the employer, indicating such lesser discipline would have been effective in correcting claimant's conduct and would have allowed the employment relationship to continue. Accordingly, claimant's actions did not create an irreparable breach of trust in the employment relationship or otherwise make a continued employment relationship impossible. Because claimant's actions were not part of a pattern of willful or wantonly negligent behavior and did not make a continuing employment relationship impossible, claimant's conduct was an isolated instance of poor judgment, and not misconduct.

Claimant's discharge by the employer therefore was not for misconduct, and claimant is not disqualified from receiving benefits based on the work separation.

DECISION: Order No. 22-UI-206175 is set aside, as outlined above.

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

DATE of Service: January 25, 2023

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.

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.

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 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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www.Oregon.gov/Employ/eab

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