

EMPLOYMENT APPEALS BOARD DECISION
2023-EAB-0866

Affirmed
Disqualification

PROCEDURAL HISTORY: On May 23, 2023, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant was discharged for misconduct and was therefore disqualified from receiving unemployment insurance benefits effective April 16, 2023 (decision # 141357). Claimant filed a timely request for hearing. On July 6, 2023, ALJ Nyberg conducted a hearing, and on July 17, 2023 issued Order No. 23-UI-230667, affirming decision # 141357. On August 7, 2023, 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 as required by OAR 471-041-0080(2)(a) (May 13, 2019).

FINDINGS OF FACT: (1) Jet Heating, Inc. employed claimant as a journeyman plumber until April 20, 2023.

(2) The employer expected that their employees would not engage in physical violence towards others in the workplace. Claimant received, and acknowledged receiving, a written copy of the employer's policies reflecting this expectation, though claimant did not read the policy because he believed he was not given sufficient work time to do so. Claimant nonetheless understood the employer's expectation.

(3) On April 19, 2023, claimant was upset that he was not given an accurate start time for the day's work, which resulted in him reporting to the work site much earlier than the time he was permitted to begin working. He also was upset that other employees appeared to report to the worksite late without consequence that day. Claimant had recently been warned about being tardy and felt that the employer was treating him more harshly than other employees. Claimant complained about these issues to an onsite project manager, C.S., prior to the start of work.

(4) At approximately 8:30 a.m., C.S. and a foreman, B.P., approached claimant and another plumber, Z.G., because C.S. was upset with claimant after learning that claimant had mentioned to claimant's supervisor that C.S. had failed to adequately provide materials at the worksite. A verbal argument ensued between claimant and C.S., in which both parties criticized each other over various perceived shortcomings. Both parties used raised voices and foul language. C.S. directed claimant to go home. Claimant gathered his things from the room in which he had been working, while C.S. and B.P. waited in a hallway outside. When claimant exited the room into the hallway, an argument began between claimant and B.P. During that argument, B.P. called claimant "fatso," then approached claimant "close to his face." Exhibit 2 at 3. Claimant pushed B.P., who fell backward, hitting his head on the floor. Claimant left the worksite while he and C.S. continued to yell at each other. Immediately following the incident, the employer filed a complaint against claimant with the police.

(5) On April 20, 2023, the employer's human resources manager gathered statements regarding this incident from the involved parties and witnesses including C.S., Z.G., and claimant. None of these three people, nor any other witness, told the human resources manager that B.P. touched claimant prior to claimant pushing him. The employer discharged claimant for violating their policy against engaging in physical violence in the workplace.

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. "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).

The employer discharged claimant because he pushed B.P. in the midst of an argument, causing B.P. to fall backward and hit his head. The employer reasonably expected that their employees would not engage in physical violence in the workplace. Claimant initialed an acknowledgement form that he received a written copy of this policy when he began working for the employer. While claimant may have felt that he was not given sufficient time to read the policy during working hours, he demonstrated an understanding of the policy by testifying that he thought it was "against the rules" for an employee to "put his hands on an employee." Transcript at 13. Accordingly, the record shows that claimant was aware of the employer's expectation regarding workplace violence.

Claimant violated the employer's reasonable expectation by initiating physical violence against B.P. The relevant portions of the accounts of this incident advanced by the employer and claimant are substantially similar with respect to the verbal arguments that took place between claimant, C.S., and B.P., and with respect to claimant pushing B.P., causing him to fall backwards. The primary factual dispute regarding the incident involved whether B.P. initiated physical contact with claimant immediately prior to claimant pushing him. Claimant testified that when B.P. approached claimant and got "in my face," B.P. "poke[d] my chest and – and I see that he's about to throw – like he puts his hands in a fist, so I give him a little shove out of the way." Transcript at 10.

By contrast, the written account given by C.S. the day after the incident stated that B.P. was standing with his hands in his coat pockets when claimant "lunged at [B.P.] and shoved [B.P.] in the chest with both hands resulting in [B.P.] being knocked off his feet." Exhibit 1 at 8. Similarly, Z.G. wrote the day after the incident that, "[B.P.] said 'Oh yeah, try me,' and took a step towards [claimant] and got close to his face. Then [claimant] pushed him." Exhibit 2 at 3. Claimant moved that Z.G.'s statement be admitted to evidence, referring to him as "my witness." Transcript at 17. The human resources manager testified, while reviewing the statement claimant gave her the day following the incident, that claimant did not allege at that time that B.P. had touched him at any point during the altercation. Transcript at 17. Claimant disputed this, testifying that he told the human resources manager "that he did poke me." Transcript at 16.

While a first-hand account of an event is generally afforded greater weight than that given to hearsay accounts of that event, other factors are considered in weighing the evidence. The testimony of claimant and the human resources manager are at odds over whether claimant said in his initial statement on April 20, 2023 that B.P. had poked him in the chest immediately preceding claimant pushing him. As the human resources manager's testimony was based on the written account of her interview with claimant that was presumably made at the time of the interview and kept in the ordinary course of business, it is likely a more accurate depiction of the interview than claimant's recollection of it in July 2023. Therefore, more likely than not, claimant did not report in his April 20, 2023 statement that B.P.

initiated physical contact with him prior to claimant pushing him. Further, the two other eyewitness accounts written on April 20, 2023, one of which was offered into evidence by claimant, also omitted any mention of B.P. touching claimant prior to being pushed. Therefore, more likely than not, B.P. did not touch claimant prior to claimant pushing him. Accordingly, the employer has shown by a preponderance of evidence that claimant pushed B.P. without B.P. having touched claimant first, and the facts have been found accordingly.

The record shows that claimant acted with at least wanton negligence when he pushed B.P. Claimant did not dispute that he pushed B.P., nor did he dispute that he did so consciously. Instead, claimant implied at hearing that he was acting in self-defense. However, as stated above, the record shows that while B.P. closely approached claimant's face, perhaps to provoke a response from claimant, he did not actually touch claimant. Rather, the record suggests that claimant found B.P.'s close approach to him to be sufficient provocation to escalate the matter to physical violence by pushing B.P. Claimant knew or should have known that pushing B.P. in response to his approach, rather than retreating or merely refraining from making physical contact, would probably result in a violation of the standards of behavior which an employer has the right to expect of an employee. That claimant resorted to physical violence, when he could have taken other action that might have avoided violence, demonstrated claimant was indifferent to the consequences of his actions. Therefore, the employer has met their burden to show that claimant, with at least wanton negligence, violated the employer's reasonable expectation.

Claimant's actions cannot be excused as an isolated instance of poor judgment. Claimant's conduct involved a decision to take action in pushing B.P., and therefore involved judgment. This conscious decision to take action resulted in a wantonly negligent violation of the employer's reasonable standard of behavior, and therefore evinced poor judgment. The record does not show that claimant engaged in other willful or wantonly negligent acts involving poor judgment, and thus it was isolated. However, acts that violate the law or acts that are tantamount to unlawful conduct exceed mere poor judgment. As previously noted, the record shows by a preponderance of evidence that B.P. did not poke claimant in the chest or otherwise touch claimant prior to claimant pushing him. Accordingly, claimant, more likely than not, was not acting in self-defense. The employer contacted the police immediately following the incident to make a criminal complaint against claimant and the police conducted an investigation. While the record is not clear as to the outcome of that complaint, the record as a whole supports the inference that claimant's conduct was, if not a violation of the law against harassment, at least tantamount to a violation of that law.¹ Therefore, claimant's conduct does not fall within the exculpatory provisions of OAR 471-030-0038(3) as an isolated instance of poor judgment. Accordingly, claimant's actions constituted misconduct.

For these reasons, claimant was discharged for misconduct and is disqualified from receiving unemployment insurance benefits effective April 16, 2023.

DECISION: Order No. 23-UI-230667 is affirmed.

¹ ORS 166.065(a)(A) provides, in relevant part, that a person commits the crime of harassment if the person intentionally harasses or annoys another person by subjecting such other person to offensive physical contact.

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

DATE of Service: September 21, 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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