

EMPLOYMENT APPEALS BOARD DECISION
2023-EAB-0970

Affirmed
No Disqualification

PROCEDURAL HISTORY: On June 7, 2023, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant was discharged, but not for misconduct, and was not disqualified from receiving unemployment insurance benefits based on the work separation (decision # 54359). The employer filed a timely request for hearing. On August 16, 2023, ALJ Taylor conducted a hearing, and on August 24, 2023 issued Order No. 23-UI-234226, affirming decision # 54359. On August 29, 2023, the employer filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) C & K Market, Inc. employed claimant as a person-in-charge (PIC) from August 31, 2020 until April 29, 2023.

(2) The employer maintained a policy which prohibited employees from engaging in any form of discrimination against members of a protected class, and any form of physical, visual, verbal, or sexual harassment. The employer's policy defined sexual harassment, in relevant part, to include "any sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature." Exhibit 1 at 4. Claimant signed his acknowledgment of receipt of that policy on the date of his hire. Exhibit 1 at 6. As a PIC, claimant was considered part of the employer's management team, and had received training on sexual harassment "multiple times." Transcript at 13.

(3) In early December 2020, claimant and one of his coworkers "talked all night," and at the end of the conversation claimant stated, "life's a bitch and so are you." Transcript at 31-32. The coworker was offended by this comment.

(4) On March 29, 2021, the employer issued claimant a written warning for having allegedly sent "spiteful message[s] to fellow employees after have [sic] been talked to in the past about texting employee[s] off duty" on March 27, 2021. Exhibit 1 at 3.

(5) On April 4, 2021, the employer issued claimant a written warning alleging that he had sent text messages to another employee in which he called the employee a “bitch” and leveled other insults against her. Exhibit 1 at 2. The written warning was alleged to have been “re created [*sic*] since 1st one went missing.” Exhibit 1 at 2. The written warning alleged that the complaining employee brought the matter to management’s attention on December 8, 2020.

(6) On March 29, 2023, a female employee reported to her store manager that claimant had sexually harrassed her on March 26, 2023. The employee alleged that claimant stood near her at a cash register that she was cleaning and pantomimed towards her in a sexually-suggestive manner.

(7) On April 24, 2023, claimant was driving a forklift in the back bay of the store he was working in near the same female coworker whom he had allegedly harassed on March 26, 2023. While he was driving the forklift, a box that he was moving fell off of the forklift and hit the employee in the leg. When she let claimant know the box had hit her, claimant laughed about it and said something to the effect of, “You want me to kiss it and make it better?” Exhibit 1 at 9, Transcript at 24. Claimant intended the statement to be “funny.” Transcript at 24. Claimant’s intent was based, in part, on the employee and other female employees having made similar statements to claimant previously. Nevertheless, the employee was offended at claimant’s response, and reported the incident to management.

(8) On April 26, 2023, the employer suspended claimant pending an investigation of the April 24, 2023 incident. While investigating the April 24, 2023 incident, the employer’s human resources director learned about the alleged March 26, 2023 incident.

(9) On April 29, 2023, the employer discharged claimant due to violation of their harassment policy. The employer specifically decided to discharge claimant because of the comment he made to the female employee during the incident on April 24, 2023. Audio Record at 58:45.

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 having violated their harassment policy. The employer testified that the incident which immediately preceded the discharge—the forklift incident on April 24, 2023—caused them to discharge claimant. Audio Record at 58:45.

Claimant testified that he did not intend his comment, in which he said something to the effect of, “You want me to kiss it and make it better?” during that incident to be sexual, and only made it to be “funny.” Transcript at 24. However, the record shows that claimant had acknowledged receipt of the employer's policy, which prohibited “any sexual advances . . . and other verbal or physical conduct of a sexual nature.” Exhibit 1 at 4. The record also shows that claimant had received multiple trainings on sexual harassment. It is conceivable that claimant may have intended his comment offering to “kiss [the employee] and make it better” to sarcastically evoke a parental tone, rather than a sexual one. Regardless, given the employer's policy and the trainings he received, claimant should have known that an offer to kiss another employee could be construed as sexual in nature, and therefore a violation of the employer's policy. As claimant did not apparently contemplate this possibility, or that his statement could be construed as offensive, he acted without regard for the consequences of his actions. Therefore, claimant's conduct on April 24, 2023 constituted a willful or wantonly negligent disregard for the employer's standards of behavior.

However, based on the record on review, claimant's conduct on April 24, 2023 was an isolated instance of poor judgment. Under OAR 471-030-0038(1)(d)(A), isolated instances of poor judgment must be “a single or infrequent occurrence rather than a repeated act or pattern of other willful or wantonly negligent behavior.” Although the employer alleged that claimant had violated their harassment policy on three prior occasions, they failed to meet their burden of proof to show that any of those alleged incidents constituted willful or wantonly negligent behavior.

Regarding the alleged December 2020 incident, claimant testified at hearing that the April 4, 2021 written warning, which the employer claimed to have re-created, was never actually issued to him and essentially suggested that the employer fabricated it. Transcript at 36. While claimant denied much of the substance of that written warning, he admitted that, at the end of a long conversation with another employee, he told her, “Life’s a bitch and so are you.” Transcript at 31–32. Neither party offered further explanation of what occurred in this conversation, and as such the employer did not meet their burden to show that the conduct was connected with work. Even if the conduct *was* connected with work, however, the employer did not meet their burden to show that this single statement, out of context and at the end of a long conversation, constituted a willful or wantonly negligent disregard of their standards of behavior.

Regarding the alleged March 29, 2021 incident in which the employer claimed that claimant sent “spiteful” text messages to other employees, the employer did not offer specific information on the written warning regarding what claimant was alleged to have said to those employees. *See* Exhibit 1 at 3. At hearing, the employer’s witness did not offer any further information regarding the allegation, while claimant asserted his belief that he had actually been written up for allegedly improper handling of a customer’s check. Transcript at 9, 37.

Regarding the alleged March 26, 2023 incident, claimant testified at hearing that “[t]here was no incident at any register,” that he was on the other side of the counter from the employee who made the complaint against him (rather than beside her), and that the allegation was “completely false.” Transcript at 27. Again, claimant’s first-hand testimony here is afforded more weight than the employer’s, which is hearsay.

Because the employer failed to show that any of the above-alleged incidents constituted willful or wantonly negligent conduct, claimant’s conduct during the April 24, 2023 incident was isolated. Further, while claimant’s conduct may have been offensive, the employer did not show that the conduct violated the law or was tantamount to unlawful conduct, created an irreparable breach of trust in the employment relationship, or otherwise made a continued employment relationship impossible. Therefore, claimant’s conduct during the final incident was an isolated instance of poor judgment, which is 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. 23-UI-234226 is affirmed.

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

DATE of Service: October 12, 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 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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