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State of Oregon
Employment Appeals Board
875 Union St. N.E.
Salem, OR 97311

EMPLOYMENT APPEALS BOARD DECISION
2023-EAB-1274

Reversed
No Disqualification

PROCEDURAL HISTORY: On October 13, 2023, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant was discharged for misconduct and therefore was disqualified from receiving unemployment insurance benefits effective July 30, 2023 (decision # 131222). Claimant filed a timely request for hearing. On November 1, 2023, ALJ Frank conducted a hearing, and on November 9, 2023, issued Order No. 23-UI-240842, affirming decision # 131222. On November 17, 2023, 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) New Seasons Market, LLC employed claimant, most recently as a logistics driver, from August 3, 2017, until August 1, 2023.

(2) The employer maintained a written policy concerning employees' interactions with each other. In relevant part, this policy prohibited employees from engaging in "[i]ntimidation, threats of or actual physical violence or aggressive or hostile behavior directed at a customer, vendor, staff member, or any other individual", or "using abusive language." Exhibit 1 at 8. The policy included an "Open Door" provision which stated, in relevant part, that employees should "[s]peak up and listen," that "voicing opinions is central to [their] culture," and that employees should "speak to someone who [they] think can help resolve [their] concern and always be respectful." Exhibit 1 at 3. The employer provided claimant with access to this policy when he was hired, and claimant electronically signed a written acknowledgment that he was responsible for reading, understanding, and following the policy. Exhibit 1 at 10–11.

(3) On November 24, 2021, claimant was approached by one of the other logistics drivers who asked claimant to cover one of the other driver's stops. The driver had post-traumatic stress disorder (PTSD) and told claimant that he was "not having a very good morning." Transcript at 27–28. Claimant refused because he had his own route to drive, but suggested that the other driver make modifications to his route. Claimant was not in a supervisory role, and no supervisors or members of management were available to consult on the matter at the time.

(4) On December 3, 2021, claimant was involved in a verbal altercation with an agitated customer in the parking lot of one of the employer's stores.

(5) On December 29, 2021, one of claimant's supervisors directed him to pick up scanners and step stools at one of the employer's stores to help with the employer's inventory process. Claimant responded to the supervisor on one of the employer's public Slack channels, stating, "Really, step stools and scanners . . .". Exhibit 1 at 14 (ellipses in original).

(6) On January 3, 2022, claimant was absent from work because he contracted COVID-19. Claimant's supervisor subsequently "attempted to engage with him about his absence and illness," but claimant did not respond to the supervisor except via Slack messaging. Exhibit 1 at 15.

(7) On January 7, 2022, the employer issued claimant a written warning with respect to the four above incidents, alleging that these incidents demonstrated "a pattern of behavior that violates [the employer's] code of conduct." Exhibit 1 at 14.

(8) On May 10, 2023, claimant was assigned to drive a route with a newer employee. During the course of the day, the other employee felt that claimant refused to "answer reasonable questions" that he had asked claimant about work. Transcript at 6. Instead, claimant referred the employee to a handbook which he had expected the other employee to bring with him, but which the other employee had left behind. Also during the course of the day, while speaking to the other employee, claimant referred to his own supervisor as a "fat ass," which offended the other employee. Exhibit 1 at 12. Claimant did so because he had been "stressed" and had been suffering from disturbed sleep, depression, and anxiety. Transcript at 25. Additionally, while stopped at one of the employer's stores, where claimant and the other employee had started their route that day, the other employee notified claimant that he was going to take his half-hour lunch break at the store. The other employee expected claimant to wait for him during his lunch break. Instead, claimant drove away in the employer's vehicle, leaving the other employee behind and requiring him to drive his personal vehicle to catch up with claimant. Claimant had received permission from a person-in-charge (PIC) to continue on the route in that manner.

(9) The other employee reported his concerns about the events of May 10, 2023, to the employer. From May 16, 2023, through July 25, 2023, claimant was on an approved medical leave. As such, the employer did not investigate the other employee's complaints until claimant returned from his medical leave. On July 26, 2023, the employer's regional human resources director met with claimant and discussed the matter. Claimant admitted to the allegations regarding his actions on May 10, 2023.

(10) On August 1, 2023, the employer discharged claimant for his conduct on May 10, 2023, as reported by the other employee who worked with claimant that day.

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 a series of behaviors he engaged in on May 10, 2023. The order under review concluded that this constituted misconduct because "[b]y committing multiple violations of the employer's policies on May 10, 2023, claimant willfully violated the standards of behavior that the employer had a reasonable right to expect of an employee." Order No. 23-UI-240842 at 4. The order under review further concluded that claimant was not discharged for an isolated instance of poor judgment because "the incidents were varied and repeated." Order No. 23-UI-240842 at 4. The record does not support these conclusions.

As a preliminary matter, while claimant engaged in three separate offending behaviors on May 10, 2023, all three should be considered part of one overarching incident. In *Perez v. Employment Dept.*, 164 Or. App. 356, 992 P.2d 460 (1999), the Court of Appeals found that a claimant's multiple violations of the employer's expectations over two days was a single occurrence when considered within the context of a 13-year employment relationship. The Court also considered the claimant's three separate abusive answering machine messages to his supervisor during one evening, about a single subject matter, to be a single occurrence in the employment relationship. *Waters v. Employment Division*, 125 Or. App. 61, 865 P2.d 368 (1993). Arguing with a supervisor for 15 to 20 minutes, despite the supervisor's instruction to "shut up," was also deemed a single occurrence in the employment relationship. *Goodwin v. Employment Division*, 35 Or. App. 299, 581 P.2d 115 (1978).

While the employer has alleged four separate prior instances of claimant having violated their policies, those incidents all occurred over the course of about a month, nearly a year and a half prior to the events of May 10, 2023. Claimant's behavior on May 10, 2023, by contrast, occurred all on the same day, driving the same route, and involving the same coworker. Thus, it is reasonable to view those events as a single occurrence.

This is relevant because while the employer has not met their burden to show that all of claimant's behaviors that day were done with willful or wantonly negligent disregard for their standards of behavior, one of the three—claimant's profane reference to his supervisor—was. The employer's written policy prohibited employees from using "abusive language." Claimant's use of the term "fat ass" to describe his supervisor was abusive. Furthermore, claimant's only explanation for why he chose that language was that he had been suffering from stress and related conditions. As such, the preponderance of the evidence shows that claimant, with at least wanton negligence, violated the employer's standards of behavior. Because this single willful or wantonly negligent act is part of a larger occurrence, it is not necessary to discuss the other two behaviors to determine that the overall occurrence was willful or wantonly negligent.

However, claimant's behavior on May 10, 2023, was, at worst, an isolated instance of poor judgment. Besides this occurrence, the employer alleged that claimant violated their policies on four prior occasions between November 24, 2021, and January 3, 2022. The employer has not met their burden to show that any of those four occurrences were the result of claimant having violated the employer's policies willfully or with wanton negligence.

In regard to the November 24, 2021, incident, one of the employer's witnesses testified that a supervisor had previously told claimant "not to redirect drivers . . . once a route had been assigned by his supervisor," suggesting that claimant's actions violated that directive. Transcript at 17. However, claimant explained that during that exchange, the other driver in question was suffering from symptoms of PTSD and felt that he could not make one of the stops; that no supervisor was available at the time; and that claimant therefore suggested a modification to the other driver's route. Transcript at 27–28. Furthermore, the record shows that claimant was not a supervisor. Under those circumstances, it cannot reasonably be said that claimant "redirected" the driver because he had no authority over that driver, and merely offered the driver advice in the absence of an authority figure.

In regard to the December 3, 2021, incident involving an agitated customer in one of the employer's parking lots, little detail was given in regards to the incident by either party. In their documentary

evidence, the employer described the incident by stating that claimant "did not drive with patience and, instead created an incident with another driver in the parking lot of [their store]." Exhibit 1 at 14. This vague description is insufficient to explain what actually occurred, and, as such, the employer did not meet their burden to show that claimant willfully, or with wanton negligence, violated the employer's policies.

Similarly, in regard to the December 29, 2021, incident in which claimant responded to a supervisor's direction by stating, "Really, stepstools and scanners . . ." on a Slack channel, the employer has not shown that claimant objectively violated any of their standards of behavior. Exhibit 1 at 14. While claimant's response suggests he was being sarcastic, plain text, as used on a messaging platform, can often mask or misrepresent the tone or intent of the message. Thus, while claimant's supervisor may have subjectively found his response offensive, the record does not show that it constituted a willful or wantonly negligent violation of the employer's standards of behavior. Moreover, even had claimant intended the statement to be sarcastic, the comment did not rise to the level of wanton negligence.

Finally, in regard to the January 3, 2022, incident, the employer failed to offer sufficient details to explain how claimant's lack of response to his supervisor via any medium other than Slack messaging constituted a violation of their policies. The employer's documentary evidence states, "When [claimant's] supervisor attempted to engage with him about his absence and illness, he was uncooperative. When she asked him to connect via phone to get additional details, he refused to call her back. His supervisor needed to share urgent information with [claimant] over Slack." Exhibit 1 at 15. Particularly given that claimant was ill—and therefore likely averse to talking on the phone—and that he *did* respond to his supervisor regarding a request for information (via Slack), it appears that claimant actually did comply with the information request. Therefore, the employer has not shown that claimant's conduct during this incident constituted a willful or wantonly negligent disregard for their standards of behavior.

As explained above, the record shows only that claimant engaged in willful or wantonly negligent behavior during the incident on May 10, 2023. Claimant's behavior was therefore isolated. Furthermore, the record does not show that claimant's violation on May 10, 2023, fell within the exceptions under OAR 471-030-0038(1)(d)(D) because the record does not show that claimant's conduct did not violate the law, was not tantamount to unlawful conduct, and did not create an irreparable breach of trust or otherwise make a continuing employment relationship impossible. As such, the final incident in this matter 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 benefits based on the work separation.

DECISION: Order No. 23-UI-240842 is set aside, as outlined above.

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

DATE of Service: December 29, 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.

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 – 本判决会影响您的失业救济金。 如果您不明白本判决， 请立即联系就业上诉委员会。 如果您不同意此判决，您可以按照该判决结尾所写的说明，向俄勒冈州上诉法院提出司法复审申请。

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 ໄດ້ ໂດຍປະຕິບັດຕາມຄໍາແນະນໍາທີ່ບອກໄວ້ຢູ່ຕອນທ້າຍຂອງຄໍາຕັດສິນນີ້.

Arabic

هذا القرار قد يؤثر على منحة البطالة الخاصة بك، إذا لم تفهم هذا القرار، إتصل بمجلس منازعات العمل فورا، 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 دستورالعمل موجود در پایان آن، از دادگاه تجدید نظر اورگان درخواست تجدید نظر کنید.

Employment Appeals Board - 875 Union Street NE | Salem, OR 97311
Phone: (503) 378-2077 | 1-800-734-6949 | Fax: (503) 378-2129 | TDD: 711
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