

EMPLOYMENT APPEALS BOARD DECISION
2024-EAB-0555

Affirmed
Disqualification

PROCEDURAL HISTORY: On June 11, 2024, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant was discharged for misconduct and therefore disqualified from receiving unemployment insurance benefits effective May 19, 2024 (decision # L0004571450). Claimant filed a timely request for hearing. On July 15, 2024, ALJ Monroe conducted a hearing, and on July 18, 2024, issued Order No. 24-UI-259542, modifying decision # L0004571450 by concluding that claimant was discharged for misconduct and disqualified from receiving unemployment insurance benefits effective April 28, 2024. On July 24, 2024, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Pacific Architectural Wood Products, Inc. employed claimant as a pre-finish operator in their door production facility, most recently from April 13, 2006, until April 29, 2024. Claimant worked for the employer approximately 27 years in total, including an earlier period of employment.

(2) The employer expected that their employees would remain at their workstation performing work except during designated break times, and that they would clean or ask their supervisor to assign them work if they believed there was no more of their usual work to be done. The employer also expected that their employees would treat others with “dignity and respect.” Transcript at 6. Claimant understood these expectations.

(3) On March 19, 2024, one of claimant’s designated breaks was scheduled to begin at 1:00 p.m. At or before 12:58 p.m., claimant left his workstation and seated himself with his lunchbox open and his phone in his hand. A member of the employer’s human resources staff observed the situation and immediately reported it to claimant’s supervisors. One of the supervisors warned claimant about being on his phone and away from his workstation during working hours.

(4) In approximately late March 2024, the employer hired an assistant lead for the department, who served as one of claimant’s supervisors. At or shortly after the time the assistant lead was hired, claimant learned that the assistant lead was being paid \$1.50 more per hour than claimant, and claimant believed

that he was not qualified to supervise claimant or perform production duties. The assistant lead's hiring and supervisory authority was announced to all employees of the department, including claimant.

(5) On April 5, 2024, claimant was instructed, "If you find yourself not busy, you need to find your immediate pre-Finish Supervisor or Production Supervisor for further work instructions." Exhibit 1 at 2. The employer believed that claimant was observed "several times" thereafter "[n]ot staying productive" as instructed. Exhibit 1 at 2. Claimant was therefore given a written warning on April 22, 2024, reiterating the expectation regarding what to do if "not busy" with his usual work, which claimant signed.

(6) On April 26, 2024, claimant ran out of his usual work to do, which claimant attributed to an interruption in the flow of production caused by the assistant lead. Claimant swept and cleaned his workstation and then was "standing around" as other employees cleaned their stations or finished what work was left for them to do. Transcript at 15. The assistant lead approached claimant and told him he "should go help those guys clean their filters and. . . sweep their floors for them." Transcript at 17. Claimant replied that the other employees "had a half hours' worth of work to do" and that "the reason nobody's working is because you ain't getting your job done." Transcript at 16-17. Claimant therefore refused to assist the other employees in cleaning filters and did not perform any other work. The assistant lead reported the matter to his supervisors, including that claimant used foul language toward him, which claimant denied. These supervisors told claimant that he was suspended with pay for the remainder of the day and was to immediately leave the worksite. In their presence, claimant extended his middle finger toward the assistant lead in what he intended as an offensive gesture. Claimant then left the worksite.

(7) On April 29, 2024, claimant's next scheduled workday, the employer discharged claimant for his conduct on April 26, 2024.

CONCLUSIONS AND REASONS: Claimant was discharged 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).

The employer discharged claimant due to his refusal to perform an assigned task on April 26, 2024, after having previously been warned about the need to perform work at all times.¹ The employer reasonably

¹ While the employer's belief that claimant used foul language toward the assistant lead also factored into their decision to discharge him, it can reasonably be inferred that claimant would have been discharged for the failure to perform work alone, given the recent repeated warnings about violating that policy, including a "final" warning four days earlier. Transcript at 7.

expected that their employees would seek work from a supervisor when there was no more of their usual work to do, and that they would perform that other work as instructed. Claimant understood this expectation, as evinced by his having signed a written warning reiterating this expectation on April 22, 2024, four days prior to the final incident. Further, the employer reasonably expected that their employees would treat others with “dignity and respect,” as stated in their written policy. Claimant was also aware of this expectation.

Claimant and the employer offered accounts of the April 26, 2024, final incident that differed, most significantly with regard to claimant’s use of foul language toward the assistant lead. The employer’s witness was not present for the final incident and based her testimony on the hearsay accounts of others. Transcript at 6. The employer asserted, through multiple levels of hearsay, that claimant used foul language on that occasion, while claimant denied this assertion, testifying, “I don’t cuss, and you can ask anybody there.” Exhibit 1 at 1; Transcript at 17. However, the reliability of claimant’s testimony that he does not “cuss” was undermined by his later statement during the hearing regarding the employer’s witness that “she ain’t being honest about shit[.]” Transcript at 39. Nevertheless, this evidence and the employer’s hearsay evidence is insufficient, when weighed against claimant’s first-hand account, to show by a preponderance of the evidence that claimant used foul language toward the assistant lead. This fact, and other disputed facts regarding the final incident, have been found in accordance with claimant’s first-hand account.

According to claimant’s account, due to an interruption in the flow of production he attributed to the assistant lead, claimant had no more of his usual work to do that morning. Claimant therefore cleaned his workstation and was then “standing around” as other employees cleaned theirs, tended to the last of their usual work, or also stood around. Transcript at 15. Claimant testified that the assistant lead therefore told him to assist other employees in cleaning filters and sweeping their workstations. Transcript at 17. However, claimant admitted that he did not do as instructed. Transcript at 17. Instead, claimant testified, “I told him the reason nobody’s working is because you ain’t getting your job done.” Transcript at 16. At hearing, claimant gave various reasons for refusing the directive, such as that the filters did not need cleaned, the employees he was told to assist still had 30 minutes of their usual work they could do instead, claimant’s presence would have interfered with other employees’ work, and that the assistant lead lacked authority to tell claimant what to do. Transcript at 20-22, 25. Claimant knew that the assistant lead had such authority² and none of these circumstances prevented claimant from doing as instructed rather than standing around. The employer has therefore shown that claimant willfully violated their expectation that, at all times, he either perform work or immediately seek other work from a supervisor.

Further, regarding the employer’s allegation that claimant made an offensive gesture with his middle finger toward the assistant lead, claimant admitted in testimony that he “flew him a bird as I was heading for the door,” and that he “suppose[d] it wasn’t a right thing to do or a very nice thing to do.” Transcript at 25. Claimant did not rebut the employer’s assertion that he was aware at the time such

² The record shows that, more likely than not, claimant was aware the assistant lead had such authority. The employer’s witness testified that an announcement had been made to that effect to every employee in the department. Transcript at 36. Claimant’s testimony that he knew the assistant lead’s level of training and experience and his exact hourly wage, and that he had on many occasions assigned claimant work to do, undermined claimant’s assertion that he did not know the assistant lead’s job title or role in the company as one of his supervisors. *See* Transcript at 32-33. Claimant therefore failed to rebut the employer’s testimony that claimant was aware of the assistant lead’s authority to assign him work as one of his supervisors.

conduct would violate their written policy requiring that others be treated with “dignity and respect.” *See* Transcript at 13. The employer has therefore also shown that claimant willfully violated that policy.

However, isolated instances of poor judgment are not misconduct. OAR 471-030-0038(3)(b) (September 22, 2020). 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).

Claimant’s willful policy violations on April 26, 2024, evinced poor judgment. However, the incident was not isolated. Just four days before the incident, claimant received a written warning about having been observed on several occasions in the preceding weeks not working at times that he was supposed to have been working. The clearest example of such an occasion occurred on March 19, 2024, when claimant, by his own testimony, left his worksite and began a break two minutes before his break was scheduled to begin.³ Transcript at 29. Claimant’s testimony demonstrated that he had been aware of his scheduled break time and of the employer’s policy regarding breaks, but that he left his workstation early because he did not “know they’d make a big issue out of it.” Transcript at 29. It can reasonably be inferred from this evidence that claimant was conscious of his actions on this occasion but was indifferent to the consequences of them. Therefore, the employer has shown that claimant violated their break policy with at least wanton negligence. Because the final incident was part of a pattern of other

³ The employer’s witness testified that she observed claimant taking this break “at least 45 minutes to a half hour” before claimant was scheduled to take his break, and read into the record the contents of a contemporary disciplinary report tending to support this version of events, which claimant signed. Transcript at 9, 45. However, as claimant’s testimony also describes a violation of policy, it is unnecessary to weigh these differing accounts and this decision accepts claimant’s account that he began the break two minutes early.

willful or wantonly negligent behavior, it was not an isolated instance of poor judgment and constituted misconduct.

For these reasons, claimant was discharged for misconduct and is disqualified from receiving unemployment insurance benefits effective April 28, 2024.

DECISION: Order No. 24-UI-259542 is affirmed.

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

DATE of Service: August 16, 2024

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

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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.

Employment Appeals Board - 875 Union Street NE | Salem, OR 97311
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