EO: Intrastate
BYE: 08-Feb-2025

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

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DS 005.00

EMPLOYMENT APPEALS BOARD DECISION
2024-EAB-0680

Affirmed
No Disqualification

PROCEDURAL HISTORY: On May 23, 2024, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant was discharged, but not for misconduct, and therefore was not disqualified from receiving unemployment insurance benefits based on the work separation (decision # L0004206761). The employer filed a timely request for hearing. On September 11, 2024, ALJ Schmidt conducted a hearing, and on September 19, 2024, issued Order No. 24-UI-266789, affirming decision # L0004206761. On September 24, 2024, the employer filed an application for review with the Employment Appeals Board (EAB).

WRITTEN ARGUMENT: The employer filed written arguments on September 24, 2024, and October 8, 2024. Claimant filed written arguments on September 28, 2024, and October 8, 2024. EAB considered claimant's October 8, 2024, argument when reaching this decision.[1] EAB did not consider the employer's September 24, 2024, argument when reaching this decision because they did not include a statement declaring that they provided a copy of their argument to the opposing party or parties as required by OAR 471-041-0080(2)(a) (May 13, 2019). Additionally, claimant's September 28, 2024, argument and the employer's October 8, 2024, argument each contained information that was not part of the hearing record, and did not show that factors or circumstances beyond the respective parties' reasonable control prevented them 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 September 28, 2024, argument and the employer's October 8, 2024, argument to the extent the arguments were based on the record.

FINDINGS OF FACT: (1) Charles M. Kaady employed claimant as a shift operator from August 14, 2023, until February 15, 2024. The employer operated a chain of car washes, and claimant worked at one such location.

[1] In his October 8, 2024, written argument, claimant requested that the employer's witness "be sanctioned under penalty of perjury" for allegedly offering false testimony at hearing. Claimant's October 8, 2024, Written Argument at 3. Claimant should note that EAB lacks the power to sanction parties as he has requested, and therefore declines to do so in this case.

(2) The employer maintained a written policy which prohibited "harassment," defined as "any offensive action directed at a person's protected status." Exhibit 1 at 1. The policy gave examples of such prohibited conduct, including, in relevant part, "foul language jokes, slurs, derogatory comments, negative stereotyping, threatening or intimidation [*sic*] acts[.]" Exhibit 1 at 1. The policy specifically prohibited "harassment" if, in relevant part, it "has the purpose or effect of creating an intimidation [*sic*], hostile, or offensive working environment or of unreasonably interfering with an employee's work performance[.]" Exhibit 1 at 1. The employer provided claimant with a copy of this policy upon hire, and discussed the policy with him during his orientation.

(3) Claimant is of Czech and Slovak descent, "look[s] Slavic," and "get[s] mistaken for Russian all the time." Transcript at 26. As a child, other children discriminated against claimant and used slurs against him, based on his ethnicity.

(4) In or around early January 2024, the employer started charging a small fee for wipe cloths that they had previously offered customers for free with a car wash. Customers regularly became upset at this new charge.

(5) On or around January 19, 2024, claimant was interacting with a customer who had become angry at claimant because claimant, per the employer's instructions, would not give the customer free wipe cloths. The customer, apparently believing claimant to be of Russian descent, called claimant a "stupid vodka nigger." Audio Record at 38:52. Claimant, surprised and upset at being called such, reported the incident to two separate coworkers, both of whom held supervisory positions. In reporting the incident, claimant repeated the exact phrasing of the slur that the customer used against him. Neither took action other than to tell claimant that they were uncomfortable with him using the slur. Claimant did not repeat the use of the slur in question to either employee after learning that they were uncomfortable with it.

(6) A few days later, another customer became upset with claimant, again because of claimant's refusal to give the customer free wipe cloths. That customer, apparently believing claimant to be Polish, angrily called claimant a "dumb Polack" in response. Transcript at 29. Claimant also reported this incident to two separate coworkers, this time to the general manager and the manager of the individual location. Neither manager took any action.

(7) In or around late January or early February 2024, yet another customer became upset with claimant because of the issue of charging for previously-free wipes. After the customer, who was Black, angrily walked off, one of claimant's coworkers who had observed the transaction asked claimant if the customer had tipped claimant. Claimant, attempting to diffuse the tension and make light of the situation, explained to the coworker, "Black people don't tip." Transcript at 30. Claimant did not believe this statement to be offensive, but felt that it was acceptable to say it because he had been told the same by a close friend of his, who was Black.

(8) At the time that he made the statements in the above three incidents, claimant did not believe that he had violated the employer's harassment policy.

(9) On February 12, 2024, two of claimant's coworkers reported to the employer that claimant had made racist comments at work.

(10) On February 15, 2024, the employer discharged claimant for having allegedly violated their harassment policy during the incidents described above. The employer had never previously disciplined claimant for any other alleged violations of their policies.

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 in connection with three incidents which took place in January and possibly early February 2024, which the employer asserted violated their harassment policy. The first two of those incidents involved claimant repeating racial or ethnic slurs that customers had angrily used

against him, while the third involved claimant having repeated a racial stereotype to a coworker. It is not clear whether the employer took issue with the second incident (in which a customer called claimant a "Polack,"), or merely the first and third. Regardless, the employer has not met their burden to show that any of these incidents constituted misconduct.

As to the first incident, there is some conflict in the record regarding the responses given to claimant after he reported to coworkers what the customer said to him. At hearing, the employer's witness, who was not present for any of the incidents, testified that the employees to whom claimant spoke "asked [claimant] to stop" using the racial slur that the customer used against him. Transcript at 6. By contrast, claimant testified that neither employee to whom he reported the first incident specifically asked him to stop using the slur in question, but that they merely told claimant that they were uncomfortable with claimant's use of the word. Transcript at 42. Because claimant testified from his own first-hand knowledge of the interaction, his account is afforded more weight than the hearsay testimony offered by the employer's witness, and the facts have been found accordingly.

Had the employees to whom claimant reported the first incident specifically told claimant to stop using the slur in question, claimant's continued use of that word might have constituted a willful violation of the standards of behavior that an employer has the right to expect of an employee, as both employees were in supervisory roles. Merely telling claimant that they were uncomfortable with his use of the word, however, is insufficient to show that claimant either knew or had reason to know that he should refrain from repeating the word to anyone else while reporting the incident to them.

Furthermore, in both the first and second incident, claimant was clearly the *victim* of discrimination or harassment by the customers who angrily used the slurs against him. While it might have been prudent for claimant to use an abbreviated version of those slurs to avoid unintended offense, his purpose in repeating the slurs to the employees he reported them to was, seemingly, to request help or intervention. An employer does not have the inherent right to expect that an employee who is the victim of discrimination or harassment refrain from reporting what actually happened to them, even if the language used against them in that interaction was itself offensive. Likewise, the language of the employer's harassment policy defines harassment as "any offensive action directed at a person's protected status." Here, claimant's use of those slurs was not directed at another person's protected status (i.e., membership in a protected class), but was instead a recounting of the offensive language used against *him*. Because claimant's only use of the slurs was to report what was said to him, rather than using those slurs to refer to anyone else, it was not a violation of the employer's harassment policy. Thus, claimant's conduct in the first two incidents was not a willful or wantonly negligent violation of the employer's standards of behavior.

As to the final incident, in which claimant repeated a stereotype of Black people to one of claimant's coworkers, this was a wantonly negligent violation of the employer's standards of behavior. The harassment policy specifically included "jokes, slurs, derogatory comments, [and] negative stereotyping" as examples of prohibited conduct, when directed towards a person's protected status. Here, claimant employed, apparently as a joke, a negative stereotype about Black people while discussing a Black customer with another employee. While claimant believed that it was okay to repeat this stereotype, claimant nevertheless had reason to know that the comment would violate the employer's policy because it was explicitly mentioned in the policy, which the employer had provided to him. In particular, claimant repeated the stereotype as a joke, without any apparent consideration as to

whether others would find it offensive. Thus, the comment was a wantonly negligent violation of the employer's standards of behavior.

However, the third incident was, at worst, an isolated instance of poor judgment. As explained above, claimant's conduct during the first two incidents did not amount to willful or wantonly negligent violations of the employer's standard of behavior. Likewise, the record does not show that claimant engaged in any other willful or wantonly negligent behavior during his tenure with the employer. As such, the conduct was isolated. While claimant's decision to make that comment was ill-advised, the record does not show that it was illegal or tantamount to unlawful conduct. Neither did the employer meet their burden to show that the comment constituted an irreparable breach of trust in the employment relationship. As such, claimant's conduct during the third incident did not make a continued employment relationship impossible, and was therefore an isolated instance of poor judgment, which is not misconduct.

For the above reasons, the employer discharged claimant, but not for misconduct, and claimant is not disqualified from receiving unemployment insurance benefits based on the work separation.

DECISION: Order No. 24-UI-266789 is affirmed.

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

DATE of Service: October 18, 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.

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