

EMPLOYMENT APPEALS BOARD DECISION
2024-EAB-0820

Reversed
No Disqualification

PROCEDURAL HISTORY: On October 7, 2024, 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 September 15, 2024 (decision # L0006466996).¹ Claimant filed a timely request for hearing. On November 20, 2024, ALJ Frank conducted a hearing, and on November 26, 2024, issued Order No. 24-UI-274905, affirming decision # L0006466996. On November 29, 2024, claimant filed an application for review with the Employment Appeals Board (EAB).

WRITTEN ARGUMENT: Claimant did not declare that he provided a copy of his argument to the opposing party as required by OAR 471-041-0080(2)(a) (May 13, 2019). The argument also 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 as required by OAR 471-041-0090 (May 13, 2019). EAB considered only information received into evidence at the hearing when reaching this decision. *See* ORS 657.275(2).

FINDINGS OF FACT: (1) Dynatron Software Inc. employed claimant as a lead systems architect from May 13, 2019, until September 19, 2024.

(2) The employer expected their employees to refrain from conducting themselves in a manner offensive to other employees. The employer also prohibited employees from bullying other employees, which included shouting or raising one's voice at another employee. Claimant understood these expectations.

(3) On May 11, 2023, the employer placed claimant on a performance improvement plan. One of the items the employer noted in the plan was that claimant had a "lack of professionalism in his responses."

¹ Decision # L0006466996 stated that claimant was denied benefits from September 15, 2024, to September 13, 2025. However, decision # L0006466996 should have stated that claimant was disqualified from receiving benefits beginning Sunday, September 15, 2024, and until he earned four times his weekly benefit amount. *See* ORS 657.176.

Audio Record at 17:46. The employer placed that item in the plan because on some occasions before May 11, 2023, claimant had become “over stressed and respond[ed] in some degree of unprofessional behavior.” Audio Record at 26:15.

(4) On February 5, 2024, the employer gave claimant a performance evaluation. The performance evaluation gave claimant an overall “A” rating. Exhibit 1 at 3. In the area of “Positive Attitude” the evaluation gave claimant a “B,” noting, “[o]n a couple of occasions when his anxiety gets the better of him in the moment on a call, he does not have a positive attitude.” Exhibit 1 at 4. Still, the evaluation noted that claimant “has made great progress in this area over previous reviews[.]” Exhibit 1 at 4.

(5) On September 16, 2024, claimant had a meeting with colleagues on a teleconferencing platform. At the beginning of the meeting, claimant asked for a break because he had been in back-to-back meetings for the preceding three hours without the opportunity for a rest room break. Claimant was told the meeting would be short and he would have to wait until it was over to have a break.

(6) During the meeting, the meeting participants had difficulty finding claimant’s work because, at the request of one of the participants, claimant had previously stopped recording his work on his task board. Claimant became distressed and for about five minutes yelled at the meeting participants while speaking as the group tried to locate the work. While yelling, claimant also raised his hands with open palms up to his side in an agitated manner.

(7) The employer obtained interviews from two participants in the meeting regarding claimant’s conduct, but did not interview claimant. Among other things, the participants reported that they considered claimant’s conduct to have been “very unprofessional and insubordinate.” Audio Record at 13:23. The employer regarded claimant’s behavior during the meeting as a violation of their employee conduct and no-bullying policies. On September 19, 2024, the employer discharged claimant for his conduct during the September 16, 2024, meeting.

CONCLUSIONS AND REASONS: The employer discharged claimant, 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 order under review concluded that claimant was discharged for misconduct, and that the incident for which claimant was discharged was not an isolated instance of poor judgment. Order No. 24-UI-274905 at 3-4. The record does not support this conclusion. Instead, the record shows that claimant was discharged for an isolated instance of poor judgment, which is not misconduct.

Claimant's conduct during the September 16, 2024, meeting was a wantonly negligent violation of the employer's policies. Claimant understood that the employer expected him to refrain from conducting himself in a manner offensive to other employees and that shouting at other employees during a meeting was prohibited. Claimant was conscious of his conduct of yelling at the meeting participants, as it lasted for a sustained period of about five minutes.² Claimant had been in back-to-back meetings previously and been denied a rest room break, which are factors that may lead a person to become agitated and raise their voice. Even so, the record evidence is sufficient to conclude that claimant acted with indifference to the consequences of his actions because his yelling continued for a sustained period of about five minutes, long enough to recognize his behavior and to compose himself. For these reasons, Claimant's conduct during the September 16, 2024, meeting violated the employer's expectations with wanton negligence.

² At hearing, the employer's witness testified that she had not been present during the meeting or seen a recording of it, and read into the record witness statements of what occurred during the meeting. Audio Record at 9:27, 12:11, 13:08 to 15:57. Claimant offered his firsthand account of what transpired during the meeting. Audio Record at 19:58. The accounts were roughly the same. However, one witness statement indicated that claimant yelled for 20 minutes, while claimant testified that he raised his voice for "closer to 5 minutes." Audio Record at 15:25, 23:52. Because claimant's firsthand account is entitled to more weight than the hearsay statement of one of the meeting participants, the weight of the evidence favors claimant's testimony regarding how long he yelled, and the facts of this decision have been found in accordance with claimant's account on that point.

Nevertheless, claimant's violation was not misconduct because it was an isolated instance of poor judgment. Claimant's behavior of conducting himself in a manner offensive to other employees and shouting at other employees was an infrequent occurrence rather than a repeated act or pattern of willful or wantonly negligent behavior. The record indicates that prior to May 11, 2023, the employer had noted a "lack of professionalism" in claimant's responses to colleagues and made that item part of a performance improvement plan. Audio Record at 17:46. Claimant conceded that, as of when he received the plan, he had, on occasions, gotten "over stressed and respond[ed] in some degree of unprofessional behavior." Audio Record at 26:15.

However, by the time of claimant's February 5, 2024, performance evaluation, claimant had improved in this area. The evaluation gave claimant a "B" in the area of "Positive Attitude," noting that on a "couple of occasions" claimant would get anxious during meetings and lack a positive attitude but that he had "made great progress in this area over previous reviews[.]" Exhibit 1 at 4. This evidence supports the conclusion that claimant's unprofessional conduct in meetings had become infrequent as of the February 5, 2024, evaluation. Furthermore, there is no evidence of claimant having violated the employer's expectations regarding conducting himself in a manner offensive to other employees or shouting at other employees between February 5, 2024, and the September 16, 2024, final incident. In light of these facts, as of the date of the final incident in this case, claimant's behavior of conducting himself in a manner offensive to other employees and shouting at other employees was an infrequent occurrence rather than a repeated act or pattern.

The record further shows that claimant's conduct on September 16, 2024, involved poor judgment within the meaning of OAR 471-030-0038(1)(d)(B) and (C) as it was a conscious decision to take action resulting in a wantonly negligent violation of the employer's policies. Finally, per OAR 471-030-0038(1)(d)(D), claimant's actions on September 16, 2024, did not exceed mere poor judgment. The conduct did not violate the law, nor was it tantamount to unlawful conduct. Claimant's conduct did not create an irreparable breach of trust in the employment relationship, as it did not involve, for example, violence, threats of violence, theft, self-dealing, or abuse of official position. Nor did claimant's conduct make a continued employment relationship impossible, as it did not interfere with any essential aspect of the relationship or threaten its continued existence.

Accordingly, claimant's conduct on September 16, 2024, was an isolated instance of poor judgment and, therefore, not misconduct. Claimant is not disqualified from receiving unemployment insurance benefits based on the work separation.

DECISION: Order No. 24-UI-274905 is set aside, as outlined above.

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

DATE of Service: December 31, 2024

NOTE: This decision reverses the ALJ's order denying claimant benefits. Please note that in most cases, payment of benefits owed will take about a week for the Department to complete.

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 stated above.** See ORS 657.282. For forms and information, visit <https://www.courts.oregon.gov/courts/appellate/forms/Pages/appeal.aspx> and choose the appropriate form under “File a Petition for Judicial Review.” You may also contact the Court of Appeals by telephone at (503) 986-5555, by fax at (503) 986-5560, or by mail at 1163 State Street, Salem, Oregon 97301.

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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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