

EMPLOYMENT APPEALS BOARD DECISION
2019-EAB-0380

Modified
Disqualification Effective January 27, 2019

PROCEDURAL HISTORY: On March 13, 2019, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct on January 24, 2019, and that claimant therefore was disqualified from receiving benefits, effective January 20, 2019 (decision # 82309). Claimant filed a timely request for hearing. On April 5, 2019, ALJ Murdock conducted a hearing, and on April 8, 2019, issued Order No. 19-UI-127775, decision concluding the employer discharged claimant for misconduct on January 25, 2019, and that claimant therefore was disqualified from receiving benefits, effective January 20, 2019. On April 15, 2019, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Canon Business Process Services Inc. employed claimant as an office service representative in a small, Portland, Oregon, office from September 11, 2018¹ to February 1, 2019.

(2) The employer had a written “Attendance, Punctuality and Dependability” policy that provided that employees were expected to report for work as scheduled or notify the employer at least one hour in advance of their shift on each day they were going to be late or absent. Exhibit 1. The policy also provided that the employer considered “dependability” to be “essential” and an employee’s failure to report for work or notify the employer the employee would be absent for three consecutive work days would be considered by the employer to be job abandonment and a voluntary resignation. The employer also had a “Personal Leave of Absence” policy that provided that, under certain circumstances, the employer was willing to grant leaves of absence for personal reasons, including medical reasons that were not addressed under its FMLA leave policy, for up to sixty days but that such leave needed to be

¹ We take notice of this fact, which is contained in Employment Department records. Any party that objects to our doing so must submit such objection to this office in writing, setting forth the basis of the objection in writing, within ten days of our mailing this decision. OAR 471-041-0090(1)(c) (October 29, 2006). Unless such objection is received and sustained, the noticed fact will remain in the record.

requested in writing. Exhibit 1. Claimant acknowledged receipt of the employee handbook containing these policies at hire and was aware of the employer's attendance expectations.

(3) In late 2018, claimant submitted a complaint involving a male coworker based on generally racist and homosexual comments he had been making. The employer conducted an investigation and eventually the coworker was discharged based on claimant's complaint.

(4) In January 2019, claimant submitted another complaint that since the coworker's discharge, she had been treated unfairly and there had been ongoing gossip about her in the office between claimant's supervisor (M) and a new employee the employer hired to replace the discharged employee. On January 15, 2019, an employer human resources representative in California, (JO), spoke with claimant over the phone about her complaint. JO told claimant that she would converse with M to better understand what was taking place and get back to her.

(5) Early on January 16, 2019, claimant sent an email to JO requesting a transfer or an accommodation for a disability if a transfer was not available. JO immediately responded that a transfer opportunity was available, but claimant declined it because it paid less than her regular job. JO then attempted to schedule a telephone meeting with claimant at 3:00 p.m. that same day, during claimant's shift, to discuss her request for an accommodation. Claimant declined the meeting and. However, before leaving work that day she "cleared out her desk." Transcript at 5. At 11:36 p.m. that evening, claimant emailed JO that she would be absent from work on January 17 due to illness.

(6) At 5:25 a.m. on Friday, January 18, 2019, claimant sent a text message to M stating that, "Due to illness I will not be in to work today, January 18th." Transcript at 48. M took a screen shot of the text message and sent it to JO, who put it in claimant's file.

(7) Claimant was next scheduled to work on Tuesday, January 22, 2019, as January 21, 2019 was a federal holiday for which the employer's office was closed. On January 21, 2019, claimant sent M a text message stating that she "was going to be out indefinitely" without explaining why. Transcript at 22. However, M did not receive claimant's text message.

(8) On January 22, 23 and 24, 2019 claimant did not report for work or notify the employer that she would be absent. On January 25, 2019, the employer processed claimant's final check based on the assumption that she had abandoned her job and quit.

(9) Between January 24 and February 1, 2019, there was no communications between claimant and the employer. However, on February 1, 2019, claimant sent JO an email stating that, "I should be well enough to return to work this upcoming Monday. Is there anything special I need to do before I resume?" Transcript at 34. On February 1, 2019, in response to claimant's contact, JO drafted and emailed claimant a letter stating, in relevant part:

Dear Jennifer,

We have not heard from you since Friday, January 18, 2019. Please note that our policy states that 3 consecutive days of absence without calling or reporting to work constitutes job

abandonment. Canon Business Process Services, Inc. assumed this as your intention to terminate your employment effective January 24, 2019.

Your final check was paid out effective January 25, 2019. Feel free to call me...if you have any questions.

Regards, JO

(10) On February 1, 2019, the employer discharged claimant for failing to report for work or notify the employer that she would be absent on January 22, 23 and 24, 2019.

(11) Prior to claimant's absences beginning on January 22, 2019, she had not been disciplined by the employer.

CONCLUSIONS AND REASONS: The employer discharged claimant for misconduct on February 1, 2019. Claimant therefore is disqualified from receiving benefits, effective January 27, 2019.

Work Separation. The first issue is the nature of the work separation. If the employee could have continued to work for the same employer for an additional period of time, the work separation is a voluntary leaving. OAR 471-030-0038(2)(a) (December 23, 2018). If the employee is willing to continue to work for the same employer for an additional period of time but is not allowed to do so by the employer, the separation is a discharge. OAR 471-030-0038(2)(b). "Work" means the continuing relationship between an employer and employee. OAR 471-030-0038(1)(a). The date an individual is separated from work is the date the employer-employee relationship is severed. *Id.*

Claimant asserted that she was "fire[d]" on February 1, 2019, when the employer sent her the letter informing her that it considered her failure to report for work or notify it that she would be absent for three consecutive days to be her intention to terminate her employment effective January 24, 2019. Transcript at 19. The Department also concluded that the work separation was a discharge but found that claimant was "fired" on January 24, 2019. Decision # 82309. Although the employer processed her check on January 25, 2019, there was no evidence that it was ever sent or paid to her prior to February 1, 2019, when claimant expressed her intention to resume her employment on February 4, 2019 and the employer first notified her that her employment had ended. Because claimant was willing to continue to work for the same employer for an additional period of time after February 1, 2019, but was not allowed to do so by the employer, the work separation was a discharge that occurred on February 1, 2019.

Discharge. ORS 657.176(2)(a) requires a disqualification from unemployment insurance benefits if the employer discharged claimant for misconduct connected with work. OAR 471-030-0038(3)(a) defines misconduct, in relevant part, as a willful or wantonly negligent violation of the standards of behavior which an employer has the right to expect of an employee, or an act or series of actions that amount to a willful or wantonly negligent disregard of an employer's interest. OAR 471-030-0038(1)(c) defines wanton negligence, in relevant part, as 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. In a discharge case, the employer has the burden to establish misconduct by a preponderance of the evidence.

Babcock v. Employment Division, 25 Or App 661, 550 P2d 1233 (1976). Isolated instances of poor judgment and good faith errors are not misconduct. OAR 471-030-0038(3)(b).

The employer discharged claimant for failing to report for work or notify the employer that she would be absent on January 22, 23 and 24, 2019. The employer had the right to expect claimant to either report for work as scheduled on those days or notify it at least one hour in advance her shifts that she would be absent. On September 10, 2019, claimant acknowledged receipt of the employer's handbook which contained its "Attendance, Punctuality and Dependability" policy which set forth those attendance requirements. Exhibit 1. Moreover, by notifying the employer at least one hour in advance of her shifts on January 17 and January 18 that she would be absent due to illness, claimant demonstrated her awareness of the employer's attendance and reporting requirements.

At hearing, claimant asserted that her reasons for not notifying the employer that she would be absent each day on January 22, 23 and 24 was because she sent her supervisor a text message on January 21 that she would be "out indefinitely" and that she "just[knew] that [the employer] didn't want [her] working there anymore and they were going to use whatever excuse they could." Transcript at 21. When asked why she did not request a leave of absence to be "out indefinitely", claimant responded, "Like I know that if you're going to be out for a longer period of time you need to, you know, put in the proper paperwork and seek medical treatment [but] I didn't know what I was supposed to do." Transcript at 22. When asked at that point if she contacted JO to find out, claimant responded, "No." *Id.*

By leaving her supervisor a text message on a day the office was closed that she would be "out indefinitely," without stating a reason, and concluding notification was not necessary because she believed she would be fired anyway, claimant demonstrated conscious indifference to the consequences of her conduct for the employer. By failing to inquire about and then take the proper steps to request a leave of absence, either a personal or FMLA leave, if she felt one was necessary, rather than report for work or notify the employer she would be absent, claimant similarly demonstrated a conscious disregard for the employer's interests. Claimant's decision to simply notify the employer by text message on January 21, 2019 that she would be "out indefinitely" without stating a reason was at least wantonly negligent.

Claimant's conduct cannot be excused as an isolated instance of poor judgment under OAR 471-030-0038(3)(b). For conduct to be considered an isolated instance of poor judgment, it must be a single or infrequent occurrence rather than a repeated act or pattern of other willful or wantonly negligent conduct. OAR 471-030-0038(1)(d)(A). And some conduct, even if it is isolated, such as acts that violate the law, are tantamount to unlawful conduct, 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)(D).

Claimant's conduct was not isolated, having likely involved separate decisions to fail to notify the employer that she would be absent and the reason therefor on January 22, 23 and 24, 2019, with each decision demonstrating a conscious disregard for the employer's interests. However, even assuming that claimant's conduct in leaving her supervisor the text message on January 21, 2019 constituted a single instance of poor judgment, her failure to follow up with the employer until February 1, 2019, viewed

objectively, exceeded mere poor judgment by making a continued employment relationship impossible. An employer cannot be reasonably be expected to simply wait to see if an employee will ever return to work after being told, without more, that the employee will be “out indefinitely,” particularly when the employer has put the employee on notice in its attendance policy that “dependability” is considered by the employer to be “essential.” Claimant’s conduct cannot be excused as an isolated instance of poor judgment.

Nor can claimant’s conduct be excused as the result of a good faith error in her understanding of the employer’s expectations regarding attendance and absence reporting. Claimant did not assert or show that she believed, or had a factual basis for believing, the employer would condone failures to report for work or properly notify it that she would be absent on January 22, 23 and 24, 2019. Moreover, by her absence reports on January 16 and January 18, 2019, claimant demonstrated that she understood the employer’s absence reporting requirements.

The employer discharged claimant for misconduct under ORS 657.176(2)(a). Claimant is disqualified from receiving unemployment insurance benefits based on her work separation until she has earned at least four times her weekly benefit amount from work in subject employment.

DECISION: Order No. 19-UI-127775 is modified, as outlined above.

D. P. Hettle and S. Alba;
J. S. Cromwell, not participating.

DATE of Service: May 23, 2019

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 Asuntos Laborales. Si no está de acuerdo con esta decisión, puede presentar una Petición 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 فوراً، و إذا كنت لا توافق على هذا القرار، يمكنك رفع شكوى للمراجعة القانونية بمحكمة الإستئناف بأوريغون و ذلك باتباع 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.

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