

EMPLOYMENT APPEALS BOARD DECISION
2019-EAB-0662

Affirmed
Disqualification

PROCEDURAL HISTORY: On April 19, 2019, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 152446). Claimant filed a timely request for hearing. On May 20, 2019, the Office of Administrative Hearings (OAH) mailed notice of a hearing scheduled for May 30, 2019 at 9:30 a.m. On May 30, 2019, claimant failed to appear at the hearing and ALJ Seideman issued Order No. 19-UI-130830, dismissing claimant's request for hearing because claimant failure to appear. On June 7, 2019, claimant filed a timely request to reopen the May 30, 2019 hearing. On June 14, 2019, OAH mailed notice of a hearing scheduled for June 26, 2019 at 10:45 a.m. to consider claimant's motion to reopen and, if the motion was allowed, whether claimant was disqualified from the receipt of benefits based on his work separation. On June 26, 2019, ALJ Seideman conducted a hearing, and on June 28, 2019, issued Order No. 19-UI-132547, allowing claimant's request to reopen, cancelling Order No. 19-UI-130830, and affirming decision # 152446 concluding the employer discharged claimant for misconduct. On July 16, 2019, claimant filed an application for review the Employment Appeals Board.

Based on a *de novo* review of the entire record in this case, and pursuant to ORS 657.275(2), the portion of the order under review concluding that claimant showed good cause for failing to appear at the May 30, 2019 hearing is **adopted**.

FINDINGS OF FACT: (1) Press Pros, a printing company, employed claimant as a bindery worker from August 1, 2018 to March 19, 2019.

(2) The employer expected claimant to report for work at 8:00 a.m. as scheduled, take two 10-minute breaks per eight-hour shift, one prior to lunch and one following lunch, and to take no longer than a one-hour lunch break. Claimant understood the employer's expectations.

(3) Prior to March 18, 2019, claimant often reported for work after the start of his scheduled shift, took extra morning breaks, and took lunch breaks that exceeded one hour. As a result, the employer's owner verbally warned claimant on multiple occasions that his failure to follow the employer's expectations

regarding reporting for work as scheduled and taking breaks as permitted was detrimental to his continued employment.

(4) On March 18, 2019, claimant reported to work late, at 9:35 a.m. That day, the employer's manager prepared, and claimant signed, a written warning that clarified that claimant was expected to report for work as scheduled, was allowed only "two 10-minute breaks per eight-hour shift, one prior to lunch and one following lunch," and was not allowed to take "extended lunches." Later that day, the employer sent claimant home before the end of his shift because he took another extended lunch break. Before leaving work, claimant signed a statement stating that he "took too long of a lunch [and] it won't happen again. Transcript at 9.

(5) On March 19, 2019, claimant took two 10-minute breaks prior to his lunch break, in violation of the warning he had signed one day earlier. Claimant took the two breaks when he did after concluding that he was not busy. Later that day, the employer discharged claimant for taking two breaks within a three hour period.

CONCLUSIONS AND REASONS: The employer discharged claimant 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) (December 23, 2018). "[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). Isolated instances of poor judgment and good faith errors are not misconduct. OAR 471-030-0038(3)(b). 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 for taking two 10-minute breaks within a three-hour period prior to his lunch break on March 19, 2019. The employer had the right to expect claimant to take only one ten-minute break prior to lunch and one ten-minute break after lunch because claimant had signed the employer's reminder of that expectation one day earlier. Claimant violated that expectation on March 19 after concluding he was not busy and that is what he had done in the past. Transcript at 19. Claimant's decision to take two breaks prior to his lunch break after being reminded one day earlier that doing so was not allowed demonstrated conscious indifference to the consequences of his actions for the employer and was at least wantonly negligent.

Claimant's March 19 conduct cannot be excused as an isolated instance of poor judgment under 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). Claimant's wantonly negligent conduct on March 19 was not an isolated instance. On March 18, 2019, claimant was sent home early for taking an extended lunch after being warned against doing so by the owner and admitted in writing before going home that he had taken "took too long of a lunch [and] it won't happen again." Claimant's admission demonstrated his indifference in following the employer's expectation regarding lunch breaks and also was at least wantonly negligent.

Nor may claimant's March 19 conduct be excused as the result of a good faith error in claimant's understanding of the employer's expectation under OAR 471-030-0038(3)(b). Claimant admitted at hearing that he recalled being told by the employer on more than one occasion prior to March 19 that such conduct was not allowed. Transcript at 29.

The employer discharged claimant for misconduct and claimant is disqualified from receiving unemployment insurance benefits until he has earned at least four times his weekly benefit amount from work in subject employment.

DECISION: Order No. 19-UI-132547 is affirmed.

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

DATE of Service: August 21, 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 desisyong ito.

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 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 دستور العمل موجود در پایان آن، از دادگاه تجدید نظر اورگان درخواست تجدید نظر کنید.

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