

EMPLOYMENT APPEALS BOARD DECISION
2020-EAB-0133

Affirmed
Disqualification

PROCEDURAL HISTORY: On November 7, 2019, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that the employer discharged claimant for misconduct connected with work and was disqualified from benefits effective August 25, 2019 (decision # 132630). Claimant filed a timely request for hearing. On January 22, 2020 ALJ Monroe conducted a hearing, and on January 30, 2020 issued Order No. 20-UI-143615, affirming the Department's decision. On February 13, 2020, claimant filed an application for review with the Employment Appeals Board (EAB).

EAB considered claimant's written argument to the extent it was based on the hearing record.

FINDINGS OF FACT: (1) New Seasons Market LLC employed claimant as a cashier from September 29, 2004 to August 29, 2019.

(2) The employer expected its employees to refrain from using their cell phone during work hours unless the use was authorized for a work-related purpose. The employer also expected its employees to refrain from interfering in an on-going investigation by speaking to any coworker other than management about the subject matter of the investigation. Claimant was aware of an understood the employer's expectations.

(3) On August 25, 2019, claimant was working as a cashier near the deli area. The deli supervisor observed claimant using his cellphone out on the floor multiple times during claimant's work shift. At times, the supervisor observed claimant using his cellphone while by himself while at his assigned register and at other times he observed claimant showing his cellphone to other coworkers. During the

shift, the deli supervisor coached claimant “to put his phone away” several times. Transcript at 9-10; Exhibit 1. Claimant asked the deli supervisor not to report the coaching conversations to the employer.

(4) Thereafter, the supervisor reported her observations to the department manager, who reported the information to the employer’s human resources (HR) manager.

(5) On August 26, 2019, the HR manager conducted a fact-finding meeting with claimant to determine if and why he had used his cellphone during his shift and ascertain the nature of the cellphone content he had shown to coworkers. During an initial fact-finding meeting, claimant reported to the HR manager that he had used his cellphone and its calculator function to assist him at his register. He also reported that he had used his cell phone to look at Facebook pictures of former female coworkers and then show them to two other coworkers, whom he identified. He admitted that he knew that he was not supposed to use his cellphone for a purpose unrelated to work and apologized for his conduct. Transcript at 12. Before the meeting ended, the HR manager warned claimant not to talk to any other staff members about the investigation or to “circle back” with any of the coworkers he had spoken to the night before because the investigation was ongoing. Transcript at 14, 49. The manager also told claimant that his request to the deli manager not to report her coaching conversations with him to the employer was an improper request.

(6) After the fact-finding meeting, the HR manager spoke to the two coworkers that claimant had shown his cellphone to whom claimant had identified. One told the manager that claimant had shown them a photo of a former female coworker in a bikini that was on Facebook and making commentary about it on the floor that made him uncomfortable. The other told the manager that he had not actually seen the photo on claimant’s cellphone but that claimant’s commentary about it out on the floor made him uncomfortable.

(7) After the HR manager’s conversation with the first coworker, that coworker reported to the HR manager that claimant had approached him after leaving the HR office to talk about the situation. He reported that claimant had asked him to change his story so that claimant would not “get in trouble.” Transcript at 13. He felt uncomfortable about their conversation during the rest of his shift. A third coworker who had not been involved in the August 25 incident also reported to the HR manager that claimant had approached him while he was returning to work from a break and asked him to talk to the other two coworkers who had been involved in the August 25 incident and “advocate” for claimant during the investigation. Transcript at 15.

(8) The HR manager then conducted a second fact-finding meeting with claimant. At that meeting, claimant admitted that he knew he should not have said anything to the coworker he had approached after their first meeting because he understood the HR manager’s expectation in that regard. Transcript at 16. He explained that he had been “stressed out...about what was going to happen next... and wanted to immediately approach that staff member to try to fix it.” Transcript at 16. He apologized for discussing the matter with coworkers and said he understood the expectation not to. Transcript at 16.

(9) On August 29, 2019, the employer discharged claimant for using his cellphone on the floor of its store for a purpose unrelated to work and for interfering in an on-going investigation by speaking to coworkers other than management to attempt to affect its outcome.

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 using his cellphone on the floor of its store for a purpose unrelated to work and for interfering in an on-going investigation by speaking to coworkers other than management to attempt to affect its outcome. Claimant admitted that he understood the employer expectations in those regards and apologized to the employer for violating them during its fact-finding meetings. Claimant’s conduct in asking the deli supervisor not to report her coaching conversations with him on August 25 and his attempts to convince one coworker to change his report regarding what claimant has shown him on August 25 so claimant would not “get in trouble” demonstrated that he knew that his use of the phone violated the employer’s expectations. By knowingly using his phone on the store floor for a reason unrelated to work and then later attempting to affect the outcome of an investigation regarding that conduct after being warned not to do so, claimant demonstrated conscious indifference to the employer’s expectations and 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). 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 August 25 and then again shortly thereafter to affect the outcome of the investigation was not isolated. Claimant's conduct during that period involved separate acts constituting separate instances of poor judgment, and occurred on different days and for different reasons. Accordingly, claimant's conduct cannot be excused as an isolated instance of poor judgment.

Nor may claimant's conduct be excused as the result of a good faith error in claimant's understanding of the employer's expectations under OAR 471-030-0038(3)(b). Claimant admitted during the employer's investigation that he understood the employer's cellphone expectations and that he was not supposed to interfere with the employer's investigation. He did not sincerely believe that his conduct did not violate the employer's expectations, nor did he sincerely believe the employer would condone or excuse his repeated violations of those expectations.

The employer discharged claimant for misconduct. 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. 20-UI-143615 is affirmed.

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

DATE of Service: March 20, 2020

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 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 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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