

EMPLOYMENT APPEALS BOARD DECISION
2020-EAB-0215

Reversed
Disqualification

PROCEDURAL HISTORY: On December 12, 2019, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct, and disqualifying claimant from benefits effective October 6, 2019 (decision # 84551). Claimant filed a timely request for hearing. On February 7, 2020, February 24, 2020, and February 27, 2020, ALJ Murdock conducted a hearing, and on March 6, 2020 issued Order No. 20-UI-145816, reversing decision # 84551 and concluding that claimant's discharge was not for misconduct. On March 10, 2020, the employer filed an application for review with the Employment Appeals Board (EAB).

EAB did not consider the employer's written 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).

FINDINGS OF FACT: (1) The Department of the Air Force employed claimant as a general engineer from October 1, 2018 to October 8, 2019.

(2) Claimant and the employer disagreed with respect to many aspects of claimant's employment, including, among many other things, claimant's chain of command and use of disabled veterans leave (DVL). Claimant insisted that the way he understood matters was correct, and that the employer was wrong, discriminating against him, and/or violating his reasonable accommodations.

(3) The employer expected claimant to report to work when scheduled to work, and to notify his supervisor each day he was absent. The employer also expected claimant to code his absences appropriately, for example, when using sick leave, DVL, annual leave, and when absent without leave.

(4) On January 16, 2019, claimant sent a text to his first-line supervisor, Captain D., that he was sick and would not work that day. On January 17, 2019, claimant did not report to work or notify Captain D. that he was sick or would be off work that day. Later that day, Captain D. sent a text to claimant asking for his status, and claimant later replied that he was still sick.

(5) In response to claimant's January 17th absence without notice, Captain D. sent an email to claimant "clearly communicating" his expectations with respect to taking leave, and notifying claimant that his January 17th leave would be marked as "absence without leave." Exhibit 1. Captain D. also sent text messages to claimant on January 17th, one telling claimant to look for the email, and a second telling claimant to call him at a specified time on January 18th.

(6) On January 18, 2019, claimant did not work or notify the employer that he would be absent. He was supposed to telecommute that day, but did not call Captain D. at the specified time as instructed, and was not logged into Skype as would be expected if he was actually working that day.

(7) Later that day claimant and Captain D. spoke on the phone. During that call, Captain D. told claimant that he was being marked as absent without leave for his January 17th and January 18th absences. Claimant disagreed with the captain and wanted his January 16th sick call to apply to the other two absences and complained that the captain's "shifting expectations" had left things unclear. Captain D. directed claimant to read his January 17th email regarding his expectations, and reiterated that the January 17th and 18th absences were without leave. Claimant responded by stating, "Ok." Exhibit 1.

(8) Claimant subsequently claimed on time cards that he had worked on January 16th, January 17th, and January 18th, even though he had not. Captain D. instructed that claimant's time cards be modified to reflect that claimant was sick on January 16th and absent without leave on January 17th and January 18th.

(9) On January 30, 2019, while Captain D. was on paternity leave, claimant asked a sergeant to change his time card entries for January 17th and January 18th to sick leave. Claimant falsely told the sergeant that Captain D. had approved the change, even though he knew Captain D. had not done so. The sergeant contacted Captain D., who told the sergeant not to change claimant's time card.

(10) On February 27, 2019, claimant took the day off because of inclement weather. Captain D. told claimant he would need to use leave to cover the absence because the base was still open despite the weather. Claimant claimed sick leave to cover that absent, even though he was not absent because he was sick. On February 28, 2019, Captain D. instructed claimant to correct the leave request from sick leave to annual leave during the next pay period.

(11) In mid-July 2019, claimant again attempted to change his January 17th absence from absent without leave to DVL. He also attempted to change his February 27th absence from annual leave to DVL. Captain D. had not authorized either of those changes, and the changes were contrary to prior instructions Captain D. had given him.

(12) Captain D. noticed claimant's attempt and emailed the group to clarify that the January 17th and February 27th absences were not to be marked as DVL. Claimant then approached Lieutenant Colonel C., Captain D.'s superior and claimant's third-tier supervisor, to try to persuade her to overrule Captain D. Lieutenant Colonel C. told claimant she would not countermand Captain D., claimant's immediate supervisor. Only after Lieutenant Colonel C. refused to take action did claimant cease trying to claim the January 17th and February 27th absences as DVL.

(13) Upon being hired, the employer notified claimant of his chain of command. Claimant spent the first three months of his employment refusing to recognize his chain of command on belief that the designated chain of command was incorrect. Claimant was aware of his chain of command even though he continued to disagree with it.

(14) On August 16, 2019, claimant sent an email to Colonel L., the fourth-tier supervisor in his chain of command. Claimant's email did not include any of the three supervisors preceding Colonel L. in claimant's chain of command.

(15) On August 19, 2019, Lieutenant Colonel C. sent an email to claimant stating, in pertinent part:

I would also like to remind you that you work in a military organization that has a clear chain of command/supervision line. Anything having to do with the mission of the . . . [s]quadron should be communicated to the following in this order:

1. Capt D[]
2. Mr. T[]
3. Lt Col C[]

It is completely inappropriate for you to address the Mission Support Group Commander directly about specific project concerns that have not been discussed with the three supervisors above.

Exhibit 5.

(16) On August 21, 2019, Colonel L. replied to claimant's email stating, "You should attempt to resolve all issues within your immediate chain of command. Direct report to me . . . is not an option that I am considering . . . I ask that you continue to bring your concerns to your supervision and work through them in a professional manner . . ." Exhibit 7. Colonel L.'s email also stated that claimant was being "extremely unprofessional and I will not tolerate it." Exhibit 7.

(17) Later the same day, claimant replied to Colonel L.'s email despite the August 19th and August 21st emails telling him not to contact Colonel L. Claimant indicated in the email that he was refusing to follow the chain of command because his supervision was his concern, so "it falls to outside sources to resolve those concerns." Exhibit 7. Claimant also stated, "To be clear, what is your immediate action? Should I go home?" Exhibit 7. Colonel L. responded, "no you should not go home. I am not even sure why you would suggest that. You should follow the work schedule and plan outlined by your supervision. If you are confused you can call Capt D[], Mr. T[] and LtCol C[]. If after attempting contact with all three and you can't reach them, then Chief C[] will take your concerns and relay them to me." Exhibit 7.

(18) In early September 2019, the employer submitted documentation regarding claimant's conduct to its legal team for review. Effective October 1, 2019, the employer conditionally removed claimant from his position based upon his conduct, including the conduct described herein. Claimant asked that the removal decision be reviewed. The employer reviewed the decision, and, on October 9, 2019, Colonel L. notified claimant that he was being discharged from employment effective that day.

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).

The order under review concluded that claimant’s discharge was not for misconduct because although “a series of events [] resulted in supervisors and claimant having difficulty working together”, “[c]laimant believed he was complying with rules, regulations and procedures and advocating for himself with respect to his pay, position and job duties, as well as asserting himself when he felt his supervisors were discriminating against him or failing as leaders in other ways.” Order No 20-UI-145816 at 5. The record does not support that conclusion.

The employer had the right to expect claimant to comply with lawful instructions, and refrain from insubordination. The totality of the evidence suggests that claimant was aware of those expectations.

On January 17th, Captain D. notified claimant via email that his January 17th absence was without leave. On January 18th, Captain D. reiterated the same thing, and claimant replied, “Okay.” Notwithstanding Captain D.’s instructions and claimant’s acknowledgment of the same, claimant thereafter on three occasions attempted to undermine that instruction, first by certifying on his time card for that date that he had actually worked on January 17th, second in late January 2019 when claimant falsely told a sergeant that Captain D. had authorized his January 17th absence to be recorded as sick leave instead of absence without leave, and third in mid-July when he tried to re-code his January 17th absence as DVL.

On February 27th, claimant was absent from work due to inclement weather. He falsely recorded the absence as sick leave. Captain D. subsequently instructed him to fix his leave type to reflect that he had not been sick that day. In mid-July 2019, claimant again tried to falsely record the absence as DVL, even though he had not been absent due to sickness or his disability.

When Captain D. refused to permit the absences to be re-coded, claimant intentionally attempted to subvert Captain D.’s authority, and violated his chain of command by skipping his second-tier supervisor, by asking his third-tier supervisor to intervene. Only when Lieutenant Colonel C. refused to undermine Captain D.’s decision did claimant stop trying to claim that his January 17th and February 27th absences had been due to illness or related to his disability.

However, claimant continued to willfully or with wanton negligence violate his chain of command on at least three additional occasions. First, claimant sent an email to a colonel at least four removed from his

immediate chain of command, under circumstances where he knew or should have known that was inappropriate. He then received an email specifically designating the three individuals in his immediate chain of command and instructing him not to go outside it unless he had first approached all three of them. Claimant received a second email from Colonel L. that stated claimant was being “extremely unprofessional” and needed to follow the chain of command, which did not include Colonel L. Even though claimant had just been told not to do so, twice, he again emailed Colonel L., willfully violating his chain of command and at least two instructions, within just days of Lieutenant Colonel C.’s and Colonel L.’s emails, both of which listed the individuals in claimant’s chain of command and instructed him to contact them rather than Colonel L.

Claimant’s conduct as described in this decision involved an ongoing pattern willful or wantonly negligent conduct on his part. The conduct described includes: three instances in which he willfully violated Captain D.’s instructions with respect to the January 17th absence; one instance in which he willfully made false claims to a sergeant that Captain D. had authorized him to change the January 17th absence from leave without pay to sick leave; one instance in which he falsely coded his February 27th absence as sick leave; one instance in which he willfully violated Captain D.’s instructions by attempting to have the February 27th absence re-coded as DVL; one instance in which he tried to subvert Captain D.’s authority and violated his chain of command by attempting to have Lieutenant Colonel C., his third-tier supervisor, authorize the January 17th and February 27th absences to be re-coded as DVL; one instance in which he wantonly negligently violated chain of command by sending an email to Colonel L., his fourth-tier supervisor, when he knew or should have known that he was expected to follow his chain of command and demonstrated indifference to the consequences of his conduct by going outside the chain of command anyway; and one instance in which he willfully violated chain of command by again emailing Colonel L. after twice being instructed not to do so.

Claimant’s conduct cannot be excused as a good faith error. Claimant acted as he did out of an insistence that he was right and the employer was wrong, despite every available resource the employer had telling claimant that he was not right and instructing him as to the appropriate course of action. He chose to act in most instances in direct contradiction to specific instructions the employer had given him. Under those circumstances, any belief claimant might have had that he was acting appropriately was neither reasonable nor sincere, and he had no reasonable or sincere basis to believe the employer would continue to condone his ongoing violations of their clear expectations and specific instructions.

Claimant’s conduct also cannot be excused as an isolated instance of poor judgment. An isolated instance of poor judgment is defined to include a single or infrequent exercise of willful or wantonly negligent poor judgment, and cannot exceed mere poor judgment by causing an irreparable breach of trust in the employment relationship or otherwise making a continued employment relationship impossible. *See* OAR 471-030-0038(1)(d). As set forth in this decision, claimant engaged in at least nine separate willful or wantonly negligent violations of the employer’s clearly communicated expectations, each of which involved claimant’s exercise of poor judgment. His conduct therefore was not a single or infrequent act, but rather involved repeated exercises of poor judgment over the course of approximately eight months. Claimant’s conduct therefore was not isolated. Claimant’s conduct also exceeded mere poor judgment in two respects. First, his repeated willful and wantonly negligent acts in the face of the employer’s clear instructions to the contrary, and his attempts to falsely induce the employer to falsely designate two absences as sick leave or DVL – including falsely telling a sergeant that Captain D. had approved him for sick leave when Captain D. had not – caused an irreparable breach of trust in the

employment relationship. No reasonable employer would continue to trust an employee who was not willing to follow instructions and had engaged in false acts. Second, given that the employer in this case is the Air Force, a military entity, claimant's falsehoods and repeated violations of the chain of command likely made a continued employment relationship impossible, as no reasonable military employer would be likely to continue to employ an individual who has made false statements to induce the employer to act to his benefit or who repeatedly violated the employer's chain of command.

For the reasons set forth above, singly or considered together, the preponderance of the evidence in this record establishes that the employer discharged claimant for misconduct. Having so concluded, we need not and do not address the employer's remaining allegations concerning claimant's conduct. Claimant is disqualified from receiving unemployment insurance benefits based upon this work separation until he has earned four times his weekly benefit amount from work in subject employment.

DECISION: Order No. 20-UI-145816 is set aside, as outlined above.

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

DATE of Service: April 13, 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 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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