EO: 200
BYE: 202106

State of Oregon
Employment Appeals Board
875 Union St. N.E.
Salem, OR 97311

356
DS 005.00

EMPLOYMENT APPEALS BOARD DECISION
2020-EAB-0340

Affirmed
Disqualification

PROCEDURAL HISTORY: On March 18, 2020, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct and claimant was disqualified from receiving unemployment insurance benefits effective February 9, 2020 (decision # 64731). Claimant filed a timely request for hearing. On April 16, 2020, ALJ Snyder conducted a hearing, and on April 17, 2020 issued Order No. 20-UI-148342, affirming the Department's decision. On May 3, 2020, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Kaiser Foundation Health employed claimant as a materials coordinator from May 19, 2014 until February 13, 2020.

(2) The employer expected claimant to respond to recall notices in a timely manner. The employer required claimant to access the recall management system and respond to any notice regarding a potentially life-threatening product recall within 24 hours, excluding weekends. To respond to a recall notice, the employer expected claimant to go into the building where the product was located, remove and separate the product if there was any there, report what he found to the recall management system, and await further instructions regarding the product. If claimant found none of the product, the employer expected him to report that within the recall management system.

(3) The employer expected claimant to ensure any refrigerated product was kept refrigerated and delivered immediately to the correct department. Claimant had been trained to recognize if a product needed refrigeration, and how to handle such products. If claimant did not know which department ordered a product, the employer expected claimant to continue to ensure the product was refrigerated and to contact the employer's strategic sourcing department to determine which department ordered the product.

(4) On Friday, December 6, 2019, claimant received an email regarding a recall notice for a potentially life-threatening product recall. On Monday, December 9, 2019, claimant looked for the

recalled product and did not find any of the product. He attempted logging into the recall management system to respond to the recall notice, but could not remember his log in information. Claimant contacted the recall management system without logging into its system and told them the employer did not have any of the product. They told claimant he still had to log into the system and document his response there. By December 19, 2019, claimant had received three more recall notices for the same recall because he had not logged into the system and documented his response. All the recall emails were also sent to claimant's immediate supervisor, who was on vacation at the time. Claimant never contacted anyone for assistance with logging into the recall management system website, or reported to a supervisor that he had not documented a response to the recall notices on the recall management system's website.

(5) On approximately December 12, 2019, a refrigerated product was delivered to claimant. Claimant knew the product required refrigeration. Claimant tried to deliver the product to two different departments, but both departments returned the product to claimant and told him the product did not belong to their departments. Claimant tried to contact the administrative department to learn where he should deliver the product, or if it was a mistaken shipment. Claimant was not able to contact anyone in that department on Friday, December 13. Claimant left the product sitting unrefrigerated on his desk over the weekend. Several days later, the department that needed the product contacted claimant. The product was no longer usable because it had been unrefrigerated for several days. The product was worth $5,000 and a patient's treatment was delayed because the product was unusable.

(6) On December 19, 2019, claimant's supervisor returned from vacation, reviewed the four emails addressed to her and claimant about the December 6 product recall, and asked claimant to log into the recall management system regarding the product recall notice. Claimant did not tell his supervisor that he had been unable to access the system. Claimant remembered his log in information, logged into the system, and responded to the notice, indicating that the employer did not have any of the recalled product.

(7) On January 8, 2020, the employer put claimant on administrative leave while it conducted a "joint discovery" between the employer and claimant's union. Transcript at 12.

(8) On February 13, 2020, the employer discharged claimant because he failed to respond properly to a recall notice and failed to keep a product refrigerated until it was delivered to the proper department.

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). 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 and good faith errors are not misconduct. OAR 471-030-0038(3)(b).

The employer discharged claimant in part because he failed to respond to a recall notice on time or in the proper manner. Claimant asserted that he responded to the recall notice by sending an email to "the people that sent the recall [that] . . . answered their concerns . . . via email." Transcript at 25. However, claimant knew or should have known from both the employer's policy and the email response that he received from the recall management system in response to his email that he still needed to log into the system and document his response to the recall notice. Moreover, the recall management system sent claimant three additional emails asking him to respond to the recall notice. Claimant did not attempt to obtain assistance in logging on to the recall management system website to respond to the recall notice. At hearing, claimant asserted that the recall "had been addressed" because he checked that the clinic had none of the recalled product. Transcript at 26. However, the employer's policy presumably required claimant to respond via the recall management system's website for multiple reasons that would not be satisfied by claimant's emailed response. Claimant's conduct was a wantonly negligent disregard of the employer's reasonable expectation that he access the recall management system and respond to any notice regarding a potentially life-threatening product recall within 24 work hours. Nor does the record show that claimant had a good faith basis to believe that the employer would permit or condone an exception to following recall response protocol based on his inability to recall his log in information.

The employer also discharged claimant in part because he failed to refrigerate a product that required refrigeration while he attempted to find the department that had ordered the product, or until it was returned to the vendor. Claimant asserted that he thought the product was a "misship" and he therefore set it aside to research later. Transcript at 23. Although the record does not show that claimant knew the product's value was $5,000 or that failing to refrigerate it would adversely affect a patient, claimant should have known as a matter of common sense that even if the product was mistakenly sent to the employer, it required refrigeration to maintain its value and usefulness. Moreover, because the product was not a mistaken shipment, had claimant contacted the employer's strategic sourcing department as per the employer's policy, it is more probable than not that the correct department would have been identified. Claimant was wantonly negligent in failing to ensure the product was refrigerated until he was able to deliver it to the correct department. Nor can claimant's conduct be excused as a good faith error in his understanding of the employer's expectations. The facts do not show that it would have been reasonable for claimant to believe the employer would condone his failure to preserve the product he was charged with delivering to the correct department.

The next issue is whether claimant's December 2019 conduct was an isolated instance of poor judgment, and not misconduct. *See* 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 conduct involved poor judgment and probably did not exceed mere poor judgment. However, the record contains evidence of multiple incidents of wantonly negligent violations of the employer's expectations. Between December 6 and December 18, claimant repeatedly failed to respond to the notices of a recall that required a response within 24 work hours. Although each incident involved the same recall, claimant failed to take the necessary steps to ensure the recall response was completed in response to four different emails on four different days. Claimant's decision not to log into the recall management system's website the first time was wantonly negligent, but claimant's subsequent failures to respond to three more emails showed a higher level of disregard because the recall management system warned claimant that his first emailed response was insufficient, and the emails showed that the matter had not been "addressed," as claimant asserted at hearing. Transcript at 28. Claimant's repeated failures to act were not a single or infrequent occurrence. Moreover, claimant's failure to refrigerate a product that he knew required refrigeration, combined with claimant's failure to respond to the recall emails, formed a pattern of wantonly negligent behavior, and was not a single or infrequent occurrence. Claimant's conduct therefore was not isolated and cannot be excused as an isolated instance of poor judgment.

The employer discharged claimant for misconduct. Claimant is disqualified from receiving unemployment insurance benefits.

DECISION: Order No. 20-UI-148342 is affirmed.

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

DATE of Service: <u>May 28, 2020</u>

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 – 本判决会影响您的失业救济金。 如果您不明白本判决， 请立即联系就业上诉委员会。 如果您不同意此判决，您可以按照该判决结尾所写的说明，向俄勒冈州上诉法院提出司法复审申请。

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 ໄດ້ ໂດຍປະຕິບັດຕາມຄຳແນະນຳທີ່ບອກໄວ້ຢູ່ຕອນທ້າຍຂອງຄຳຕັດສິນນີ້.

Arabic

هذا القرار قد يؤثر على منحة البطالة الخاصة بك، إذا لم تفهم هذا القرار، إتصل بمجلس منازعات العمل فورا، 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 دستورالعمل موجود در پایان آن، از دادگاه تجدید نظر اورگان درخواست تجدید نظر کنید.

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