

EMPLOYMENT APPEALS BOARD DECISION
2020-EAB-0656

Affirmed
Disqualification

PROCEDURAL HISTORY: On January 30, 2020, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that the employer discharged claimant for misconduct and claimant was disqualified from receiving benefits effective December 15, 2019 (decision # 95014). Claimant filed a timely request for hearing. On February 27, 2020, the Office of Administrative Hearings (OAH) mailed notice of a hearing scheduled for March 12, 2020 at 10:45 a.m., at which time claimant failed to appear. On March 12, 2020, ALJ Griffin issued Order No. 20-UI-146098 dismissing claimant's request for hearing for failure to appear.

On March 23, 2020, claimant filed a timely request to reopen the hearing. On April 20, 2020, OAH mailed notice of a hearing scheduled for May 4, 2020 at 3:30 p.m. On May 4, 2020, ALJ Schmidt conducted a hearing, and on May 6, 2020 issued Order No. 20-UI-149338, denying claimant's request to reopen the hearing. On May 25, 2020, claimant filed an application for review of Order No. 20-UI-149338 with the Employment Appeals Board (EAB).

On May 29, 2020, EAB issued EAB Decision 2020-EAB-0416, reversing Order No. 20-UI-149338 and concluding that claimant had good cause to reopen the March 12, 2020 hearing. On June 2, 2020, OAH mailed notice of a hearing scheduled for June 12, 2020. On June 12, 2020, ALJ Schmidt conducted a hearing, and on June 17, 2020 issued Order No. 20-UI-151131, affirming decision # 95014. On July 6, 2020, claimant filed a timely application for review of Order No. 20-UI-151131 with EAB. EAB received claimant's application for review on October 13, 2020.

Claimant did not declare that they provided a copy of the written argument they mailed to EAB on June 6, 2020 to the opposing party or parties as required by OAR 471-041-0080(2)(a) (May 13, 2019). The argument also contained information that was not part of the hearing record, and did not show that factors or circumstances beyond claimant's reasonable control prevented them from offering the information during the hearing as required by OAR 471-041-0090 (May 13, 2019). EAB considered only information received into evidence at the hearing when reaching this decision. *See* ORS 657.275(2).

FINDINGS OF FACT: (1) Knutson Towboat Company employed claimant as a machinist welder from September 25, 2017 to December 16, 2019.

(2) The employer required that employees report on time for their scheduled shifts. The employer required that employees call and notify the employer if they would be late or absent.

(3) Claimant initially worked for the employer in the machine shop. Claimant was repeatedly late and did not always call the employer to report his tardiness. Sometimes claimant did not report to work or notify the employer of his absence, and on at least ten occasions the employer had to call around to claimant's mother or girlfriends to find claimant and determine why he was not at work.

(4) The shop foreman repeatedly verbally warned claimant about his attendance, and by March 2019 decided that he no longer wanted to employ claimant in the shop. Because claimant was a good welder and fabricator, the employer's log yard manager offered to transfer claimant to the employer's log yard.

(5) Once working in the log yard, claimant continued to be repeatedly late to work and absent without notice. The log yard manager repeatedly gave claimant verbal warnings. During the first part of November 2019, the log yard manager took claimant aside and warned him that no one from the employer's other departments wanted claimant to work for them, and that the log yard manager was the last person claimant would be working for.

(6) Claimant continued to report to work late, without notice or excuses justifying his tardiness, approximately 8 times between October 1 and November 18, 2019.¹ On November 7, 2019, claimant promised the manager he would "Have my shit together tomorrow" and "will become a Good employee." Exhibit 3. Claimant reported to work late because of some ongoing medical issues in mid-November. On November 19, 2019, claimant reported to work 15 minutes late, but did not have an excuse for why he was tardy on that date, or why he had continued to report to work late after at least four verbal warnings.

(7) Claimant continued to work for the employer for approximately one week, but the log yard manager was already "done" with claimant because of his repeated tardiness. Transcript at 8.

(8) As of November 25, 2019, the log yard manager decided to discharge claimant because of claimant's cumulative history of tardiness and no-call/no-shows. Transcript at 8. After claimant finished his November 25th shift, the log yard manager told claimant that there was no work available for the rest of the year and sent claimant home. The log yard manager did not tell claimant he was going to be discharged, and claimant assumed that he would return to work after the first of the year when the employer had more work.

(9) Between November 25, 2019 and December 16, 2019, the log yard manager informed the human resources manager that he had decided to discharge claimant and the employer prepared his final

¹ It is more likely than not on this record that claimant's start time while working in the log yard was usually 6:30 a.m. See Exhibit 3; Transcript at 17, 22. Claimant reported to work later than 6:30 a.m. on at least 8 occasions between October 1, 2019 and November 18, 2019. See Exhibit 3.

paycheck. On December 16, 2019, claimant reported to the workplace to collect his paycheck, and the human resources manager told claimant he was discharged.

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) (September 22, 2020). “[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).

The employer discharged claimant because of his cumulative, regular tardiness and absences from work.² The employer reasonably expected claimant to report to work as scheduled and notify the employer when he would be absent from work. Claimant knew or should have known the employer's expectations because of the four or more verbal warnings he received, and because the log yard manager told claimant that the log yard manager was the last manager willing to employ claimant. Notwithstanding the warnings he had received, claimant continued to report to work late or be absent without notice. Claimant's conscious decision to engage in a pattern of behavior that repeatedly violated the employer's reasonable expectations with respect to his attendance demonstrated his indifference to the employer's expectations and the consequences of his conduct, and was therefore more likely than not wantonly negligent.

Although absences due to illness or other physical or mental disabilities are not misconduct under OAR 471-030-0038(3)(b), claimant's behavior is not excusable under that rule. The employer's witness testified that while some of claimant's attendance issues were related to illness or headaches, which are excusable under OAR 471-030-0038(3)(b), and text messages between claimant and his manager during mid-November 2019 suggest that claimant had a knee injury that affected his attendance, that was not the case of all of the absences and tardiness at issue. With respect to claimant's November 19th tardiness, for example, he did not remember why he was tardy, and did not attribute that tardiness to illness or injury. Transcript at 23. Claimant did not dispute that he was absent and tardy from work with no excuse on other prior occasions, that he received at least four warnings about his attendance, and continued to report to work late or be absent without notice; claimant only alleged that the situation was “not as bad as – as – as it's being made out to be.” Transcript at 32. Given that claimant did not dispute

² The employer's witness testified that claimant was late to work on November 25th, but ultimately could not establish by a preponderance of the evidence what claimant's scheduled start time was on that date or that claimant reported to work late. As such, the employer did not prove that there was a November 25th “final incident” that caused the employer to discharge claimant. However, the employer's failure to establish what happened on November 25th does not change the outcome of this decision because the employer established that the decision to discharge claimant was not because of a November 25th “final incident,” it was based upon claimant's “cumulative” attendance, and regardless whether or not claimant had been late on November 25th the employer would still have decided to discharge claimant when they did because “everybody was at their wit's end.” See Transcript at 8, 11.

most of the employer's evidence about his attendance, and did not allege that all or even some of his attendance problems during the last month or two of his employment were the result of illness or injury, the preponderance of the evidence in the record does not show that claimant's tardiness and absences were excused from misconduct under OAR 471-030-0038(3)(b).

OAR 471-030-0038(3)(b) also provides that good faith errors are not misconduct; however, claimant's conduct was not the result of a good faith error. Claimant was repeatedly late, and did not dispute the employer's testimony that claimant was repeatedly late and absent without notice; claimant's only mitigating claim was that the events were "not as bad as – as – as it's being made out to be." The preponderance of the evidence fails to establish that claimant was unaware he was reporting late to work or otherwise failing to work as scheduled or notify the employer. Nor, given all the warnings the employer gave him, does the record establish that he sincerely believed the employer would excuse or condone his attendance problems. Claimant's discharge therefore was not the result of a good faith error.

Finally, OAR 471-030-0038(3)(b) provides that isolated instances of poor judgment are not misconduct. Claimant's conduct was not isolated. Conduct is only considered "isolated" if it is "a single or infrequent occurrence rather than a repeated act or pattern of other willful or wantonly negligent behavior." OAR 471-030-0038(1)(d)(A). In this case, claimant was repeatedly late and/or absent without notice; for the reasons already explained in this decision, claimant's repeated violations of the employer's attendance policy were wantonly negligent. Because claimant repeatedly engaged in wantonly negligent violations of the employer's expectations, claimant's conduct was not isolated and cannot be excused as an isolated instance of poor judgment.

For the reasons explained, the employer discharged claimant for misconduct. Claimant therefore is disqualified from receiving unemployment insurance benefits effective December 15, 2019 and until he requalifies for benefits under Employment Department law.

DECISION: Order No. 20-UI-151131 is affirmed.

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

DATE of Service: October 19, 2020

NOTE: This decision denies payment of your Unemployment Insurance (UI) benefits.

However, you may be eligible for Pandemic Unemployment Assistance (PUA) benefits for the period you are not eligible for other benefits as long as you are unable to work, unavailable for work, or unemployed due to the COVID-19 public health emergency. PUA is a new unemployment benefits program available through the Oregon Employment Department in response to the COVID-19 pandemic.

Visit <https://unemployment.oregon.gov> for more information, to apply for PUA, or to contact the Oregon Employment Department using the "Contact Us" form. You can also apply for PUA by calling 1-833-410-1004, but please be aware that the PUA staff cannot answer questions about this decision that denies payment of regular Unemployment Insurance (UI) benefits.

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.

Please help us improve our service by completing an online customer service survey. To complete the survey, please go to <https://www.surveymoz.com/s3/5552642/EAB-Customer-Service-Survey>. You can access the survey using a computer, tablet, or smartphone. If you are unable to complete the survey online and need a paper copy of the survey, please contact our office.



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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www.Oregon.gov/Employ/eab

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El Departamento de Empleo de Oregon es un programa que respeta la igualdad de oportunidades. Disponemos de servicios o ayudas auxiliares, formatos alternos y asistencia de idiomas para personas con discapacidades o conocimiento limitado del inglés, a pedido y sin costo.