

EMPLOYMENT APPEALS BOARD DECISION
2020-EAB-0667

Reversed
No Disqualification

PROCEDURAL HISTORY: On August 27, 2020, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant not for misconduct (decision # 90641). The employer filed a timely request for hearing. On October 6, 2020, ALJ J. Williams conducted a hearing, and on October 9, 2020 issued Order No. 20-UI-155077, concluding that the employer discharged claimant for misconduct and that claimant was disqualified from receiving unemployment insurance benefits effective March 10, 2019.¹ On October 17, 2020, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Columbia Steel Casting Co. Inc. employed claimant as an engineer from August 8, 2006 until March 11, 2020.

(2) The employer had an attendance policy that stated, “[A]ny three [unexcused absences] in a 90-day period will result in the appropriate level of discipline . . . and [the disciplinary level] is good for one (1) year from the date the disciplinary notice is delivered.” Exhibit 1 at 5. The employer’s attendance policy also stated that family medical leave “shall be considered excused if proper notification is given” to the employer. Exhibit 1 at 6. Claimant understood the employer’s attendance policy.

(3) On June 17, 2019, the employer suspended claimant for three days and gave him a written warning for violating the employer’s attendance policy. The warning also stated, “[A]ny future violation of the attendance program (more than 2 incidents in a 90-day period, within a year from [June 17, 2019]), may result in termination.” Exhibit 1 at 7.

(4) Prior to 2020, claimant’s “old bosses” told claimant that, if he ever needed a day off work, he should call and use a “code” as a joke, saying he was “high centered on a pubic mound,” and they would grant him the time off work, “no excuses asked you just call off and say that.” Transcript at 26, 6, 22.

¹ The correct date of disqualification should have been March 8, 2020 and not March 10, 2019 because Order 20-UI-155077 concluded that the employer discharged claimant for misconduct on March 11, 2020.

Claimant's supervising manager and foreman knew about the "code" to ask for time off work. They had worked with claimant under the same "old bosses" who "passed down" the "code." Transcript at 22.

(5) On January 20, 2020 and February 20, 2020, claimant had unexcused absences from work.

(6) During the first week of March 2020, claimant's father, who lived two to three hours' driving distance from claimant's home, experienced a worsening of his medical conditions. Claimant missed work for one shift that week due to his father's medical conditions, and told his supervising manager that he had to miss work because his father was having ongoing "heart issues." Transcript at 21. The supervising manager told claimant to call the employer and "use FMLA." Transcript at 31.

(7) On March 5, 2020, claimant informed the employer's human resources leave administrator that he needed to request family medical leave. On March 6, 2020, the human resources leave administrator gave claimant family medical leave paperwork to complete, and told claimant that he had fifteen days to return the completed paperwork.

(8) Claimant worked an overnight shift from 10:00 p.m. on March 9 until 6:30 a.m. on March 10, 2020. On March 10, at 9:00 a.m., claimant's father called him and told claimant that he thought he was having "another heart attack." Transcript at 21. Claimant immediately drove "almost three hours" to assist his father. Transcript at 21. When he arrived, his father had received medical attention. While with his father, claimant gave him the family medical leave paperwork and asked him to give it to his primary care physician at an appointment the next week and have the doctor fax it to claimant's employer. Claimant left his father's home when he seemed stable, drove for more than two hours, and arrived at his home by 5:30 p.m. Claimant had not slept in 32 hours and was "exhausted . . . [and] could barely keep [his] eyes open." Transcript at 22.

(9) Claimant was scheduled to work for the employer from 10:00 p.m. on March 10, 2020 until 6:30 a.m. on March 11, 2020. On March 10 at 6:25 p.m., claimant called and left a telephone message on the "company line" for his supervising manager. In the message, claimant stated that he was "high centered on a pubic mound" and unable to work his shift that night. Transcript at 17, 6. Claimant intended for only his supervising manager to hear the message. After claimant left the telephone message, the employer's human resources leave administrator asked claimant's supervising manager why claimant called in before his March 10 shift, and the manager forwarded claimant's telephone message to the leave administrator.

(10) On March 11, 2020, claimant called his supervising manager and told him what had occurred with his father the prior day. The supervising manager told claimant, "I know. I understand. I know what's going on with your Dad," but that he had forwarded the message to human resources and "had nothing to say about it . . . and no hand in this at all." Transcript at 33-34. Had claimant reported on March 10 that he needed to take family medical leave, the leave administrator would have considered claimant's absence excused. The supervising manager told the leave manager that claimant had explained that his prior managers allowed the use of the inappropriate code language to call off from work.

(11) On March 11, 2020, the employer's human resources leave administrator called claimant and told him that the employer was discharging claimant due to excessive absenteeism and violation of the employer's attendance policy.

CONCLUSIONS AND REASONS: The employer discharged claimant, but not 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). 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).

Order No. 20-UI-155077 concluded that the employer discharged claimant for misconduct because claimant provided an unacceptable excuse for his absence on March 10, 2020 and therefore violated the employer’s attendance policy.² The order reasoned, correctly, that claimant knew he faced possible termination if he were to have an unexcused absence within 90 days of January 20, 2020 (before April 19, 2020).³ The order also reasoned that claimant’s conduct was not an isolated instance of poor judgment because it was a repeated act.⁴ However, the order also reasoned that claimant knew or should have known that using a “code,” saying he was “high centered on a pubic mound,” to report that he was not able to work his shift beginning on March 10, 2020 would result in an unexcused absence and a violation of the employer’s attendance policy, and was not a good faith error.⁵ The record does not support that conclusion.

On March 11, 2020, the employer discharged claimant because the reason claimant provided the employer before he missed his shift on March 10 was not a permissible reason for an absence under the employer’s attendance policy. Claimant knew that using the code excuse he gave on March 10 “was never a company policy.” Transcript at 27. The record therefore supports the order’s conclusion that claimant violated the employer’s attendance policy. However, the record shows that claimant’s March 10 violation occurred as the result of a good faith error on claimant’s part. Claimant had a good faith belief that providing his supervising manager the code excuse before his shift began on March 10 would suffice to excuse his absence. Claimant testified that his supervising manager and foreman in March 2020 knew that claimant’s previous supervisors had allowed the use of the “code” phrase if he ever needed time off work, “no excuses asked.” Transcript at 42-43. Order No. 20-UI-155077 concluded that claimant’s testimony about the “code” excuse was implausible and “illogical” because claimant “presented no evidence supporting use of the code phrase at work,” did not mention the meaning of the phrase to the employer when given the opportunity, and would have asked for medical leave if that had

² Order No. 20-UI-155077 at 3.

³ Order No. 20-UI-155077 at 3.

⁴ Order No. 20-UI-155077 at 4.

⁵ Order No. 20-UI-155077 at 3-4.

been the reason he needed time off work.⁶ However, the record does not show that claimant was asked about specific instances when others had used the phrase, and claimant's testimony shows that he would not have used the excuse regularly, but, rather, would have used it as he did, on a rare occasion, as a "get out of jail free card." Transcript at 24. Claimant explained his absence to the employer, his supervising manager, and the record shows claimant's supervising manager told the human resources leave administrator that claimant had explained to him that the code excuse was acceptable to his "old bosses." Transcript at 22. Finally, although claimant's supervising manager and foreman told claimant to ask for family medical leave if he needed time off due to his father's medical conditions, claimant explanation was plausible and logical that he intended for only his supervising manager to hear the message, and assumed his supervising manager would know why he asked for the time off work "because of everything that was going on – because of missing [on March 4] – and everything that we talked about getting the paperwork . . ." Transcript at 36. Claimant had not yet received approval for a family medical leave request, and the record does not show that he received formal instructions about how to use it. Claimant's supervising manager or foreman did not testify to contradict claimant's testimony about the code excuse. Absent a reason to disbelieve claimant's testimony, it is more likely than not on this record that claimant sincerely, if mistakenly, believed that the message he left for his supervising manager on March 10 would excuse his absence on March 10. Because claimant's beliefs were reasonable, and based on a sincere but mistaken belief that he was complying with the employer's expectations, his violation of the attendance policy on March 10 was the result of a good faith error. Good faith errors are not misconduct. Therefore, because claimant was discharged based on the March 10 violation, his discharge was not for misconduct.

For the foregoing reasons, claimant is not subject to disqualification from unemployment insurance benefits because of his discharge from the employer.

DECISION: Order No. 20-UI-155077 is set aside, as outlined above.

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

DATE of Service: November 24, 2020

NOTE: This decision reverses an order that denied benefits. Please note that payment of benefits, if any are owed, may take approximately a week for the Department to complete.

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.

⁶ Order No. 20-UI-155077 at 4.

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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 ໄດ້ ໂດຍປະຕິບັດຕາມຄຳແນະນຳທີ່ບອກໄວ້ຢູ່ຕອນຫ້າຍຂອງຄຳຕັດສິນນີ້.

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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