

EMPLOYMENT APPEALS BOARD DECISION
2020-EAB-0729

Affirmed
Request to Reopen Allowed
Disqualification

PROCEDURAL HISTORY: On August 20, 2020, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant was discharged, not for misconduct, and therefore was not disqualified from receiving unemployment insurance benefits (decision # 64212). The employer filed a timely request for hearing. On September 23, 2020, ALJ Williams conducted a hearing at which claimant failed to appear, and on October 1, 2020 issued Order No. 20-UI-154701, concluding that claimant was discharged for misconduct and was disqualified from receiving benefits effective April 12, 2020. On October 5, 2020, claimant filed a timely request to reopen the hearing. On October 28, 2020, ALJ Williams conducted a hearing, and on November 3, 2020 issued Order No. 20-UI-156018, allowing claimant's request to reopen the hearing and again concluding that claimant was discharged for misconduct and was disqualified from receiving benefits effective April 12, 2020. On November 20, 2020, claimant filed an application for review with the Employment Appeals Board (EAB).

WRITTEN ARGUMENT: Claimant did not declare 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). 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).

Based on a *de novo* review of the entire record in this case, and pursuant to ORS 657.275(2), the portion of Order No. 20-UI-156018 allowing claimant's request to reopen the September 23, 2020 hearing is **adopted**.

FINDINGS OF FACT: (1) Mason Family Farm LLC employed claimant as a trimmer from April 15, 2020 until April 17, 2020.

(2) During the interview for the trimmer position on April 8, 2020, the employer informed claimant that she would be required to wear a face mask while at work. Claimant agreed to comply with this policy. The employer also had signs posted in their facility reminding employees to wear masks.

(3) On April 15, 2020, claimant reported to work and began training with the trim shop manager. While training with the trim shop manager, claimant repeatedly removed her mask, complaining that it was uncomfortable and too hot. The trim shop manager directed claimant to put her mask back on at least ten times that day.

(4) On April 16, 2020, claimant reported for work and continued to refuse to wear a mask. That day, the trim shop manager again reminded claimant at least ten times that she was required to wear a mask while working. The trim shop manager subsequently informed the owner that claimant had repeatedly violated the employer's mask policy, and that other employees were uncomfortable working around claimant because of her refusal to wear a mask. As a result, the owner instructed the trim shop manager to discharge claimant.

(5) On April 17, 2020, the employer discharged claimant because of claimant's refusal to comply with the employer's mask policy.

CONCLUSIONS AND REASONS: Claimant was discharged 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).

The parties offered conflicting testimony on whether or not the employer required their employees to wear masks at all time while working. Both of the employer's witnesses—the owner and the trim shop manager—testified that they had informed claimant that she was required to wear a mask at all times. Transcript September 23, 2020 at 8, 19. Claimant testified that the employer told her only that she was required to wear a mask when she was less than six feet away from other employees. Transcript October 28, 2020 at 20. The order under review concluded that "the independent evidence tended to corroborate the accuracy of the employer's account" because the employer provided face masks, gloves and rubbing alcohol to their employees, and it would be illogical for the employer to provide these supplies to employees if employees were not required to use them. Order No. 20-UI-156018 at 5. The order further concluded that because the employer placed signs reminding staff of the mask policy and social-distancing requirements, because the mask policy was required by the Oregon Liquor Control Commission (OLCC), the Occupational Safety and Health Administration (OSHA) and Governor Kate Brown's office, and because the employer risked fines and closure if it failed to comply with

government mandates, the employer “demonstrated more likely than not that its facemask policy was not optional and claimant violated it by not consistently wearing a facemask at work.” Order No. 20-UI-156018 at 5. The order’s conclusions are supported by the record, but for different reasons.

Primarily, the facts cited in the order’s conclusions—that the employer provided masks and other safety supplies, for instance, or that they posted signs informing staff of their mask policy—do not conclusively prove what the employer’s policy actually required. An employer might just as easily provide its staff with safety equipment required by policy to be worn in certain circumstances as it would if the policy required the equipment worn in all areas at all times. Similarly, evidence that an employer posts signs communicating a policy to its employees does not prove what is printed on the sign. That evidence is therefore insufficient to support a finding of what the employer’s mask policy was, and likewise what policy the employer communicated to claimant.

Instead, the weight of the evidence shows that the employer’s account of their own policy is more likely to have been accurate than claimant’s account simply because the employer’s two witnesses—both of whom offered first-hand testimony regarding the policy—outweighs claimant’s uncorroborated testimony to the contrary. Thus, the most likely set of facts on this record shows that the employer told claimant, both during the hiring process and several times throughout her two days working for them, that she was required to wear a mask at all times while working.

By her own testimony, claimant did not comply with this policy, instead wearing a mask only when “. . . within six feet of another person. . . .” Transcript October 28, 2020 at 20. Because the employer advised claimant of their policy requiring that she wear a mask at all times, and repeatedly warned her that she had violated that policy, claimant’s continued refusal to wear a mask at all times constituted a willful violation of the standards of behavior which an employer has the right to expect of an employee, and was therefore misconduct.

Claimant's behavior cannot be excused as an isolated instance of poor judgment. For conduct to be considered an isolated instance of poor judgment, it must be a single or infrequent occurrence rather than a repeated act or pattern of other willful or wantonly negligent conduct. OAR 471-030-0038(l)(d)(A). Claimant's refusal to wear a mask at work was not an isolated event, as she repeatedly refused to obey the directives given to her by her supervisor to wear a facemask at work during the two days she worked for the employer. Neither can claimant's behavior be excused as a good faith error per OAR 471-030-0038(1)(d)(B), because the record shows that claimant likely understood the employer’s policy requiring her to wear a mask at all times, and knowingly disregarded it. Because claimant's behavior was not an isolated instance of poor judgment or a good faith error, her conduct is not excusable under OAR 471-030-0038(3)(b).

For the above reasons, the employer discharged claimant for misconduct, and claimant is disqualified from receiving unemployment insurance benefits effective April 12, 2020.¹

¹ 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.

DECISION: Order No. 20-UI-156018 is affirmed.

D. P. Hettle and S. Alba.

DATE of Service: December 18, 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.

Please help us improve our service by completing an online customer service survey. To complete the survey, please go to <https://www.surveygizmo.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.

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.



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 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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