

EMPLOYMENT APPEALS BOARD DECISION
2021-EAB-0034

Modified
Request to Reopen Allowed
No Disqualification

PROCEDURAL HISTORY: On October 7, 2020, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that the employer discharged claimant for misconduct, disqualifying claimant from receiving benefits effective May 10, 2020 (decision # 91637). Claimant filed a timely request for hearing. On October 27, 2020, the Office of Administrative Hearings (OAH) served notice of a hearing scheduled for November 6, 2020 at 9:30 a.m. On November 6, 2020, claimant failed to appear at the hearing, and ALJ Janzen issued Order No. 20-UI-156167, dismissing claimant's request for hearing for failing to appear. On November 27, 2020, claimant filed a timely request to reopen the hearing. On December 24, 2020, ALJ Janzen conducted a hearing, and on December 29, 2020 issued Order No. 20-UI-158298, allowing claimant's request to reopen the November 6, 2020 hearing but affirming decision # 91637. On January 15, 2021, claimant filed an application for review with the Employment Appeals Board (EAB).

WRITTEN ARGUMENT: Claimant did not declare that she provided a copy of her 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 her 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-158298 allowing claimant's request to reopen the November 6, 2020 hearing is **adopted**. The remainder of this decision addresses the order's conclusion that the employer discharged claimant for misconduct.

FINDINGS OF FACT: (1) Kilchis House Nehalem Bay House employed claimant as a homeless outreach case manager from March 26, 2018 until May 15, 2020.

(2) About 10 years prior to her separation from work, claimant had been diagnosed with post-traumatic stress disorder (PTSD) as a result of a traumatic incident involving her son. Claimant suffered from related symptoms, including “extreme anxiety” and flashbacks to the original traumatic incident. Transcript at 34. Claimant had a difficult time discussing the incident or the PTSD that resulted from it, despite obtaining counseling and medication to help with her condition.

(3) Prior to May 12, 2020, claimant was on a medical leave of absence from work. While claimant was on leave, she attempted to wear a face mask to protect against COVID-19 while visiting a grocery store while. Wearing a face mask triggered claimant’s PTSD, causing her to experience flashbacks and nightmares.

(4) On May 12, 2020, claimant returned to work from medical leave. When claimant returned to work, the employer notified her that, due to the COVID-19 pandemic, they would be implementing a policy requiring all employees to wear face masks as of May 13, 2020. The employer’s policy provided for exemptions for medical reasons.

(5) When claimant learned of the employer’s mask policy, she determined that she would not be able to wear a mask because doing so triggered her PTSD. However, claimant informed the employer that she would not wear a mask because it was her “constitutional right” not to do so. Transcript at 11. Claimant told this to the employer because it was her “go-to” explanation to avoid speaking about her PTSD, and she did not want to put the image of the traumatic incident “in someone else’s head.” Transcript at 23, 20. Claimant did not wear a mask to work on May 12, 2020 or May 13, 2020.

(6) On May 14, 2020, claimant did not wear a mask while at work. Claimant was not required to wear a mask in her own office, and stayed there as much as possible. She avoided common areas, including the restroom. At some point during the day, claimant “couldn’t hold it any longer” and “waited until nobody was around” to make a “beeline for the restroom.” Transcript at 18.

(7) On May 15, 2020, claimant did not wear a mask to work. That day, the employer’s executive director met with claimant and asked her if she would either wear a mask or seek a medical exemption. Claimant declined both options. Claimant did not agree to obtain a medical exemption because she “froze” when the employer confronted her about the issue, and felt unable to speak to the employer about her PTSD. The employer discharged claimant that day because of claimant’s failure to comply with the mask policy.

(8) In the year prior to the employer’s issuance of the face mask policy, the employer had not warned claimant that she had violated any of its policies.

CONCLUSIONS AND REASONS: Claimant was discharged, 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 are not misconduct. OAR 471-030-0038(3)(b) (September 22, 2020). 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).

The record shows that the final incident which led the employer to discharge claimant was claimant’s May 15, 2020 failure to either comply with the employer’s face mask policy or agree to seek a medical exemption from the policy. The order under review concluded that, because “claimant had a few days between the implementation of the policy and her discharge to decide what to do,” and “should have known that refusing to wear a mask or obtain a medical exemption would violate the employer’s policy,” claimant “violated the employer’s policies with wanton negligence.” Order No. 20-UI-158298 at 5. The record does not support this conclusion.

The record shows that claimant did violate the employer’s mask policy willfully or because she was indifferent to the consequences of her actions, but rather that she simply was unable to comply with the policy without triggering her PTSD symptoms. Further, claimant’s testimony suggested that her decision to not to seek a medical exemption was the result of the difficulty she had in discussing her PTSD diagnosis, explaining that she “froze” when discussing the matter with the employer on May 15, 2020. Transcript at 21–22. More likely than not, claimant’s failure to agree to seek a medical exemption was

the result of the same PTSD-related inhibition that prevented her from wearing a mask at work, rather than willful or wantonly negligent behavior.

Even if claimant's failure to agree to obtain a medical exemption were willful or wantonly negligent, however, the record shows that it was an isolated instance of poor judgment. Both parties testified that, aside from the policy violation discussed above, the employer had not warned claimant of any policy violations for the year prior, and the record contains no evidence to indicate that claimant had otherwise violated any other of the employer's policies. Claimant's failure to agree to obtain a medical evaluation therefore was an isolated act, and not a repeated act or part of a pattern of other willful or wantonly negligent behavior.

The order under review concluded that claimant's conduct was not excusable as an isolated instance of poor judgment because "claimant's refusal to wear the mask made a continuing work relationship impossible," as the employer "viewed wearing a mask as a life or death issue during the pandemic." Order No. 20-UI-158298 at 5–6. However, the record does not support a finding that claimant's conduct made a continuing relationship impossible. Viewed objectively, the employer could have suspended claimant without pay, prohibited her from returning to work until she agreed to wear a mask or obtained a medical exemption from wearing it, allowing claimant time to reflect on her failure to obtain a medical exemption, and discharged her later if she did not agree to comply with the employer's policy. Accordingly, even if claimant's failure to agree to obtain a medical exemption from the employer's mask policy were willful or wantonly negligent, it was excusable as an isolated instance of poor judgment.

The employer discharged claimant, not for misconduct. Claimant is not disqualified from receiving benefits based on this work separation.

DECISION: Order No. 20-UI-158298 is modified, as outlined above.

S. Alba and D. P. Hettle.

DATE of Service: February 22, 2021

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.

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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 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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