

EMPLOYMENT APPEALS BOARD DECISION
2021-EAB-0250

Affirmed
Disqualification

PROCEDURAL HISTORY: On December 18, 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 unemployment insurance benefits effective August 16, 2020 (decision # 150525). Claimant filed a timely request for hearing. On March 15, 2021, ALJ Micheletti conducted a hearing, and on March 23, 2021 issued Order No. 21-UI-163267, affirming decision # 150525. On April 5, 2021, claimant filed an application for review with the Employment Appeals Board (EAB).

WRITTEN ARGUMENT: Claimant submitted written arguments in support of his application for review on April 5, 2021 and April 26, 2021. Claimant did not declare that he provided a copy of his arguments to the opposing party or parties as required by OAR 471-041-0080(2)(a) (May 13, 2019). The arguments 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 him 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).

EAB reviewed the hearing record in its entirety. To the extent claimant asserted or implied in his arguments that the hearing proceeding was unfair or the ALJ was biased, the record shows that the ALJ inquired fully into the matters at issue and gave all parties reasonable opportunity for a fair hearing as required by ORS 657.270(3) and (4) and OAR 471-040-0025(1) (August 1, 2004).

FINDINGS OF FACT: (1) Lanz Cabinet Shop, Inc. employed claimant as a machine operator from September 1, 2019 to August 17, 2020.

(2) After the COVID-19 pandemic began, claimant experienced various upper respiratory symptoms and suspected that he may have contracted COVID-19. On June 11, 2020, claimant went to an urgent care center to be examined and tested. He tested negative for COVID-19, but because he had pre-existing conditions that he understood made him more susceptible to the virus, he remained concerned about

having contracted COVID-19. For that reason, on June 11, 2020, the provider scheduled claimant to undergo additional tests on August 17, 2020.

(3) The employer had a leave of absence policy which allowed employees to request personal leaves of absence for various reasons. Claimant contacted the employer's human resources manager and requested a leave of absence over his concern about contracting COVID-19 while at work. The employer had decided to allow all of their employees to take a leave of absence for that reason and sent claimant a leave of absence request form to fill out and return to the employer.

(4) On June 22, 2020, claimant completed and signed the leave of absence request form on which he requested a start date for his leave of June 8, 2020, and a return to work date of August 10, 2020. The form stated in relevant part, "I understand that if I do not return to work on the above date, or contact my supervisor, I will be considered to have abandoned my job." Exhibit 1. The form also stated, "Requests for extensions or any other questions regarding your leave should be referred to your supervisor or Human Resources." Exhibit 1. On June 29, 2020, claimant returned the completed form to the human resources manager via email. The employer granted the requested leave of absence.

(5) On August 10, 2020, claimant did not return to work for the employer as expected because he was concerned about whether his preexisting conditions increased his susceptibility to COVID-19, and his appointment for additional tests was not scheduled to occur until August 17, 2020. Prior to August 10, 2020, claimant did not notify his supervisor, the human resources manager or anyone else at the employer that he would not return to work when expected or request an extension of his leave of absence, in part, because he lost his phone on or about August 1, 2020. Although the human resources manager periodically attempted to contact claimant by phone during his leave period regarding his status, claimant did not answer those phone calls or contact the manager prior to August 10, 2020 because he was unhappy with the manager's "tone of . . . voice" when claimant first reported that he might have contracted COVID-19, and did not think it was "relevant." Transcript at 28-29.

(6) Between August 10, 2020 and August 17, 2020, the human resources manager attempted to contact claimant by phone, without success, to determine his intent with regard to returning to work. On August 17, 2020, the employer decided it could not wait any longer and terminated claimant's employment because he did not return to work on August 10, 2020, and the employer had not heard from claimant since June 29, 2020. The employer sent claimant a letter that day notifying him that his employment had been terminated.

(7) On August 20, 2020, a motor vehicle struck claimant while he was riding a bicycle. On August 21, 2020, claimant attempted to fax a document to the employer requesting an extension of his leave of absence. On September 3, 2020, claimant went to the employer's office and told the human resources manager about his bicycle accident and that he wanted to return to work on a later date. The manager informed claimant that the employer had terminated his employment on August 17, 2020.

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). Isolated instances of poor judgment and good faith errors are not misconduct. OAR 471-030-0038(3)(b). 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 employer discharged claimant on August 17, 2020 for failing to return to work as scheduled on August 10, 2020, and failing to contact the employer at all about returning to work from June 29, 2020 until after August 17, 2020. Claimant’s conduct violated the employer’s reasonable expectation that he return to work on August 10, 2020 or contact the employer about an extension of his leave based on the leave of absence request form he completed and emailed to the human resources manager on June 29, 2020. Although claimant did not return to work on August 10, 2020 because he was concerned about whether his preexisting conditions increased his susceptibility to COVID-19, and his testing appointment was scheduled for August 17, 2020, he was aware of that appointment date on June 11, 2020 and did not attempt to request an extension of his leave period.

When the human resources manager attempted to contact claimant by phone during claimant’s leave period regarding his return to work status prior to the time claimant lost his phone, claimant chose to not answer those phone calls because he was unhappy with the manager’s “tone of . . . voice” when claimant first reported to him that he might have contracted COVID-19. Although claimant lost his phone on or around August 1, 2020, that did not prevent him from attempting to fax a document to the employer on August 21, 2020 or personally travel to the employer’s office on September 3, 2020 to discuss his bicycle accident with the human resources manager. More likely than not, claimant’s failure to contact the employer by fax or a personal visit prior to August 10, 2020 demonstrated conscious indifference to the consequences of his inaction for the employer, when he knew that his inaction probably violated standards of behavior the employer had the right to expect of him. Claimant’s failure to contact the employer prior to August 10, 2020 was at least wantonly negligent.

Claimant’s wantonly negligent failure to contact the employer prior to August 10, 2020 is not excusable as an isolated instance of poor judgment. 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). Although claimant's decision not to contact the employer prior to August 10, 2020 because he was unhappy with the human resource manager's previous "tone of . . . voice" and did not think it was "relevant" may have been isolated, it exceeded mere poor judgment and was not excusable under OAR 471-030-0038(1)(d)(D) because it made a continued employment relationship impossible. Viewed objectively, it was not reasonable for claimant to expect an employer to keep a position open for an employee who was absent without leave and had made no contact with the employer for more than a week after the employee's scheduled return.

Claimant's wantonly negligent decision to neither return to work when expected nor communicate with the employer about a leave extension also is not excusable a good faith error in his understanding of the employer's expectations under OAR 471-030-0038(3)(b). The employer's expectations in those regards were stated in the leave form claimant completed and returned to the employer in June of 2020. Moreover, claimant also understood, as a matter of common sense, that the employer needed to hear from him regarding his planned return to work, particularly after claimant knew that the human resources manager had been attempting to contact him periodically during his leave period.

For these reasons, the employer discharged claimant for misconduct. Accordingly, claimant is disqualified from receiving unemployment insurance benefits effective August 16, 2020.

DECISION: Order No. 21-UI-163267 is affirmed.

S. Alba and D. Hettle;
Angela Steger-Bentz, not participating.

DATE of Service: May 12, 2021

NOTE: This decision affirms a denial of 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.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.



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 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.

Employment Appeals Board - 875 Union Street NE | Salem, OR 97311
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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.