

EMPLOYMENT APPEALS BOARD DECISION
2021-EAB-0267

Affirmed
Disqualification

PROCEDURAL HISTORY: On November 19, 2020, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that the employer discharged claimant for misconduct and was disqualified from receiving unemployment insurance benefits effective April 12, 2020 (decision # 105000). Claimant filed a timely request for hearing. On January 5, 2021, ALJ Snyder conducted a hearing, and on January 7, 2021 issued Order No. 21-UI-158808, affirming decision # 105000. On January 26, 2021, claimant filed an application for review with the Employment Appeals Board (EAB). On February 26, 2021, EAB issued EAB Decision 2021-EAB-0053, remanding the matter for further development of the record to determine whether the employer discharged claimant for misconduct.

On March 10, 2021, OAH served notice of a hearing scheduled for March 24, 2021 at 3:30 p.m. On March 24, 2021, ALJ Snyder conducted a hearing at which claimant failed to appear, and on March 26, 2021 issued Order No. 21-UI-163573, re-affirming decision # 105000. On April 13, 2021, claimant filed a timely application for review of Order No. 21-UI-163573 with EAB. Claimant's application for review did not include a written statement setting forth the reason(s) claimant missed the March 24, 2021 hearing. Therefore, pursuant to OAR 471-041-0060(4) & (5) (May 13, 2019); EAB treated the application for review as an application for review rather than as a request to reopen the hearing under ORS 657.270.

WRITTEN ARGUMENT: The employer's argument contained information that was not part of the hearing record, and did not show that factors or circumstances beyond the employer's reasonable control prevented them from offering the information during the hearing. Under ORS 657.275(2) and OAR 471-041-0090 (May 13, 2019), EAB considered only information received into evidence at the hearing when reaching this decision. EAB considered the employer's argument to the extent it was based on the record.

FINDINGS OF FACT: (1) Naegeli Reporting Corporation employed claimant as a scheduling coordinator from March 7, 2020, until April 12, 2020.

(2) The employer had previously employed claimant from 2016 through 2018, and ultimately discharged her due to poor attendance. When the employer rehired claimant in March 2020, they warned claimant that “the first time [she] start[s] not showing up for work or calling in sick all the time or being late,” they would discharge her. March 24, 2021 Audio Record at 14:55.

(3) The employer expected claimant to arrive on time for each shift, and to notify the employer prior to her shift if she expected to be unable to report to work. If claimant anticipated being late, the employer expected claimant to communicate whether and when she would arrive for the shift. Claimant was aware and understood the employer’s expectations regarding attendance, and knew she could be discharged if she violated those expectations.

(4) On March 10, 2020, claimant was late to work. On March 11, 2020, claimant was “severely” late for work because her alarm did not go off. March 24, 2021 Audio Record at 15:17. On March 24, 2020, claimant called in sick for work; when the employer reminded claimant of the importance of her attendance, claimant reported to work about an hour late. On March 31, 2020, claimant was late for work. On April 6, 2020, claimant called in sick for work. On April 7, 2020, claimant was late for work. On April 9, 2020, claimant was late for work.

(5) In early April 2020, the employer informed claimant that she was expected to report to work for a training on April 12, 2020 at 10:00 a.m. Claimant acknowledged that she would report to work that day.

(6) On April 12, 2020, claimant sent a text message to the employer at 8:41 a.m., and stated that she was running late, but would arrive by 9:15 a.m. at the latest. Claimant sent a second text message at 9:24 a.m. stating, “I am on my way.” January 5, 2021 Audio Record at 21:07. Claimant sent another text message at 9:43 a.m. stating that she was late because two ride service drivers had canceled her ride requests, and that by the time she got to work by bus it “will be by approximately 12:15 p.m.” January 5, 2021 Audio Record at 21:44. Claimant did not report to work on April 12, 2020, and did not send any additional messages or otherwise convey whether she would arrive for her shift.

(7) On April 12, 2020, the employer discharged claimant for failing to communicate whether and when she would arrive for her April 12, 2020 shift.

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). Isolated instances of poor judgment and good faith errors are not misconduct. OAR 471-030-0038(3)(b).

The employer discharged claimant because she was a no-call no-show for her shift on April 12, 2020 after having confirmed that she would attend. Claimant disputed this at the January 5, 2021 hearing, testifying variously that she had initially told the employer that she could not attend due to her religious practices (as the day was Easter Sunday); that she had called out sick at about 7:30 a.m. that day; and that she did not recall having sent the employer text messages regarding having difficulty getting to work that day. January 5, 2021 Audio Record at 12:25 to 12:45, 27:23. The order under review found that claimant's testimony on this point was "not credible because the Employer presented evidence of claimant's text messages about arriving late to work, including specific details about the time the messages were sent and the exact content of the messages." Order No. 21-UI-163573 at 3. Because the ALJ made an explicit credibility determination on this point, and because no reasonable basis is apparent for reversing it, EAB defers to the ALJ's determination of claimant's credibility and finds facts in accord with this determination.¹

Claimant also disputed that the employer had previously warned her about her attendance, and testified that if she got ill, she called in and spoke to the appropriate personnel. January 5, 2021 Audio Record at 15:34. By contrast, the employer offered detailed testimony regarding each of the seven days on which claimant was late for or absent from work between March 7, 2020 and April 9, 2020. The employer also testified at both hearings that they had warned claimant at the time of hire that they would discharge her if her attendance became a problem again. The order under review did not make explicit credibility determinations as to whether claimant had previously violated the employer's attendance expectations or been warned by the employer about her attendance. However, on these points as well, the employer's testimony was significantly more detailed and more internally consistent than claimant's. For that reason, EAB finds facts regarding these points in accordance with the employer's testimony.

The record does not show the precise reason why claimant neither arrived for work on April 12, 2020 nor advised the employer that she would not be coming to work that day. Because the record shows that the employer warned claimant at least twice about the importance of meeting their attendance expectations, and because claimant offered no evidence to explain why she failed to do so on April 12, 2020, the preponderance of the evidence indicates that, more likely than not, claimant acted with conscious indifference to the employer's expectations. Therefore, claimant's failure to either report for work or advise the employer that she would not be reporting for work on April 12, 2020 was a wantonly negligent violation of the employer's standards of behavior.

Claimant's conduct cannot be excused as an isolated instance of poor judgment. In order to be considered an isolated instance of poor judgment, the act must be isolated, meaning that 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." OAR 471-030-0038(1)(d)(A). Here, the record shows that, in addition to absences or late arrivals due to circumstances which may have been beyond her control, claimant was late for work on March 10, 2020, March 31, 2020, April 7, 2020, and April 9, 2020

¹ When there is evidence in the record both to make more probable and less probable the existence of any basic fact or inference, the board need not explain its decision to believe or rely on such evidence unless the administrative law judge has made an explicit credibility determination regarding the source of such facts or evidence. ORS 657.275(2)

without explanation or excuse. Without explanation for why claimant was late to work on those four occasions, the preponderance of the evidence indicates that, more likely than not, claimant acted with conscious indifference to the employer's expectations on those occasions as well. Claimant's conduct therefore was not isolated because the exercise of poor judgment was a repeated act, and not a single or infrequent occurrence.

For the above reasons, claimant was discharged for misconduct, and is disqualified from receiving benefits effective April 12, 2020.

DECISION: Order No. 21-UI-163573 is affirmed.

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

DATE of Service: May 20, 2021

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.

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.

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 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 الإستئناف 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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