

EMPLOYMENT APPEALS BOARD DECISION
2021-EAB-0336

Affirmed
Disqualification

PROCEDURAL HISTORY: On January 21, 2021, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that the employer discharged claimant for misconduct and claimant was disqualified from receiving unemployment insurance benefits effective December 13, 2020 (decision # 161319). Claimant filed a timely request for hearing. On April 12, 2021, ALJ L. Lee conducted a hearing, and on April 20, 2021 issued Order No. 21-UI-165155, affirming decision # 161319. On April 27, 2021, claimant filed an application for review with the Employment Appeals Board (EAB).

WRITTEN ARGUMENT: EAB did not consider claimant's written argument when reaching this decision because she did not include a statement declaring 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).

EVIDENTIARY MATTER: At hearing, the ALJ admitted Exhibit 1 into evidence, but failed to mark it in the record. As a clerical matter, EAB identified the exhibit based on the ALJ's description of it, and marked it as Exhibit 1. Audio Record at 5:43 to 7:40.

FINDINGS OF FACT: (1) Overhead Door Corporation employed claimant full-time from March 12, 2020 until December 17, 2020 as a scheduler. Claimant's regular hours were Monday through Friday, from 7:00 a.m. to 4:00 p.m.

(2) The employer occasionally expected claimant to work mandatory overtime. The employer expected claimant to refrain from engaging in insubordinate conduct such as yelling at a supervisor or refusing to work a scheduled shift or mandatory overtime. Claimant understood the employer's expectations.

(3) On September 14, 2020, the employer advised claimant that they expected claimant to work overtime after her regular shift ended on September 16, 2020. On September 16, 2020, in addition to her scheduling duties, the employer assigned claimant to answer the telephone because the receptionist was out that day. Claimant's supervisor reminded claimant that the employer expected her to work overtime

at the end of her regular shift. Claimant replied to her supervisor that she would not work overtime that day and “shouted,” “Fire me if you have to – I’m not working it.” Exhibit 1 at 1. Claimant asked a human resources representative if she would be “written up” for refusing to work overtime. Exhibit 1 at 1. Human resources told claimant that her conduct was insubordinate, and that she would receive a “write up.” Exhibit 1 at 1. Shortly after, at 2:30 p.m., claimant gathered her belongings, and stated, “I am not quitting, but I’m leaving because I’m upset.” Exhibit 1 at 1. In doing so, claimant left both her scheduling duties and the reception telephone duties unfulfilled.

(4) On September 17, 2020, the employer gave claimant a final written warning and an unpaid two-day suspension for her conduct on September 16, 2020. The warning stated that the employer would not tolerate insubordination or claimant leaving her shift without prior approval. Exhibit 1 at 1.

(5) Prior to December 16, 2020, the employer had agreed to notify claimant by 10:00 a.m. during her shift if they expected claimant to work overtime after her shift, and for how many additional hours they expected claimant to work. On December 16, 2020, claimant reported to work but was experiencing pain from an infection, and planned to pick up a prescription for her infection after her shift that day. At 9:23 a.m. on December 16, 2020, claimant’s supervisor sent claimant an email stating that she was required to work one hour of overtime at the end of her shift that day, from 4:00 p.m. to 5:00 p.m. When claimant did not respond immediately, the supervisor went to claimant’s desk and asked her if she had read the overtime email. Claimant started yelling and “kind of ranting” at the supervisor that she would not work overtime, needed to get a prescription, could get someone else to do the job, and “didn’t care.” Transcript at 53-54. Because the discussion became a “confrontation,” claimant and the supervisor did not discuss options regarding claimant’s need to get a prescription. Transcript at 55.

(6) Another employee called one of the employer’s human resources representatives and told her that claimant was yelling at her supervisor and that claimant stated that, “she had things to do,” “wasn’t staying,” and “doesn’t care.” Exhibit 1 at 7. At 9:40 a.m., claimant’s supervisor emailed the human resources representative and reported the same conduct that the employee had reported by telephone.

(7) At no time after 9:40 a.m. on December 16, 2020 did claimant ask her supervisor or another employer representative if she could leave work early, at 4:00 p.m., or discuss her need to pick up her prescription with her supervisor or human resources. Claimant’s pharmacy was open after 5:00 p.m.

(8) At 4:00 p.m. on December 16, 2020, claimant left work without working the scheduled one hour of overtime.

(9) On December 17, 2020, the employer discharged claimant for insubordination when she yelled at her supervisor and left work without working the mandatory one hour of overtime on December 16, 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). 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 for insubordination based upon her conduct toward her supervisor when the supervisor approached claimant to discuss working one hour of overtime on December 16, 2020, and claimant's failure to work the overtime. Claimant asserted at the hearing that she told her supervisor she would not work overtime on December 16, 2020, and that the supervisor did not say "one word" to claimant and "just had her face of whatever," and did not say anything to claimant for the rest of her shift, so claimant assumed that the supervisor did not expect claimant to work overtime from 4:00 p.m. to 5:00 p.m. Transcript at 27-28. Claimant also denied yelling or stating that she told her supervisor that someone else needed to do claimant's job and that she "didn't care." Transcript at 37.

The employer's evidence outweighed claimant's testimony about what occurred when the supervisor approached claimant to ask her if she had read the overtime email the morning of December 16, 2020, and the findings herein reflect that conclusion. Although the only witnesses to testify who were present at the "confrontation" were claimant and her supervisor, the supervisor's testimony was corroborated by testimony from the human resources representative, who received a telephone call from another employee reporting the same information that the supervisor also reported to the human resources representative just minutes later. The human resources representative's testimony therefore corroborates the testimony from claimant's supervisor, which was that claimant yelled at her supervisor that she would not work, someone else should do the work, and claimant "didn't care." The preponderance of the evidence also therefore shows that the supervisor did not remain silent about the overtime, and did not implicitly give claimant permission to leave work at 4:00 p.m. as claimant alleged. Thus, on this record, it appears more likely than not that claimant responded to her supervisor in an insubordinate manner by yelling at her, and knowingly left work before completing the overtime rather than approaching the supervisor or another employer representative to discuss options for retrieving her medication, or delaying picking up her medication for one hour.

Claimant knew from the warning she received on September 17, 2020 that insubordinate conduct and leaving work without permission would violate the employer's expectations. Claimant's conduct of yelling at her supervisor and leaving work without permission before completing the hour of overtime on December 16, 2020 was a willful violation of the standards of behavior which the employer had the right to expect of claimant.

Claimant's conduct cannot be excused under OAR 471-030-0038(3)(b) as a good faith error. Claimant knew conduct such as yelling at a supervisor and leaving work without permission would not be acceptable to the employer. On this record, claimant knew that such conduct was considered insubordinate because claimant received a warning and suspension when she had yelled at her supervisor and left work without permission just three months before, on September 16, 2020. Claimant therefore did not engage in the insubordinate conduct based upon a sincere belief that the employer would condone such conduct.

Nor can claimant's conduct be excused under OAR 471-030-0038(3)(b) as an isolated instance of poor judgment because claimant's conduct on December 16, 2020 was not isolated. In pertinent part, to be considered an "isolated instance of poor judgment," "[t]he 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). Claimant’s conduct on December 16, 2020 was a repeated act, being the same conduct of yelling at a supervisor, refusing to work overtime, and leaving work without permission, as claimant’s conduct on September 16, 2020. Because claimant’s conduct on December 16, 2020 was a repeated act of willful or wantonly negligent behavior, it cannot be excused as an isolated instance of poor judgment.

The employer discharged claimant for misconduct. Claimant is therefore disqualified from receiving unemployment insurance benefits based on this work separation.

DECISION: Order No. 21-UI-165155 is affirmed.

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

DATE of Service: June 3, 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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