

EMPLOYMENT APPEALS BOARD DECISION
2021-EAB-0406

Reversed
No Disqualification

PROCEDURAL HISTORY: On April 19, 2021, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant was discharged for misconduct and therefore disqualified from receiving unemployment insurance benefits effective February 7, 2021 (decision # 71006). Claimant filed a timely request for hearing. On May 18, 2021, ALJ Murdock conducted a hearing, and on May 20, 2021 issued Order No. 21-UI-167188, modifying¹ decision # 71006 by concluding that claimant was discharged for misconduct and was disqualified from receiving benefits effective February 14, 2021. On May 22, 2021, claimant filed an application for review with the Employment Appeals Board (EAB).

WRITTEN ARGUMENT: Claimant did not declare that he provided a copy of his 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 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).

FINDINGS OF FACT: (1) Fred Meyer Stores Inc. employed claimant as a grocery parcel clerk from October 21, 2020 until February 13, 2021.

(2) The employer maintained a policy requiring employees to call a manager or person-in-charge prior to a scheduled shift if they planned to miss their shift. The employer provided claimant with a copy of the policy when they hired him, and claimant was generally aware of the employer's expectation that he call in to report an absence before the start of a shift.

¹ The order under review stated that it affirmed decision # 71006. Order No. 21-UI-167188 at 3. However, because the order under review found a different date of disqualification, it actually modified decision # 71006.

(3) On January 14, 2021, claimant was absent from work. Because he was feeling unwell and “slept through when [he] was supposed” to notify the employer of the absence, claimant did not notify the employer of his absence prior to his shift as required by their policy. Audio Record at 11:40. As a result, the employer suspended claimant for three days.

(4) On February 11, 2021, claimant worked his last shift for the employer. Claimant was scheduled to work shifts on February 12, 13, 14, and 15, 2021. On February 12, 2021, claimant learned that a wedding at which he was scheduled to sing and play guitar, and which had previously been rescheduled several times due to the COVID-19 pandemic, was scheduled for that weekend in Astoria, Oregon. On the same day, claimant called his manager to notify him that he would be out of town and therefore unavailable to work his scheduled shifts from February 12, 2021 through February 15, 2021. Claimant also told his manager that he would try to return earlier if he could. In response, claimant’s manager “just kind of laughed at” claimant. Audio Record at 12:50. Claimant subsequently travelled to Astoria, Oregon for the wedding.

(5) On February 13, 2021, the store’s human resources assistant contacted claimant and told him that the employer considered him to have abandoned his job, and discharged him for that reason.

(6) Claimant did not drive himself to Astoria, and was unable to secure a ride home earlier; as such, he ultimately returned home on February 15, 2021.

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). 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 employer discharged claimant on February 13, 2021 because they considered him to have abandoned his job after calling out for several days of work starting on February 12, 2021 to attend an out-of-town wedding. The order under review concluded that because claimant "knew or should have known the employer would not condone him missing several days of work because he chose to participate in a spur-of-the-moment, out-of-town wedding . . . his conduct was a willful violation of the employer's reasonable standards" and therefore misconduct. Order No. 21-UI-167188 at 3. The record does not support that conclusion, but does show that claimant knew or should have known that calling out for several shifts in a row for a non-emergency, non-medical reason probably violated the employer's reasonable expectations regarding attendance. For that reason, claimant's actions were a wantonly negligent disregard of the employer's expectations.

However, the record also shows that claimant's decision to attend the wedding and call out for several shifts in a row was an isolated instance of poor judgment. The order under review concluded that claimant's conduct "exceeded an isolated instance of poor judgment because his conduct caused his unexcused absences for not just one day, but four days." Order No. 21-UI-167188 at 3. Claimant's conduct did *cause* multiple days of absences—or would have, if the employer had not discharged him after the second absence—but the record also shows that the conduct itself was a single, ongoing occurrence rather than a repeated act. *See Perez v. Employment Dept.*, 164 Or. App. 356, 992 P2d 460 (1999) (the determination of whether conduct is a single or frequent occurrence depends not upon the number of "component acts" involved in the questioned conduct, but upon whether the conduct was a "single occurrence" in the employment relationship.) Further, while the employer had previously disciplined claimant for an earlier violation of their attendance policy, the employer did not meet their burden to show that claimant's having failed to timely notify them of his absence on January 14, 2021, because he overslept due to illness, was the result of wanton negligence. Therefore, claimant's wantonly negligent conduct of calling out on February 12, 2021 to attend the wedding was isolated.

The employer also did not meet their burden to show that claimant's decision to call out for four days was unlawful, created an irreparable breach of trust, or otherwise made a continuing employment relationship impossible, such that it exceeded mere poor judgment. Rather, the record shows that claimant had previously committed to playing the wedding, found out that it was scheduled on short notice, notified his manager of his absences shortly after he learned that he would be attending, and intended to try to cut the trip short in order to return to work. Additionally, claimant's manager only

laughed when claimant advised him of the trip he was taking and did not warn claimant of the consequences of continuing with the trip, and the human resources assistant did not offer claimant the chance to avoid being discharged by returning from the trip early. Taken as a whole, the record shows that claimant's conduct was the result of unusual circumstances which he tried to mitigate, and does not suggest that claimant's decision to take the time off was indicative of a generally unreliable disposition that caused an irreparable breach of trust or otherwise made a continuing employment relationship impossible. Because the incident was also isolated, as discussed above, claimant was discharged for an isolated instance of poor judgment.

For the above reasons, the employer discharged claimant for an isolated instance of poor judgment, and not misconduct. Claimant therefore is not disqualified from receiving unemployment insurance benefits based on his work separation from the employer.

DECISION: Order No. 21-UI-167188 is set aside, as outlined above.

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

DATE of Service: June 29, 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 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.

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 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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