

EMPLOYMENT APPEALS BOARD DECISION
2021-EAB-0427

Affirmed
Disqualification

PROCEDURAL HISTORY: On January 11, 2021, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant voluntarily quit work without good cause and was disqualified from receiving benefits effective June 28, 2020 (decision # 121438). Claimant filed a timely request for hearing. On May 6, 2021, ALJ Logan conducted a hearing, and on May 11, 2021 issued Order No. 21-UI-166553, affirming decision # 121438 and concluding that claimant was discharged for misconduct and disqualified from receiving benefits effective June 28, 2020. On June 1, 2021, claimant filed an application for review with the Employment Appeals Board (EAB).

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) Cornerstone Foundation System LLC employed claimant, most recently as concrete production worker, from about March 2020 until July 2, 2020.

(2) On July 1, 2020, the employer held a mandatory sexual harassment training for all of its employees. The training was provided via video and was held in a "big one room area" within the employer's office, which was a single-wide trailer. Transcript at 49. About eleven people were in attendance. Because the room was not large enough to allow for six-foot social distancing, the employer required attendees to wear surgical masks, which they provided. Claimant refused to attend the training because he would not wear a face mask. The human resources representative who was present at the training subsequently told claimant to go home, as no more work was available for the rest of the day. The employer also asked claimant to meet with them the following day regarding his refusal to wear a mask to the training.

(3) On July 2, 2020, claimant reported for work to meet with the employer's then-operations officer regarding the incident which had taken place the previous day. The meeting was to take place inside the employer's office. Claimant notified the operations officer via text message that he had arrived. The operations officer responded by directing claimant to enter the office for the meeting and to wear a mask while doing so. Claimant responded by stating that he would "not be wearing a mask," and suggested that they meet outside instead. Exhibit 1 at 11.¹ The operations officer responded that she took claimant's refusal to comply with the mask requirement as his "resignation," stated that "no further discussion [was] required," and directed claimant to turn in his shop key. Exhibit 1 at 13. Claimant responded that he had not resigned, stated that the employer had laid him off "because of [his] beliefs," and suggested that his "constitutional rights" had been violated. Exhibit 1 at 15.

CONCLUSIONS AND REASONS: Claimant was discharged for misconduct.

Nature of the Work Separation. If the employee could have continued to work for the same employer for an additional period of time, the work separation is a voluntary leaving. OAR 471-030-0038(2)(a) (September 22, 2020). If the employee is willing to continue to work for the same employer for an additional period of time but is not allowed to do so by the employer, the separation is a discharge. OAR 471-030-0038(2)(b).

The employer's operations officer stated in her text message to claimant on July 2, 2020 that the employer took claimant's refusal to comply with the mask requirement as a "resignation." Despite this characterization, the record shows that claimant was willing to continue working for the employer, and that the employer, due to claimant's refusal to comply with the mask requirement, was not willing to permit claimant to continue working for them for an additional period of time. This is further supported by the employer's immediate insistence that claimant hand in his key to the shop. The record therefore shows that the employer discharged claimant on July 2, 2020.

Discharge. 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). "[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, good faith errors, unavoidable accidents, absences due to illness or other physical or mental disabilities, or mere inefficiency resulting from lack of job skills or experience are not misconduct. OAR 471-030-0038(3)(b).

¹ The order under review stated that Exhibit 1 was admitted into evidence without objection. Order No. 21-UI-166553 at 1. However, the hearing record indicates that claimant raised an objection to the admission of Exhibit 1 because he believed it contained "untruthful information," and that the ALJ subsequently overruled claimant's objection. Transcript at 17. Because the contents of Exhibit 1 are not "irrelevant, immaterial, or unduly repetitious," the record does not show that the ALJ's admission of the exhibit at hearing was an abuse of discretion. *See* OAR 471-040-0025(5) (August 1, 2004).

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 because he refused to wear a mask and enter the employer’s office to attend a meeting with the operations officer, after having engaged in similar behavior the previous day. At hearing, claimant consistently testified that he refused to wear a mask because social distancing was not possible in the office, entering the office was therefore unsafe even while wearing a mask, and he feared for his health as a result. Transcript at 22, 25, 29. This generally conflicts with the text messages that claimant sent to the operations officer On July 2, 2020, in which he suggested that being discharged for his refusal to wear a mask was “laying [him] off because of [his] beliefs” and “against [his] constitutional rights.” Exhibit 1 at 15. According to a written incident report apparently drafted contemporaneously by another witness to the events of July 2, 2020, both claimant and his son (who also worked for the employer) had been asked to attend the meeting with the operations officer that day. Both refused to wear masks and come into the office, and subsequently engaged in a verbal altercation with the owner of the company outside the office in which claimant stated that the employer had “known from the beginning of the pandemic” that claimant would not wear a mask and that claimant “talked to his friends that said they do not have to where mask [*sic*].” Exhibit 1 at 17.

On their own, these statements suggest that claimant refused to wear a mask not because he felt that doing so was insufficient to protect him from COVID-19, but because he felt that the employer was wrong to require employees to wear masks at all. At hearing, claimant attempted to reconcile his testimony that he was concerned for his health and the statements he had made in July 2020, testifying that he had meant that the rights he had invoked were the rights to “. . . protect [his] health and [his] safety.” Transcript at 29. Claimant’s assertions here are unconvincing. Had claimant truly been concerned for his health and safety rather than an alleged Constitutional right not to wear a mask at

work, it is likely that he would have expressed a concern for his health and safety at the time the conflicts with the employer occurred. The record does not show that he did so. For that reason, the record shows that, more likely than not, claimant's refusal to wear a mask at both the sexual harassment training on July 1, 2020 and the meeting on July 2, 2020 were the result of claimant's belief in his right not to do so rather than concerns that the office was unsafe.

For the reasons outlined above, claimant's refusal to wear a mask and speak to the operations officer inside the office on July 2, 2020 was a willful or wantonly negligent disregard of the standards of behavior that the employer had the right to expect of their employees. While claimant suggested in his testimony that he believed the conditions in the office to be unsafe, he did not offer evidence to support his suggestion that masks would be insufficient to protect the occupants of the office from transmitting or contracting COVID-19, or else that being required to wear a mask was unreasonable. For that reason, the employer had the right to expect both that claimant would attend a meeting regarding a previous violation of their expectations and that he would comply with COVID-19 safety requirements while inside their buildings where 6-foot social distancing could not occur. Because claimant refused to comply, claimant's conduct constituted a willful or wantonly negligent disregard of the employer's reasonable expectations.

Further, while claimant's refusal to comply with these expectations on July 2, 2020 was poor judgment, it cannot be excused as an isolated incident of poor judgment because it was not isolated. Claimant engaged in substantially the same behavior the previous day when he refused to attend the employer's sexual harassment training. Here, too, claimant has not shown that either that the employer's expectation that he attend the training or that he wear a mask while doing so were unreasonable. The record therefore shows that claimant's refusal to attend the training and wear a mask on July 1, 2020 were also willful or wantonly negligent violations of the standards of behavior that the employer had the right to expect.

Finally, claimant's conduct in violating the employer's expectations on July 2, 2020 cannot be excused as a good faith error because the record does not show that he made an "error" as that term is used in OAR 471-030-0038(3)(b). *See Hood v. Employment Dep't.*, 245 Or. App. 606, 263 P.3d 1126 (2011) (the "error" in a GFE refers to a mistake of fact or action deriving from a mistake in fact, a GFE is not an "exception for conscientious objectors to employer policies"; the claimant in this case did not act in good faith when he chose not to make a serious attempt to comply with the employer's policy on the basis that it was not possible to comply without first having made an effort to determine if, in fact, compliance was impossible). Here, as in *Hood*, claimant did not commit "a mistake of fact or action deriving from a mistake in fact" such as a sincere but mistaken belief that he was unable to comply with the employer's mask requirement. Rather, claimant's belief that the employer's mask requirement was somehow a violation of his rights, and his resulting refusal to comply with the requirement, was tantamount to the "conscientious objectors to employer policies" which the Court of Appeals explicitly excluded from the definition of individuals who have committed good faith errors. Therefore, claimant's conduct was not a good faith error.

For the above reasons, claimant was discharged for misconduct, and is disqualified from receiving benefits effective June 28, 2020.

DECISION: Order No. 21-UI-166553 is affirmed.

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

DATE of Service: July 9, 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 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.