

EMPLOYMENT APPEALS BOARD DECISION
2021-EAB-0519

Reversed
Disqualification

PROCEDURAL HISTORY: On November 5, 2020, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that the employer discharged claimant, but not for misconduct, which did not disqualify claimant from receiving unemployment insurance benefits (decision # 92228). The employer filed a timely request for hearing. On June 7, 2021, ALJ Ramey conducted a hearing at which claimant failed to appear, and on June 9, 2021 issued Order No. 21-UI-168401, affirming the Department's decision.¹ On June 28, 2021, the employer filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) McMenamins Inc. employed claimant as a maintenance employee from March 26, 2019 until June 23, 2020.

(2) The employer expected their employees to report for work on time for scheduled shifts. Claimant was aware of and understood the employer's expectation.

(3) On June 5, 2020, claimant reported for work three hours after the start of his 7:00 a.m. to 4:00 p.m. shift and told the employer that he did not hear his alarm and overslept. On June 6, 2020, the employer gave claimant a written warning that notified him that if he was late again, his employment could be terminated.

(4) On June 10, 2020, claimant reported for work 17 minutes after the start of his 7:00 a.m. shift. Later that day, the employer reviewed claimant's history of clocking in at various employer properties on its electronic time system. The time system records showed that claimant had also reported for work late on May 30, 2020, June 2, 2020, June 3, 2020 and June 4, 2020.

¹ Order No. 21-UI-168401 stated that it modified decision # 92228 by concluding that the employer discharged claimant, but not for misconduct, and that claimant was not disqualified from receiving unemployment insurance benefits. Order No. 21-UI-168401 at 2. However, Order No. 21-UI-168401 affirmed decision # 92228, which had concluded the same.

(5) On June 11, 2020, the employer's general manager and property manager met with claimant about his recurring history of reporting for work late. Claimant explained that on each of those dates, he had been late for work because he did not hear his alarm and overslept. Claimant explained that he "had always been late . . . to everything in his life." Audio Record at 17:45 to 19:15. The managers considered claimant's explanation and offered claimant the opportunity to work an 8:00 a.m. to 5:00 p.m. shift if claimant believed it would help him report for work on time. Claimant accepted the shift change. The employer gave claimant a final written warning that notified him that if he reported late for work again, his employment would be terminated.

(6) On June 23, 2020, claimant reported for work more than one hour after the start of his 8:00 a.m. to 5:00 p.m. shift. Claimant told a manager at 9:07 a.m. that he "had just woken up" and "had problems with his alarm/not hearing it." Exhibit 1, June 23, 2020 note. Later that day, the general manager met with claimant and discharged him for reporting to work late that day. Claimant told the general manager at that time that he knew he had "fucked up" and "would lose his job." Audio Record at 21:30 to 21:45

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). 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).

Order No. 21-UI-168401 concluded that the employer discharged claimant for being late for work after having overslept because he did not hear his alarm. Order No. 21-UI-168401 at 2. The order reasoned that claimant was discharged not for misconduct because the record did not show that claimant was conscious of his failure to act, and therefore, claimant's conduct did not rise to the level of willful or wanton negligence. Order No. 21-UI-168401 at 2. However, the record does not support the order's conclusion.

The employer discharged claimant for failing to report for work on time on June 23, 2020. Claimant was late that day because he overslept and "had problems with his alarm/not hearing it," which under some circumstances would have been the result of an unconscious act. However, because claimant had been late for work six times within the previous month for the same reasons, he knew or should have known that he needed to take precautions to ensure that he reported for work on time. The record does not show that claimant took any such precautions, such as obtaining a new alarm clock, setting more than one alarm clock, going to bed earlier the night before a shift, or any other precaution to ensure he woke up in time to report for work as scheduled. Claimant's failure to take precautions to awaken in time for his

shift on June 23, 2020 was likely the result of a conscious indifference to the consequences of his actions, and his failure to report for work on time on June 23, 2020 was at least wantonly negligent.

Claimant's wantonly negligent conduct on June 23, 2020 cannot be excused 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).

Claimant's exercise of poor judgment on June 23, 2020 was not isolated. Claimant was late for work on six different occasions during the prior month because he did not hear his alarm and overslept. After, at most, the first several times claimant failed to awaken due to not hearing his alarm, he was on notice that he needed to take additional precautions to awaken on time for work. In failing to take any precautions to ensure he reported for work on time on at least the last several of the occasions he was late for work, claimant repeatedly exercised poor judgment. Accordingly, his exercise of poor judgment on June 23, 2020 was a repeated act, and not a single or infrequent occurrence and his conduct on June 23, 2020 cannot be excused as an isolated instance of poor judgment.

Claimant's conduct cannot be excused as the result of a good faith error in his understanding of the employer's expectation. After being given two warnings and counseled about punctuality during June 2020, claimant understood that the employer expected him to report for work on time. Claimant's acknowledgement to the general manager of his violation of that expectation on June 23, 2020 and that he knew that he would be discharged for it demonstrated that he did not sincerely believe, or have a factual basis for believing, that the employer would excuse his violation of that expectation on June 23, 2020.

The employer discharged claimant for misconduct, disqualifying claimant from receiving unemployment insurance benefits effective June 21, 2020.

DECISION: Order No. 21-UI-168401 is set aside, as outlined above.

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

DATE of Service: August 3, 2021

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.

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.surveymzmo.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.

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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.