

EMPLOYMENT APPEALS BOARD DECISION
2021-EAB-0553

Affirmed
Disqualification

PROCEDURAL HISTORY: On January 12, 2021, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant was discharged for misconduct and was disqualified from receiving unemployment insurance benefits effective August 16, 2020 (decision # 132206). Claimant filed a timely request for hearing. On June 14, 2021, ALJ Messecar conducted a hearing, and on June 21, 2021 issued Order No. 21-UI-169123, affirming decision # 132206. On July 12, 2021, claimant filed an application for review with the Employment Appeals Board (EAB). On July 14, 2021, ALJ Messecar issued Amended Order No. 21-UI-170312, vacating and replacing Order No. 21-UI-169123 to clarify a clerical error but otherwise leaving the substance of Order No. 21-UI-169123 undisturbed. This matter comes before EAB based on claimant's July 12, 2021 application for review, which EAB construes to apply to Amended Order No. 21-UI-170312.

WRITTEN ARGUMENT: With his application for review, claimant included a request to extend the time to submit a written argument. EAB denied claimant's request as premature. The deadline for the claimant to submit a timely written argument was August 2, 2021. As of the date this decision was issued, claimant did not submit either a written argument or another request for extension of the written argument deadline.

FINDINGS OF FACT: (1) Umpqua Valley Gymnastics, Inc. employed claimant as a gymnastics coach and, previously, as facility director, from May 31, 2016 until August 20, 2020. Prior to May 31, 2016, claimant had performed services for the employer as an independent contractor for several years.

(2) In 2017, the employer issued claimant a computer on which to perform his work. Claimant sometimes took the computer home in order to work from home. The computer contained files that were the property of the employer, as well as some of claimant's personal files.

(3) The terms of claimant's employment contract denoted that "Confidential Information," defined to include "all data and information relating to the business and management of the Employer," was the "exclusive property of the Employer. . . notwithstanding the fact that the Employee may have created or contributed to the creation of the Confidential Information." Exhibit 2 at 37, 39. The employment

contract also required claimant, upon the request of the employer, to “turn over to the Employer all Confidential Information belonging to the employer, including . . . documents . . . that . . . [are] connected with or derived from the Employee’s employment with the Employer.” Exhibit 2 at 40.

(4) On July 6, 2020, after several years of concerns that claimant was not satisfactorily discharging his duties as facility director, the employer’s board of directors notified claimant that they had decided to hire another employee as a full-time facility director and retain claimant solely as a coach.

(5) On August 13, 2020, claimant worked his last shift for the employer. That day, the employer requested that claimant leave his computer at the facility so that the incoming facility director could begin using it. Instead, claimant took the computer home in order to remove his personal files from the computer, backed up its contents, and then performed a factory reset on the computer. This wiped almost all of the employer’s files, including “. . . forms, handbooks, employee lists, customer lists, [and] everything that is needed for [their] business,” from the computer. Transcript at 9. Claimant did this because he was uncomfortable leaving the computer at work with his personal files accessible to others and he felt that he did not have enough time to remove his personal files while still at work. Claimant did not consider discussing the matter with the employer before taking the computer home, because he was “upset and . . . hurt about the way everything transpired.” Transcript at 35–36. Claimant returned the computer to the employer the following day, but did not immediately return the files he had backed up and then wiped from the computer, leaving the employer without access to those files. Claimant had never previously engaged in similar behavior.

(6) On August 14, 2020, the employer suspended claimant with pay because he had taken the computer home and wiped its contents instead of leaving it at the facility, and had failed to return the employer’s files, counter to what the employer had directed him to do that day. On August 20, 2020, the employer discharged claimant for the same reason. Claimant had not returned the files to the employer as of August 20, 2020.

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 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 because he took home his work computer on August 13, 2020 after the employer told him not to, wiped the employer's files from the computer, and then failed to timely return to the employer the files that he had wiped from the computer. It was reasonable for the employer to expect that claimant would comply with their instructions to leave the computer at work so that the incoming director could access it. By failing to do so, claimant violated this expectation. Further, given the broad terms by which the employment contract defined "Confidential Information," the record shows that, more likely than not, at least some of the files claimant backed up from the computer and then deleted constituted "Confidential Information." As such, claimant had also had a contractual duty to timely turn over the documents when the employer directed him to do so, and it was reasonable for the employer to expect that claimant would adhere to the terms of the employment contract. Because he did not, claimant violated that expectation as well. As the record demonstrates that claimant intentionally engaged in the behaviors that led the employer to discharge him, claimant was discharged for willful violations of the standards of behavior that the employer had the right to expect of him.

Claimant's actions cannot be excused as an isolated instance of poor judgment. The record shows that, prior to August 13, 2020, claimant had never previously engaged in similar behavior, and the employer did not offer evidence to show that claimant had previously engaged in other types of willful or wantonly negligent disregard for their standards of behavior. While claimant's series of actions-taking the computer home after being told not to, wiping the hard drive, and then failing to return the employer's files when directed to do so- can be viewed as a single "occurrence"¹ of actions such they constituted an isolated act, the record shows that his actions nevertheless created an irreparable breach of trust in the employment relationship and therefore exceeded poor judgment. At hearing, claimant's

¹ See, e.g., *Perez v. Employment Dept.*, 164 Or. App. 356, 992 P2d 460 (1999).

testimony indicated that while he believed that he needed to remove his personal files from the computer, he acted unilaterally rather than discussing the matter with the employer because he was “upset” and “hurt” by the employer’s decision to remove him as facility director, and therefore did not consider a discussion with the employer to be an option. The record suggests that claimant may have legitimately needed to remove some of his files from the computer before leaving it for his successor. Even if this is true, the record does not show that he needed to wipe the computer’s hard drive or withhold either important operational documents or the computer itself from the employer in order to accomplish that goal. That he did so over the employer’s explicit objections, and to the employer’s detriment, merely because he was upset suggests an impulsivity in claimant that would reasonably and irreparably damage the employer’s trust in him. Further, although it is not clear from the record as to whether claimant ever returned the files to the employer, the record shows that claimant had not done so as of the date on which the employer discharged him, because the employer reiterated their request for the files on that date. Exhibit 3 at 12. Claimant did not offer an explanation or justification for why he failed or refused to return the employer’s files for at least a week, and none is readily apparent from the record. That claimant would withhold documents important to the operations of the business for at least a week further demonstrates that the employer’s trust in claimant was irreparably breached. Because claimant’s conduct exceeded mere poor judgment, it was not an isolated instance of poor judgment, and claimant’s actions therefore constituted misconduct.

For the above reasons, claimant was discharged for misconduct, and is disqualified from receiving benefits effective August 16, 2020.

DECISION: Amended Order No. 21-UI-170312 is affirmed.

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

DATE of Service: August 12, 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.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 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.

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www.Oregon.gov/Employ/eab

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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.