

EMPLOYMENT APPEALS BOARD DECISION
2021-EAB-0578

Reversed
Disqualification

PROCEDURAL HISTORY: On May 17, 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 April 11, 2021 (decision # 70837). Claimant filed a timely request for hearing. On July 1, 2021, ALJ Monroe conducted a hearing, and on July 8, 2021 issued Order No. 21-UI-169993, reversing decision # 70837 by concluding that claimant was discharged, but not for misconduct, and was not disqualified from receiving benefits based on the work separation. On July 19, 2021, the employer filed an application for review with the Employment Appeals Board (EAB).

WRITTEN ARGUMENT: EAB considered both the employer's written argument and claimant's written argument when reaching this decision.

FINDINGS OF FACT: (1) Pedcor Management Corporation employed claimant as a leasing representative at the employer's Sunset View property from November 4, 2019 until April 12, 2021.

(2) Claimant's duties for the employer generally consisted of processing applications and other documents for prospective tenants at the Sunset View property. At times, the employer would request for claimant or other leasing agents within the company to help process files for properties other than the ones at which they worked. Helping in such a manner was typically voluntary. Around February 2021, claimant's property manager began asking for volunteers to assist with processing files for the employer's Rosewood Station property. Claimant did not volunteer to assist with that effort.

(3) On March 25, 2021, after having learned that one of her coworkers might have been exposed to COVID-19, claimant began an email exchange with the area manager in which she expressed concerns

about the employer's safety protocols and the fact that she had not been informed about her own possible exposure. In the course of that exchange, the claimant used wording and formatting—such as bold fonts and all capital letters—which the employer found to be “more and more combative.” Transcript at 26. Throughout the exchange, the employer did not answer to claimant's satisfaction questions about the possible COVID-19 exposure.

(4) On April 1, 2021, the property manager announced that all of the Sunset View employees would be required to work on files for the Rosewood Station property. The employer also required employees from other properties throughout the United States to work on the files. As all of claimant's coworkers at her property were already volunteering to do so, however, claimant was, in effect, the only person at the Sunset View property whose work requirements changed as a result of the announcement. Because of the email exchange and the fact that work on the Rosewood Station property had previously been strictly voluntary, claimant believed that the employer assigned the work to her in retaliation for her continued inquiry about the possible COVID-19 exposure. Because of her belief that the assignment was retaliatory, and because she felt that she already had too much work to do, claimant refused to work the Rosewood Station files. Claimant instead offered to take on additional files from her own property to make up the difference, which the employer did not accept.

(5) On April 2, 2021, claimant notified the property manager and area manager via email that she would “not be speaking with anyone on the phone” regarding the COVID-19 matter or the Rosewood Station assignment, but that she preferred all correspondence to be in writing. Exhibit 1 at 1. On several occasions thereafter, claimant refused to speak to members of management on the phone and instead communicated only via email.

(6) On April 5, 2021, the property manager sent claimant another email directing her to work on the Rosewood Station files. Claimant again refused. That day, the employer issued claimant a written warning, backdated to April 1, 2021, for refusing to accept a phone call from her supervisor, having exhibited “defiant,” “disrespectful,” and “disruptive” behavior in person and in via email, and refusing to work on the Rosewood Station files as she had been directed to do. Exhibit 4.

(7) On April 6, 2021, the property manager again directed claimant to work on the Rosewood Station files. Claimant again refused to work on the files, and sent an email to the employer's personnel director which restated her belief that the assignment was retaliatory in nature.

(8) On April 12, 2021, because claimant refused to work on the Rosewood Station files, used objectionable language in emails to management, and refused to accept calls from management, the employer discharged claimant.

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). Good faith errors are not misconduct. OAR 471-030-0038(3)(b).

The employer discharged claimant because of insubordinate behavior, which included repeatedly refusing to work on files assigned to her and refusing to accept calls from management, as well as the tone and content of her emails regarding those issues. The order under review concluded that because “claimant’s actions on April 6 were intended to address a problem, not violate policy, and did not demonstrate that she was indifferent to the employer’s expectations,” claimant’s actions did not amount to a “willful disregard of or indifference to the consequences of her actions, that she was conscious of her conduct, and that she knew or should have known that her behavior would probably result in a violation of the standards of behavior the employer had the right to expect of her.” Order No. 21-UI-169993 at 4. The record does not support this conclusion. Further, in so concluding, the order under review misstates the standards by which, for purposes of ORS 657.176(2)(a), an act or failure to act constitutes misconduct.

In relevant part, misconduct is defined under OAR 471-030-0038(3)(a) as either a willful *or* a wantonly negligent violation of the standards of behavior which an employer has the right to expect of an employee. Under OAR 471-030-0038(1)(c), a disregard for the consequences of one’s actions is a

necessary finding only for a conclusion that the individual violated the employer's standards of behavior with wanton negligence. In circumstances in which the individual *willfully* violated the employer's standards of behavior, no such finding is required. Here, the record unequivocally demonstrates that claimant's actions in refusing the assignments were willful: she explicitly wrote out her refusals, and the reasons for doing so, in emails she sent to her managers. Thus, the relevant analysis is not whether claimant was sufficiently conscious of the consequences of her actions, but instead whether the employer had a right to expect claimant to comply with the directive that claimant ultimately refused. The record demonstrates that the employer had such a right.

On its face, the directive to work on the Rosewood Station files appears reasonable. It was, essentially, the same work that claimant had already been performing, except for a different property, and it is reasonable for an employer to reassign an employee to work substantially the same as what they had already been performing when business needs demand it. Claimant's chief objection to the assignment was that she believed it to be retaliatory in nature. If the employer did assign the work to claimant in retaliation for her having voiced concerns about safety issues, the assignment might not have been a reasonable expectation. At hearing, claimant testified that she believed that the assignment was retaliatory because of "the timing." Transcript at 39. Claimant did not offer additional evidence to prove that the employer had intended to retaliate against her, nor is such evidence apparent from the record. Because all of the employees in claimant's office, and several from other offices around the country, were asked to work on the same assignment, the record shows that, more likely than not, the assignment was unrelated to claimant's expressed concerns about COVID-19 safety, and was not retaliatory in nature. To the extent that claimant refused the work because she was concerned about being overworked, the record also fails to show that the concern was well-founded. The fact that claimant volunteered to take on additional work at her own property to make up for work she refused from the other property, for instance, suggests that claimant did not actually lack the capacity to perform the work. Neither did claimant offer evidence to show that the additional work would have required mandatory or unpaid overtime, or that performing it would have had a negative effect on other work she was required to perform. Thus, the record demonstrates that the employer's expectation that claimant complete the Rosewood Station files assigned to her was reasonable, and that they therefore had a right to that expectation. As a result, claimant's refusals to complete the files was a willful violation of the standards of behavior that the employer had a right to expect of her.

Claimant's refusals to work on the Rosewood Station files cannot be excused as an isolated instance of poor judgment. Even assuming that claimant's refusals on April 1, 5, and 6, 2021 together constituted a single "incident,"¹ claimant's actions made a continued employment relationship impossible. Had claimant been open to discussing the assignment with a member of management and listening to the reasons they had for assigning the work to her, a continued employment relationship may have been possible. By refusing to accept any phone calls from management and instead requiring that all correspondence be conducted in writing, however, claimant significantly limited the employer's ability to find common ground and resolve the conflict with her. In such a scenario, where an employee both unilaterally refuses to perform work that the employer requires of them and refuses to discuss the matter, a continued employment relationship would not have been possible unless the employer disregarded the chain of command and acceded to claimant's requirements. Therefore, claimant's actions were not an isolated instance of poor judgment.

¹ See generally *Perez v. Employment Dep't*, 164 Or App 356, 992 P2d 460 (1999).

Finally, claimant's actions cannot be excused as a good-faith error. As discussed above, claimant's belief that the assignment to work on the Rosewood Station files was retaliatory was based on the "timing" of that assignment and the parallel controversy regarding COVID-19 safety. In other words, in erroneously concluding that the assignment was retaliatory in nature, claimant mistook correlation for causation. The record does not demonstrate that this error was made in good faith. *See Hood v. Employment Dep't*, 245 Or App 606, 263 P3d 1126 (2011) (a sincere but mistaken belief which causes an individual to violate the standards of behavior which the employer had a right to expect of them is insufficient to constitute a good-faith error; in order to support a finding that the error was made in good faith, the record must show that the individual made a serious attempt to determine if the belief was true). Here, the statements claimant made in her emails do not indicate that she attempted to inquire as to whether the assignment was retaliatory. Instead, her correspondence² with the employer shows that she acted under the assumption, without further attempts at verification, that the employer was retaliating against her. Without some showing that claimant made a serious attempt to confirm her own suspicions before acting on them, the record does not support the conclusion that claimant's refusals to work on the Rosewood Station files were the results of a good-faith error.

For the above reasons, claimant was discharged for misconduct, and is disqualified from receiving unemployment insurance benefits effective April 11, 2021.

DECISION: Order No. 21-UI-169993 is set aside, as outlined above.

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

DATE of Service: August 25, 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

² *E.g.*, "It is retaliation, as it went from voluntary to mandatory the day after Lisa was CC'd in my email from Amanda . . . If I feel I have been retaliated against, I have every right to say something." Exhibit 3 at 1 (emphasis in original).

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.surveymoz.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 desisyong ito.

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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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.