EO: 200
BYE: 202113

State of Oregon
Employment Appeals Board
875 Union St. N.E.
Salem, OR 97311

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DS 005.00

EMPLOYMENT APPEALS BOARD DECISION 2021-EAB-0617

Affirmed
No Disqualification

PROCEDURAL HISTORY: On January 14, 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 unemployment insurance benefits effective December 6, 2020 (decision # 101441). Claimant filed a timely request for hearing. On February 5, 2021, the Office of Administrative Hearings (OAH) served notice of a hearing scheduled for February 16, 2021 at 10:45 a.m. On February 16, 2021, claimant failed to appear at the hearing, and ALJ Davis issued Order No. 21-UI-161026, dismissing the hearing request due to claimant's failure to appear. On February 23, 2021, claimant filed a timely request to reopen the hearing. On June 7, 2021, OAH mailed notice of a hearing scheduled for June 25, 2021 to consider claimant's request to reopen, and if granted, the merits of decision # 101441. On July 2, 2021, OAH served a change notice of hearing, rescheduling the hearing for July 16, 2021. On July 16, 2021, ALJ Micheletti conducted a hearing, and on July 23, 2021 issued Order 21-UI-171025, allowing claimant's request to reopen the February 16, 2021 hearing and concluding that the employer discharged claimant not for misconduct and that claimant was not disqualified from receiving benefits. On July 27, 2021, the employer filed an application for review with the Employment Appeals Board (EAB).

Based on a *de novo* review of the entire record in this case, and pursuant to ORS 657.275(2), the portion of the order under review concluding that claimant had good cause to reopen the February 16, 2021 hearing is **adopted.** The remainder of this decision addresses whether claimant is disqualified for benefits based upon his work separation from Molalla Auto Works.

FINDINGS OF FACT: (1) Molalla Auto Works employed claimant as a shop manager from March 23, 2015 to December 7, 2020. Claimant's regular shift was from 9:00 a.m. to 6:00 p.m. The employer expected claimant to call the employer prior to the start of a shift if claimant was not going to be present for the shift, and to remain at work until the end of his shift unless the employer gave him permission to leave early. The employer also expected claimant to follow the owner's instructions.

(2) From April 1, 2020 to May 18, 2020, claimant took an extended leave of absence to assist elderly family members in vacating a facility that was at significant risk for a COVID outbreak. The employer

"praised" claimant for his actions and "supported" his efforts during the leave of absence. Transcript 2 at 22.

(3) When claimant returned from leave, the employer's business was adjusting to COVID-related CDC/County guidelines. The employer implemented COVID-related protocols "at the behest of [claimant]." Transcript 2 at 11-12. The owner and claimant would, at times, have "conflicts" over the COVID protocols that were established, but the employer viewed these conflicts as "fairly insignificant." Transcript 2 at 11.

(4) On Monday, December 7, 2020, claimant reported to work for his regular shift. The owner instructed claimant to prioritize his work on two particular vehicles, and to leave the work on a Ford F-250 for Wednesday. Despite this instruction, the owner observed claimant working on the F-250 on two separate occasions prior to the owner's lunch break, which prompted the owner to correct claimant both times. Later, after the owner returned from his lunch break, claimant told the owner that he had continued to work on the F-250, which caused the owner to be "pretty upset at that point". Transcript 2 at 6. Claimant then moved a different vehicle into the shop, but discovered that the vehicle had not been sanitized pursuant to the employer's COVID sanitation policy. Claimant became upset and left work at 4:00 p.m. before the end of his shift without notifying the employer.

(5) On December 8, 2020, claimant failed to report to work for his regular shift and did not notify the employer that he would be absent. At approximately 2:00 p.m., claimant texted the employer to request a meeting to address his concerns about the work environment, which claimant felt made it a challenge "to be safe, productive, and comfortable." Transcript 2 at 4. Claimant did not intend to quit work. The owner responded to claimant to meet at a local tax office the next day instead of the work place. The tax office was where the owner would normally go to terminate employees, when termination was necessary, due to its more private setting.

(6) On December 9, 2020, the owner and claimant met at the tax office. The owner arrived for the meeting with claimant's final check prepared, but had not yet made a decision to discharge claimant. Claimant and the owner discussed several issues including the incident with the F-250 and the issue with the unsanitized vehicle. After the discussion, the owner believed that he and claimant "needed a cooling off period" and "some time off" from each other. Transcript 2 at 20, 24. The owner told claimant to contact the owner in a couple of weeks because the owner was interested in "salvag[ing] this" because "prior to the COVID activities, [claimant] was an exemplary employee." Transcript 2 at 20.

CONCLUSIONS AND REASONS: The employer discharged claimant but not for misconduct.

Nature of the work separation. The first issue is the 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 record shows that claimant demonstrated a willingness to continue working for the employer when he texted the owner on December 8, 2020 to arrange a meeting to discuss claimant's concerns. This expression of willingness to remain with the employer was consistent with claimant's testimony that he

"loved" his job and had "no intentions of quitting." Transcript 2 at 19. In contrast, the owner's conduct, including insisting that the December 9, 2020 meeting take place at a local tax office where the owner would usually discharge employees and bringing claimant's final paycheck to the meeting, was consistent with a desire to prevent claimant from continuing to work. Although the owner testified that he had not made up his mind to discharge claimant prior to the meeting, and that he was interested in "salvag[ing]" the employment relationship, he also testified that by the end of the meeting he believed that he and claimant "needed a cooling-off period," lending further support to the conclusion that the owner would not allow claimant to continue working. In light of these circumstances, the preponderance of the evidence supports the conclusion that claimant was discharged because, despite claimant's willingness to continue working for the employer for an additional period of time, the employer was unwilling to let him do so.

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) (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 'isolated instances of poor judgment' analysis focuses on whether the incident was a 'single occurrence in the employment relationship,' and not whether the incident involved more than one component 'act' by the employee." *Perez v. Employment Dept.*, 164 Or. App. 356, 992 P2d 460, 446 (1999) (*quoting Waters v. Employment Div.*, 125 Or. App. 61, 64, 685 P.2d 368 (1993)).

The preponderance of the evidence supports the conclusion that claimant violated the employer's reasonable expectations for employee behavior multiple times over the two-day period from December 7, 2020 to December 8, 2020. Claimant violated the employer's reasonable expectations for claimant's behavior on Monday, December 7, 2020 when claimant prioritized working on the F-250 despite the employer's repeated directives to claimant that claimant was not to address the F-250 prior to two other vehicles at the business. While there was evidence that suggested that claimant may have been uncomfortable diagnosing the other two vehicles, claimant knew or should have known that by failing to address any discomfort with the owner and instead continuing to work on the F-250 despite the owner's instructions not to do so, claimant negligently disregarded the employer's interests and reasonable expectations. Likewise, claimant recognized that he "probably" violated the employer's reasonable expectations for employee behavior when he left work on December 7, 2020 prior to the end of his shift without notifying the employer, and when he failed to report to work on December 8, 2020 without telling the employer that he would not be in to work that day. Transcript 2 at 15.

However, it is necessary to determine if claimant's conduct was an isolated instance of poor judgment and not misconduct. The record shows that prior to claimant's conduct on December 7, 2020 and December 8, 2020, claimant had been viewed by the employer as an "exemplary employee" whom the employer "hat[ed] to los[e]." Transcript 2 at 20. Furthermore, inasmuch as claimant's February 7, 2020 actions with respect to the F-250 created tension between claimant and the owner which was later exacerbated by claimant's experience with the unsanitized vehicle, and inasmuch as claimant's frustration led him to leave work early on December 7, 2020, and fail to report to work on December 8, 2020, the preponderance of the evidence suggests that claimant's conduct over that two-day span was one occurrence, and not a series of discrete acts, of willful or wantonly negligent conduct. Furthermore, claimant's conduct during this two-day span neither exceeded poor judgment, nor created an irreparable breach of trust in the employer relationship or otherwise made a continued employment relationship impossible as evidenced by the employer's willingness to revisit the employment relationship two weeks after the discharge. Because the record shows that claimant's conduct on December 7 and 8, 2020 was a single occurrence of poor judgment and because claimant had otherwise been an exemplary employee until that point, the preponderance of the evidence shows that claimant's single occurrence of poor judgment on December 7 and 8, 2020 constituted an isolated instance of poor judgment, and claimant therefore is not disqualified from receiving unemployment insurance benefits. *See, e.g., Perez v. Employment Dept.*, 164 Or. App. 356, 992 P2d 460, 446 (1999).

DECISION: Order No. 21-UI-171025 is affirmed.

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

DATE of Service: <u>September 2, 2021</u>

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.

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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 – 本判决会影响您的失业救济金。 如果您不明白本判决， 请立即联系就业上诉委员会。 如果您不同意此判决，您可以按照该判决结尾所写的说明，向俄勒冈州上诉法院提出司法复审申请。

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 – សេចក្ដីសម្រេចនេះមានផលប៉ះពាល់ដល់អត្ថប្រយោជន៍គ្មានការងារធ្វើរបស់លោកអ្នក។ ប្រសិនបើលោកអ្នកមិនយល់អំពីសេចក្ដីសម្រេចនេះ សូមទាក់ទងគណៈកម្មការឧទ្ធរណ៍ការងារភ្លាមៗ។ ប្រសិនបើលោកអ្នកមិនយល់ស្របចំពោះសេចក្ដីសម្រេចនេះទេ លោកអ្នកអាចដាក់ពាក្យប្ដឹងសុំឲ្យមានការពិនិត្យរឿងក្ដីឡើងវិញជាមួយតុលាការឧទ្ធរណ៍រដ្ឋ Oregon ដោយអនុវត្តតាមសេចក្ដីណែនាំដែលសរសេរនៅខាងចុងបញ្ចប់នៃសេចក្ដីសម្រេចនេះ។

Laotian

ເອົາໃຈໃສ່ – ຄຳຕັດສິນນີ້ມີຜົນກະທົບຕໍ່ກັບເງິນຊ່ວຍເຫຼືອການຫວ່າງງານຂອງທ່ານ. ຖ້າທ່ານບໍ່ເຂົ້າໃຈຄຳຕັດສິນນີ້, ກະລຸນາຕິດຕໍ່ຫາຄະນະກຳມະການອຸທອນການຈ້າງງານໃນທັນທີ. ຖ້າທ່ານບໍ່ເຫັນດີນຳຄຳຕັດສິນນີ້, ທ່ານສາມາດຍື່ນຄຳຮ້ອງຂໍການທົບທວນຄຳຕັດສິນນຳສານອຸທອນລັດ Oregon ໄດ້ໂດຍປະຕິບັດຕາມຄຳແນະນຳທີ່ບອກໄວ້ຢູ່ຕອນທ້າຍຂອງຄຳຕັດສິນນີ້.

Arabic

هذا القرار قد يؤثر على منحة البطالة الخاصة بك، إذا لم تفهم هذا القرار، إتصل بمجلس منازعات العمل فورا، و إذا كنت لا توافق على هذا القرار، يمكنك رفع شكوى للمراجعة القانونية بمحكمة الإستئناف 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 دستورالعمل موجود در پایان آن، از دادگاه تجدید نظر اورگان درخواست تجدید نظر کنید.

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