

EMPLOYMENT APPEALS BOARD DECISION
2021-EAB-0658

Affirmed
Disqualification

PROCEDURAL HISTORY: On January 12, 2021, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that the employer discharged claimant for misconduct, disqualifying claimant from receiving unemployment insurance benefits effective October 4, 2020, and that claimant's benefit rights based on wages earned prior to the date of his discharge would not be canceled (decision # 82852). Claimant filed a timely request for hearing. On July 21, 2021, ALJ Logan conducted a hearing, and on July 23, 2021 issued Order No. 21-UI-170990, affirming decision # 82852, but erroneously stating that the effective date of claimant's disqualification from benefits was October 8, 2021. On July 26, 2021, ALJ Logan issued Order No. 21-UI-171080, which was identical to Order No. 21-UI-170990 except that Order No. 21-UI-171080 stated that the effective date of claimant's disqualification from benefits was October 8, 2020, not 2021.¹ On August 11, 2021, claimant filed an application for review with the Employment Appeals Board (EAB), which EAB treated as an application for review of Order No. 21-UI-171080.

WRITTEN ARGUMENT: EAB did not consider claimant's written argument when reaching this decision because he did not include a statement declaring that he provided a copy of his argument to the opposing party or parties as required by OAR 471-041-0080(2)(a) (May 13, 2019).

FINDINGS OF FACT: (1) Clarke's Sheet Metal, Inc. employed claimant as a designer in their engineering department from September 2014 until October 8, 2020.

(2) The employer had a computer use policy, which required claimant to refrain from using his work computer for personal business purposes. Violation of the policy could result in termination. Claimant signed the computer use policy on November 25, 2015.

¹ October 8, 2020 was also an incorrect date of disqualification because a disqualification from benefits begins the Sunday of the week in which the disqualification occurs, which, in this case, was October 4, 2020.

(3) Over the course of claimant's employment, the employer often assigned claimant projects with challenging deadlines, which caused claimant to work at night and on weekends. The long hours claimant worked resulted in his earning significant overtime pay until approximately October 2018.

(4) In October 2018, the employer hired two additional engineers and began discouraging claimant from working overtime. Claimant continued working long hours as necessary to complete projects but stopped reporting the overtime he worked. Shortly thereafter, to make up for the income he lost when he stopped reporting overtime, claimant started his own business making steel décor items. The employer was aware of the existence of claimant's business but did not grant him permission to use his work computer to work on his business.

(5) On June 26, 2020, while he was clocked in and working at the employer's office, claimant used his work computer to work on an inventory document relating to a steel décor item he sold as part of his business. Exhibit 1 at 27, "Bear Claw" Inventory Document. On July 7, 2020 and September 2, 2020, while he was clocked in and working at the employer's office, claimant used his work computer to work on an accounting program that listed the expenses, profits, losses, and cash flow of his business. Exhibit 1 at 36, 46, Claimant's Quickbooks Screenshots. On September 21, 2020, while he was clocked in and working at the employer's office, claimant used his work computer to view the articles of incorporation of his business. Exhibit 1 at 53, Articles of Incorporation.

(6) On or about September 21, 2020, a coworker treated claimant in a manner that claimant thought might constitute sexual harassment. Claimant reported the incident with the coworker to the employer. In the course of investigating claimant's report, the employer reviewed claimant's work email and discovered exchanges between claimant and his wife regarding looking for commercial space for claimant's business. The employer then reviewed claimant's work computer and discovered numerous instances, including those discussed above, of claimant using the computer for matters relating to his business while he was clocked in and working at the employer's office. The employer also discovered a list of potential customers for claimant's business, some of whom were the employer's customers, saved on claimant's work computer.

(7) On October 8, 2020, the employer discharged claimant for using his work computer for personal business purposes.

CONCLUSIONS AND REASONS: The employer discharged claimant for misconduct. Claimant's wage credits are not subject to cancellation.

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 and good faith errors 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 record shows that claimant violated the employer’s expectation that he refrain from using his work computer for personal business activities with wanton negligence. Claimant knew or should have known that conducting work for his business on his work computer would probably result in a breach of the employer’s reasonable expectation because the record shows that on November 25, 2015, claimant signed the employer’s computer use policy, which conveyed the employer’s expectation that claimant refrain from using work computers for personal business purposes. At hearing, claimant conceded that he worked on some matters relating to his business while working on his work computer. Transcript at 16, 20. Claimant testified, however, that this occurred when he worked at home after hours and would “port in” to his work computer remotely. Transcript at 24. Claimant suggested that he thought he was free to conduct personal business on his work computer when “ported” in from home because the employer never gave him a warning or demerit for doing so. Transcript at 24. However, there is no indication from the record that the employer’s expectation that claimant not use his work computer for personal business activities did not apply on occasions when claimant accessed his work computer remotely. Further, the record supports the inference that the employer did not warn claimant about conducting personal activities on his work computer, not because they approved of such activities, but because they were unaware claimant engaged in those activities until they analyzed his work computer shortly before they discharged him. Moreover, even if the record showed that the employer’s expectation differed when claimant accessed his work computer remotely, which it does not, claimant did not rebut the employer’s evidence that on multiple occasions in June, July, and September 2020,

claimant conducted work for his business while clocked in and working at the office on his work computer. Transcript at 32. Accordingly, claimant violated the employer's expectation with wanton negligence by using his work computer for personal business purposes as to the multiple instances in June, July, and September 2020, as well as by saving a list of potential customers for his business on his work computer and using it to exchange emails regarding looking for commercial space for his business.

Claimant's conduct cannot be excused as an isolated instance of poor judgment. Claimant's multiple instances of using his work computer for personal business purposes was not an isolated instance of poor judgment because the exercise of poor judgment was not a single or infrequent occurrence. Rather, the record shows that claimant breached the employer's expectation regarding using his work computer for personal business on numerous separate occasions in June, July, and September 2020, which means the conduct was a repeated act or pattern of wantonly negligent behavior and therefore not an isolated instance of poor judgment.

Claimant's conduct also cannot be excused as a good faith error. Focusing on claimant's conduct, the record does not support that claimant believed in good faith that the multiple instances of him using his work computer to work on matters relating to his business was not conduct that constituted using his work computer for personal business purposes. *See Freeman v. Employment Dep't.*, 195 Or App 417, 98 P3d 402 (2004) (a good faith error analysis must focus on the conduct, not the result; for example, the issue is not whether claimant believed in good faith that the employer would condone his loss of license, but whether it was good faith error for claimant to believe he was not under the influence of intoxicants when he drove home). As noted above, claimant conceded at hearing to using his work computer for some matters relating to his business, like emailing his wife about the business or checking his business bank account. Transcript at 16, 20. The record also contains substantial evidence offered by the employer that claimant conducted work for his business on his work computer on multiple occasions in June, July, and September 2020. Exhibit 1, 24-58; Transcript at 32. Claimant did not rebut this evidence or assert that he believed in good faith that the work he did for his business on those occasions did not constitute using his work computer for personal business purposes. Accordingly, claimant's violations of the employer's expectation regarding using his work computer to conduct personal business was not a good faith error.

Wage Cancellation. ORS 657.176(3) provides, in pertinent part:

If the [Department] finds that an individual was discharged for misconduct because of the individual's commission of a felony or theft in connection with the individual's work, all benefit rights based on wages earned prior to the date of the discharge shall be canceled if the individual's employer notifies the director of the discharge within 10 days following issuance of the notice provided for in ORS 657.266 or 30 days following issuance of the notice provided for in ORS 657.266, and:

- (a) The individual has admitted commission of the felony or theft to an authorized representative of the [Department];
- (b) The individual has signed a written admission of the felony or theft and the written admission has been presented to an authorized representative of the [Department]; or

(c) The felony or theft has resulted in a conviction by a court of competent jurisdiction.

The record does not support subjecting claimant's wage credits to cancellation under ORS 657.176(3). There is no evidence that claimant admitted commission of any felony or theft to a Department representative orally or in writing or was ever convicted of any felony or theft by any court of competent jurisdiction. Nor is there evidence regarding whether the employer notified the Department about the discharge of claimant within 10 days following issuance of the notice provided for in ORS 657.266 or 30 days following issuance of the notice provided for in ORS 657.266. Therefore, ORS 657.176(3) does not apply and claimant's wage credits are not subject to cancellation.

For the reasons stated above, claimant was discharged for misconduct but claimant's wage credits are not subject to cancellation. Claimant is disqualified from receiving benefits effective October 4, 2020.

DECISION: Order No. 21-UI-171080 is affirmed.

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

DATE of Service: September 15, 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 weeks ending September 4, 2021 and prior as long as you were not eligible for other benefits during that time, and were unable to work, unavailable for work, or unemployed due to the COVID-19 public health emergency. PUA was an unemployment benefits program available through the Oregon Employment Department in response to the COVID-19 pandemic. The program ended on September 4, 2021.

Visit <https://unemployment.oregon.gov> for more information, or to contact the Oregon Employment Department using the "Contact Us" form. You can also call 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 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 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 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.