

EMPLOYMENT APPEALS BOARD DECISION
2021-EAB-0684

Affirmed
Disqualification

PROCEDURAL HISTORY: On July 15, 2021, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant quit work without good cause and was disqualified from receiving unemployment insurance benefits effective April 18, 2021 (decision # 162649). Claimant filed a timely request for hearing. On August 13, 2021, ALJ Wardlow conducted a hearing, at which the employer failed to appear, and on August 19, 2021 issued Order No. 21-UI-172971, affirming decision # 162649 by concluding that claimant was discharged for misconduct and was disqualified from receiving benefits effective April 18, 2021.¹ On August 23, 2021, claimant filed an application for review with the Employment Appeals Board (EAB).

WRITTEN ARGUMENT: Claimant's argument contained information that was not part of the hearing record, and did not show that factors or circumstances beyond claimant's reasonable control prevented him from offering the information during the hearing as required by OAR 471-041-0090 (May 13, 2019). EAB considered only information received into evidence at the hearing when reaching this decision. *See* ORS 657.275(2).

FINDINGS OF FACT: (1) Walmart Associates Inc. employed claimant from June 6, 2019 until April 22, 2021.

(2) In approximately April 2020, as a COVID-19 safety precaution, the employer instituted a policy that required employees to wear either a face mask or a face shield at all times while at work. Claimant was aware of and understood this expectation.

(3) Claimant was philosophically opposed to being required to wear a face covering at work. By the spring of 2021, claimant became "disturbed" with the requirement. Audio Record at 17:01. Claimant felt

¹ The order under review characterized its disposition as modifying decision # 162649. In fact, it affirmed the administrative decision because the effect of the order was to change the reason for the administrative decision's outcome, but not the result of the administrative decision.

the employer was violating his rights and “decided to make a strong decision to defend [him]self” by refusing to wear a face covering. Audio Record at 17:16.

(4) Claimant had asthma. Although claimant regarded his asthma as “pretty much fine,” he believed that wearing a face mask caused him migraines and fatigue. Audio Record at 13:52. Claimant could have worn a face shield to satisfy the employer’s face covering requirement, which would not have affected claimant’s asthma condition, but did not because of his philosophical opposition to face coverings.

(5) On April 22, 2021, claimant arrived at the employer’s store intent to not wear any face covering. Upon his arrival, a manager offered claimant a face mask but claimant refused to wear it. The manager told claimant to “get out” and escorted him out of the building. Audio Record at 20:09.

CONCLUSIONS AND REASONS: Claimant was discharged for misconduct.

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).

Claimant’s work separation was a discharge. On April 22, 2021, claimant refused to wear a face covering and, in response, a store manager told claimant to “get out” and escorted him out of the building. This evidence is sufficient to conclude that claimant was willing to continue to work for the employer for an additional period of time but was not allowed to do so by the employer. Accordingly, claimant’s work separation was a discharge that occurred on April 22, 2021.

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) (September 22, 2020).

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).

When claimant refused to wear a face covering at work on April 22, 2021, he willfully violated the employer's reasonable expectation that he wear a face covering at all times while at work. The violation was willful because the record shows that claimant was philosophically opposed to the face covering requirement and arrived at the employer's store on April 22, 2021 intent to breach the requirement because it "disturbed" him and he viewed it as a violation of his rights. Audio Record at 17:01. The employer's face covering expectation was reasonable because it was instituted as a COVID-19 safety precaution and could be satisfied by claimant wearing a face shield (rather than a mask), which the record indicates would not have affected claimant's asthma condition. As such, claimant's violation of the employer's expectation regarding wearing a face covering at work was a willful violation of the standards of behavior that the employer had a right to expect of claimant.

Claimant's conduct is not an isolated instance of poor judgment. Claimant's conduct in refusing to abide by the employer's face covering policy exceeded mere poor judgment because claimant's philosophical opposition to the policy made a continued employment relationship impossible. The record shows that claimant was "disturbed" by the employer's face covering requirement, and had arrived at the view that it violated his rights and he was entitled "to make a strong decision to defend [him]self." Audio Record at 17:16. Based on this evidence, it is more likely than not that claimant would have continued to refuse to wear a face covering after April 22, 2021 based upon his philosophical objections. This would have placed claimant in constant violation of the employer's face covering requirement, which, as a COVID-19 safety measure, the employer was likely to continue to enforce given the ongoing nature of the COVID-19 pandemic. For these reasons, the preponderance of evidence shows that claimant's conduct made a continued employment relationship impossible and therefore was not an isolated instance of poor judgment.

Claimant's conduct also is not a good faith error because claimant did not commit a mistake of fact or action deriving from a mistake of fact, such as a sincere but mistaken belief that he was unable to comply with the employer's face covering requirement. Rather, claimant willfully violated the employer's reasonable policy based upon philosophical grounds and this does not constitute a good faith

error. *See Hood v. Employment Dep't.*, 263 P.3d 1126, 1130 (2011) (the “error” in a good faith error analysis refers to a mistake of fact or action deriving from a mistake in fact, a good faith error is not an “exception for conscientious objectors to employer policies”).

Therefore, claimant was discharged for misconduct and is disqualified from receiving unemployment insurance benefits effective April 18, 2021.

DECISION: Order No. 21-UI-172971 is affirmed.

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

DATE of Service: September 24, 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 ໄດ້ໂດຍປະຕິບັດຕາມຄຳແນະນຳທີ່ບອກໄວ້ຢູ່ຕອນທ້າຍຂອງຄຳຕັດສິນນີ້.

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.

Employment Appeals Board - 875 Union Street NE | Salem, OR 97311
 Phone: (503) 378-2077 | 1-800-734-6949 | Fax: (503) 378-2129 | TDD: 711
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