

EMPLOYMENT APPEALS BOARD DECISION
2021-EAB-0693

Reversed
No Disqualification

PROCEDURAL HISTORY: On March 29, 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 December 8, 2019 (decision # 74622). Claimant filed a timely request for hearing. On August 10, 2021, ALJ Micheletti conducted a hearing, and on August 18, 2021 issued Order No. 21-UI-172858, affirming decision # 74622. On August 24, 2021, claimant filed an application for review with the Employment Appeals Board (EAB).

WRITTEN ARGUMENT: EAB considered claimant's written argument when reaching this decision.

EVIDENTIARY MATTER: At hearing, the ALJ admitted documents submitted by claimant as Exhibit 1 into evidence, but failed to mark Exhibit 1. As a clerical matter, EAB identified the exhibit based on the ALJ's description of it, and marked it as Exhibit 1. Audio Record at 2:02 to 7:53; Transcript at 40.

FINDINGS OF FACT: (1) Salem Keizer Public Schools employed claimant as a middle school instructional assistant from September 7, 2000 until December 10, 2019.

(2) The employer expected their employees to take leaves of absences only when the employer authorized them to do so. Claimant knew and understood the employer's expectation about taking unauthorized leaves of absences.

(3) In May 2016, claimant took a leave of absence that the employer initially believed was unauthorized. The employer disciplined claimant for taking the leave, but then concluded that the leave was appropriate and rescinded the discipline.

(4) Claimant had post-traumatic stress disorder (PTSD) caused by childhood trauma. As a child, claimant's father abandoned her and she spent much of her youth in foster homes. Claimant's father abandoned claimant because he did not believe claimant was his biological daughter.

(5) In the July 2019, claimant took a DNA test that confirmed her biological relationship to her father. Thereafter, the family of claimant's father invited her to attend a family reunion in the Philippines, which was scheduled during the period of November 8, 2019 through November 18, 2019. Claimant's siblings offered to pay for claimant and her son to attend the family reunion, which otherwise would have been prohibitively expensive for claimant to attend.

(6) Claimant consulted with her therapists about the invitation to attend the family reunion. Claimant's therapists advised claimant to attend the family reunion because they concluded that doing so would improve her mental health. Claimant decided to attend the family reunion.

(7) In September 2019, claimant submitted a leave of absence request for November 8, 2019 through November 18, 2019 to attend the family reunion. On October 2, 2019, the employer denied the leave request. Claimant appealed the employer's denial and included in her appeal a letter from one of her therapists. Per the letter, claimant's therapist regarded the reunion as "a unique chance to heal trauma and strongly impact [claimant's] recovery" and "strongly recommended that claimant be given permission to attend." Exhibit 1 at 48, October 31, 2019 letter. The employer rejected claimant's appeal and informed claimant that the leave request remained denied.

(8) Despite having had her leave request denied, claimant took an unauthorized leave of absence from November 8, 2019 through November 18, 2019 and attended the family reunion. On December 10, 2019, the employer discharged claimant for taking a leave of absence without authorization.

CONCLUSIONS AND REASONS: The employer discharged claimant, but not 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) (December 23, 2018). "[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 order under review concluded that claimant's conduct constituted misconduct because the employer's expectation was reasonable and claimant violated it willfully. Order No. 21-UI-172858 at 4. The record supports a conclusion that claimant willfully violated the employer's expectations. The record does not support the conclusion of the order under review that claimant's conduct constituted misconduct, however, because claimant's misconduct was an isolated instance of poor judgment.

The record shows that claimant willfully violated the employer's expectation that claimant refrain from taking unauthorized leaves of absences when she took a leave of absence from November 8, 2019 through November 18, 2019 to attend the family reunion. However, the record also raises questions as to the reasonableness of the employer's decision to deny claimant permission to take the leave of absence, given that claimant's therapists advised claimant to attend the family reunion to improve her mental health, and claimant gave the employer a letter from one of her therapists attesting to that fact.

In any event, claimant's conduct was not misconduct because the record indicates it was, at most, an isolated instance of poor judgment. 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).

Applying these standards, the record shows that claimant's violation of the employer's expectation that she refrain from taking an unauthorized leave of absence was an isolated instance of poor judgment. Claimant's conduct was an isolated act. Other than the one instance of taking an unauthorized leave of absence from November 8, 2019 through November 18, 2019, the record is devoid of evidence that claimant had previously taken leave without authorization or otherwise engaged in any willful or wantonly negligent violation of an employer expectation. Although the employer initially disciplined claimant for a similar incident of taking a leave of absence in May 2016, the employer later concluded

that claimant's conduct was appropriate and rescinded that discipline. Claimant's decision to take leave without authorization from November 8, 2019 through November 18, 2019 involved judgment because it was act of discernment. It was an act of poor judgment because claimant willfully violated the employer's expectations.

However, claimant's conduct did not exceed mere poor judgment. Claimant taking an unauthorized leave of absence did not violate the law and was not tantamount to unlawful conduct. The record also shows, more likely than not, it did not create an irreparable breach of trust or otherwise make a continued employment relationship impossible. Viewed objectively, the record reflects that claimant's unauthorized leave of absence did not constitute an irreparable breach of trust because claimant's conduct did not constitute an act of dishonesty or bad faith. Instead, claimant's conduct was well intentioned in that claimant took the leave so that she could attend a family reunion that her therapists had advised her to attend to improve her mental health. The record also shows, more likely than not, that a continued employment relationship was possible following claimant's taking of the leave of absence. Claimant was unlikely to repeat taking an unauthorized leave given that she had no past history of doing so, and did so from November 8, 2019 through November 18, 2019 only because of the unique opportunity to attend the family reunion, which would have been prohibitively expensive for claimant to attend but for her siblings' agreement to cover her costs.

Accordingly, the employer discharged claimant for an isolated instance of poor judgment, which is not misconduct. For that reason, claimant is not disqualified from receiving unemployment insurance benefits based on this work separation.

DECISION: Order No. 21-UI-172858 is set aside, as outlined above.

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

DATE of Service: September 29, 2021

NOTE: This decision reverses an order that denied benefits. Please note that payment of benefits, if any are owed, may take approximately a week for the Department to complete.

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 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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