

EMPLOYMENT APPEALS BOARD DECISION
2021-EAB-0751

Affirmed
Disqualification

PROCEDURAL HISTORY: On June 28, 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 benefits effective May 16, 2021 based on the work separation (decision # 185910). Claimant filed a timely request for hearing. On September 2, 2021, ALJ Moskowitz conducted a hearing, and on September 10, 2021 issued Order No. 21-UI-174456, affirming decision # 185910. On September 16, 2021, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Malheur Memorial Health District employed claimant in the laundry department at their Nyssa Gardens Assisted Living facility beginning in May 2000. The employer required employees to provide 30 days advance notice of any leave requests to ensure appropriate staff coverage; however, when staff coverage was available, the employer considered short-notice leave requests. The employer communicated this policy to claimant and claimant was aware of the policy.

(2) On May 7, 2021, claimant made a verbal request to the employer's former administrator to take vacation leave from May 20, 2021 to June 11, 2021. The former administrator told claimant that the employer's leave policy required 30 days advance notice. Claimant responded that she was going to take vacation leave anyway and that her coworkers could cover claimant's laundry duties during claimant's absence.

(3) On May 10, 2021, claimant provided the former administrator a written leave form that reflected amended leave dates of May 20, 2021 to June 7, 2021. Upon receipt, the former administrator told claimant she could not approve the leave request because of staffing issues. Claimant responded, "I know it'll be a big mess when I get back, but I'm going anyway." Transcript at 14.

(4) On May 20, 2021, claimant did not report to work. The employer considered claimant's leave to be "unauthorized." Transcript at 15.

(5) Between May 20, 2021 and June 7, 2021, the employer first covered claimant's laundry duties by having their caregivers fill in; however, the extra duties for the caregivers became "a huge burden" for them, so the employer had another employee step into the laundry position because the employer "had to keep going." Transcript at 28-29. The employer also removed claimant from the work schedule. A new administrator replaced the former administrator during this time period.

(6) On June 7, 2021, claimant reported to work at 6:00 a.m. unsure of her work situation and called the new administrator. The new administrator told claimant she was not on the work schedule and did not need to be at work, and that claimant, the former administrator, and the new administrator needed to have a conversation about the situation so that claimant could give her side of the story. The new administrator told claimant she would call claimant to schedule a meeting time. No further communication occurred between the employer and claimant.

CONCLUSIONS AND REASONS: The employer discharged claimant for misconduct.

Nature of the work separation. The first issue is the nature of the work separation. "Work" means "the continuing relationship between an employer and an employee." OAR 471-030-0038(1)(a) (September 22, 2020). 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). 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 order under review concluded that claimant voluntarily left work on May 20, 2021 because she took unauthorized leave on that date, despite the availability of continuing work with the employer. Order No. 21-UI-174456 at 3. However, the record does not support that conclusion.

The preponderance of the evidence shows that the employment relationship between the employer and claimant was effectively severed after claimant began her unauthorized leave on May 20, 2021 and the employer removed claimant from the employer's work schedule and filled her laundry position, first with caregivers, and later with another employee. By removing claimant from the work schedule and filling her position, the employer demonstrated their unwillingness to continue to allow claimant to work after claimant began her unauthorized leave. Although the June 7, 2021 phone conversation shows that the employer considered *rehiring* claimant and that claimant was willing to continue working for the employer, the employer's decision not to contact claimant at any point after June 7, 2021 further supports the conclusion that the employer was not willing to allow claimant to continue to work for the employer. In light of these circumstances, the preponderance of the evidence shows that the employer was not willing to allow claimant to continue working for the employer shortly after she began her unauthorized leave and the work separation is therefore a discharge.

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). "[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 preponderance of the evidence shows that claimant violated the employer’s reasonable expectations for employee behavior when she knowingly violated the employer’s 30-day advance notice leave policy, and then willfully took unauthorized leave despite her knowledge that the employer had denied her leave request. Although the record shows that the employer would sometimes make exceptions to this policy and approve short-notice leave requests, the employer made clear that exceptions would only occur when the employer could ensure adequate staffing existed to cover any such short-notice leave request. Here, the record shows that the employer told claimant that adequate staffing to support claimant’s short-notice request was not available. Claimant willfully chose to take unauthorized leave anyway. Likewise, although the former administrator testified that she did not initially plan to discharge claimant despite claimant’s decision to willfully take the unauthorized leave, the preponderance of the evidence shows that the employer’s viewpoint on discharge effectively changed when, during claimant’s unauthorized leave, the “huge burden” caused by claimant’s absence led the employer to remove claimant from the work schedule and replace her with other employees. Transcript at 16. Claimant’s decision to proceed with the unauthorized leave was not only a willful disregard of the employer’s interests that constituted misconduct, but it was also the proximate cause of her discharge.

Claimant's actions cannot be excused as an isolated instance of poor judgment. The record fails to show that prior to May 7, 2021, claimant had ever previously engaged in any other violations of the employer's standards of behavior. While it is possible to view claimant's decisions to violate the 30-day advance notice provision and then take unauthorized leave as a single occurrence of actions such that they might constitute an isolated act, the record shows that her actions nevertheless made a continuing employment relationship impossible and therefore exceeded mere poor judgment. The preponderance of the evidence shows that in the aftermath of claimant's decision to take unauthorized leave, claimant's coworkers were left to absorb the "huge burden" caused by her absence and that this burden extended over a two-week time period. In light of the length of this time period and claimant's disregard for the burden created by claimant's willful act, the preponderance of the evidence shows that claimant's decision to take unauthorized leave made a continuing employment relationship impossible and therefore exceeded poor judgment.

Claimant's conduct is also not a good faith error because claimant willfully decided to take the unauthorized leave fully aware that the employer had previously denied her leave request. As such, claimant was discharged for misconduct and is disqualified from receiving unemployment insurance benefits effective May 16, 2021.

DECISION: Order No. 21-UI-174456 is affirmed.

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

DATE of Service: October 22, 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.

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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 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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