

EMPLOYMENT APPEALS BOARD DECISION
2021-EAB-0798

Reversed
No Disqualification

PROCEDURAL HISTORY: On July 14, 2021, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant was discharged for misconduct and was disqualified from receiving unemployment insurance benefits effective June 6, 2021 (decision # 124948). Claimant filed a timely request for hearing. On September 15, 2021, ALJ Mott conducted a hearing, and on September 16, 2021 issued Order No. 21-UI-174867, affirming decision # 124948. On October 5, 2021, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Fred Meyer Stores, Inc. employed claimant as a grocery clerk from September 25, 2020 until June 10, 2021.

(2) The employer maintained an attendance policy that, in relevant part, required employees to personally notify a person in charge (“PIC”) of absences prior to planned shifts. The employer provided claimant with a copy of their attendance policy when claimant was hired.

(3) The employer typically posted a hard copy of the work schedule for claimant’s department on the wall of the store’s stock room three weeks in advance. The schedule was also generally accessible to employees on the employer’s scheduling website.

(4) On or around November 30, 2020, claimant requested a change to her schedule that involved, among other things, no longer working on Thursdays. Claimant’s supervisor granted claimant’s request, but advised claimant that the following three weeks had already been scheduled, and that claimant’s schedule change would not take effect until after that time had passed. On December 10, 2020, claimant was scheduled to work, but neither arrived for her shift nor advised the employer that she would be absent. Claimant later explained that she did not know that she was scheduled to work that day. The employer suspended claimant for three days as a result of her failure to notify the PIC of the absence.

(5) On December 21, 2020, claimant was scheduled to begin work at 9:00 p.m., but overslept and did not wake up until 9:00 p.m. that night. Claimant called her supervisor to advise him that she would be

late, and ultimately arrived at 11 p.m. that night. The employer issued claimant a written warning for being late for work.

(6) On June 4, 2021, claimant checked her schedule on the employer's scheduling website and saw that she was scheduled to work a shift beginning at 4:00 a.m. on June 6, 2021. Claimant was not available to work that shift because she was already scheduled to babysit her grandchildren on June 6, 2021 during the daytime. Claimant had previously advised the employer that she was not available during that time.

(7) On June 5, 2021, claimant contacted the store in an attempt to clarify whether the schedule for June 6, 2021 was correct. Claimant spoke to a person at the front desk and requested that she ask her supervisor or a PIC to call her back, but nobody called claimant back. As a result, claimant assumed that the schedule was in error, and that she was not supposed to work on the morning of June 6, 2021.

(8) On June 6, 2021, claimant did not report for her 4 a.m. shift because she believed that she was scheduled for the shift in error.

(9) On June 10, 2021, the employer discharged claimant for having failed to notify a PIC that she would be absent for her shift on June 6, 2021.

CONCLUSIONS AND REASONS: Claimant was discharged, 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) (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 employer discharged claimant for having failed to notify a PIC that she would be absent for her shift on the morning of June 6, 2021. The order under review concluded that claimant was discharged for misconduct because, as she had "violated the attendance policy three times over the course of approximately six months," the incident was not an isolated instance of poor judgment. Order No. 21-UI-174867 at 4. The record does not support this conclusion.

The record shows that claimant made an attempt on June 5, 2021 to contact her supervisor or another PIC in order to confirm whether the schedule she read on June 4, 2021 was correct. The record contains conflicting evidence as to whether claimant made additional efforts to contact the employer either to clarify whether she was supposed to work the June 6, 2021 shift or to notify them that she would not be able to do so. At best, claimant's unsuccessful attempts to clarify the scheduling matter demonstrated that claimant was aware that she needed to work her shifts as scheduled or else notify the employer if she could not, and that she made an effort to comply with the employer's attendance policy. Such circumstances would not constitute a willful or wantonly negligent disregard of the employer's standards of behavior. At worst, claimant knew that she was scheduled for the June 6, 2021 shift but did not report for the shift without explicitly notifying a PIC that she intended to be absent, which would constitute a wantonly negligent disregard of the employer's standards of behavior. To the extent that claimant's failure to notify the employer constituted wanton negligence, the record also shows that it was an isolated instance of poor judgment.

Per OAR 471-030-0038(1)(d), an isolated instance of poor judgment requires, in relevant part, a single or infrequent exercise of poor judgment, rather than a repeated act or pattern of willful or wantonly negligent behavior. The employer has not met their burden of proof to show that claimant's absence was more than an infrequent exercise of poor judgment. The record does not show that claimant ever willfully violated the employer's expectations and shows only one prior instance in which claimant acted with wanton negligence: her failure to notify the employer that she would be absent for her December 10, 2020 shift. In that instance, claimant's supervisor advised her about ten days prior that she would still be required to work the shifts that had already been scheduled before she could begin working her new schedule. Claimant's only explanation was that she believed that she wasn't supposed to work that day; without some reasonable basis for that belief, claimant acted with indifference to the consequences of her actions in failing to notify the employer of her absence on December 10, 2021. However, the same cannot be said for her late arrival on December 21, 2021. In that instance, claimant was late due to having overslept, an unconscious act, but she notified a PIC shortly after she realized that

she was late for work, and arrived at work within a reasonable time after she awoke. There, claimant's efforts to comply with the employer's standards of behavior do not demonstrate that she acted without regard for the consequences of her actions or with indifference toward the employer's interests.

In sum, the only two instances of willful or wantonly negligent behavior that claimant engaged in were her failures to notify the employer of her absences on December 10, 2020 and June 6, 2021. On these facts, when compared to the scale of her tenure with the employer—claimant worked for the employer for less than nine months—the two incidents cannot be construed as either a frequent occurrence or conclusive evidence of a pattern of behavior. Instead, claimant's failure to notify the employer of her absence on June 6, 2021 was an isolated instance of poor judgment, and therefore not misconduct.

For the above reasons, claimant was discharged, but not for misconduct, and is not disqualified from receiving unemployment insurance benefits based on the work separation.

DECISION: Order No. 21-UI-174867 is set aside, as outlined above.

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

DATE of Service: November 12, 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 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.

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 desisyong.

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 ໂດຍປະຕິບັດຕາມຄໍາແນະນໍາທີ່ບອກໄວ້ຢູ່ຕອນຫ້າຍຂອງຄໍາຕັດສິນນີ້.

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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