

EMPLOYMENT APPEALS BOARD DECISION
2021-EAB-0853

Reversed
No Disqualification

PROCEDURAL HISTORY: On July 7, 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 June 13, 2021 (decision # 82525). Claimant filed a timely request for hearing. On October 7, 2021, ALJ Lucas conducted a hearing, and on October 13, 2021 issued Order No. 21-UI-177108, modifying decision # 82525 by concluding that claimant's discharge was for misconduct, but disqualified claimant from receiving benefits effective June 27, 2021. On October 20, 2021, claimant filed an application for review with the Employment Appeals Board (EAB).

WRITTEN ARGUMENT: Claimant filed three written arguments, two on October 20, 2021, and one on October 27, 2021. Each 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 her from offering the information during the hearing. Under ORS 657.275(2) and OAR 471-041-0090 (May 13, 2019), EAB considered only information received into evidence at the hearing when reaching this decision. EAB considered claimant's arguments to the extent they were based on the record.

FINDINGS OF FACT: (1) Gilliam County employed claimant, most recently as a public transportation director, from August 9, 2005 until July 1, 2021.

(2) The employer had a vehicle procurement conflict of interest policy that prohibited employees from "participat[ing] directly or indirectly in a procurement when the employee knows the employee, county court members, elected officials or agents . . . has a financial interest pertaining to the procurement." Audio Record at 20:38. Claimant was aware of the existence of the vehicle procurement conflict of interest policy because she obtained the model the policy was based on from a policy in use in a different county and sent it to her superiors for approval.

(3) The employer also had a policy that prohibited personal use of the employer's vehicles unless preapproved by a supervisor. Claimant was aware of this policy. However, when the employer's vehicles were used to provide transportation services for community members or to take the vehicles in

for maintenance, drivers including claimant regularly made stops to shop or see friends without preapproval. The employer did not discipline drivers for making those personal stops.

(4) The employer also had a policy that prohibited employees from using work cellular telephones to make personal calls except in cases of emergencies. As of 2018, claimant was aware of this policy. From that year onward, claimant used her work telephone to make personal calls because she did not have a personal cellular telephone. However, claimant's use of the work telephone for personal calls was rare because she did not "really have a life outside of work." Transcript at 34. Claimant was not disciplined for using her work telephone for personal calls.

(5) On December 26, 2020, claimant used an employer vehicle to transport a community member to the airport in Portland, Oregon, and during the trip made some shopping and social stops. On December 29, 2020, claimant took an employer vehicle in for maintenance, and during the trip made some shopping and social stops. In late January or early February 2021, claimant used an employer vehicle to transport community members to the airport in Portland, and during the trip made some shopping stops and social stops.

(6) On February 3, 2021, claimant recommended to the employer that two of the employer's vehicles, including a Honda CR-V, be traded in against the purchase of three new vehicles. The employer authorized trading in the CR-V and other vehicle.

(7) Shortly thereafter, claimant informed a coworker about the imminent trade in of the CR-V. The coworker frequently complained about not owning a car and had previously expressed interest in the CR-V. Claimant told the coworker, "You go make the deal you can buy it." Transcript at 52.

(8) On February 17, 2021, claimant and the coworker drove the CR-V and other vehicle to a dealership for appraisals of their value. The coworker drove the CR-V, arrived at the dealership first, and discussed their interest in buying the CR-V with the dealership representative. The two discussed that the dealership would sell the CR-V to the coworker. Claimant arrived at the dealership shortly afterward with the other car, received bids for the price of the three new vehicles, and learned the trade in value of the CR-V and other car.

(9) As claimant was leaving the dealership, claimant learned that the coworker and representative had discussed the coworker buying the CR-V. The representative mentioned to claimant that the coworker may not be sufficiently credit-worthy for the dealership to finance their purchase of the CR-V. Claimant told the representative, "I'll just pay for it if [they] can't get financed." Transcript at 53.

(10) On March 3, 2021, based on claimant's recommendation, the employer approved procuring the new vehicles from, and trading in the old vehicles to, the dealership claimant visited on February 17, 2021. As claimant was preparing to drive the old vehicles over to the dealership, the coworker changed their mind and decided they did not want to purchase the CR-V from the dealership. When claimant arrived at the dealership, she completed the paperwork for the employer's purchase of the new vehicles and the trade in of the CR-V and other vehicle. The representative also "had everything ready to go" regarding selling the CR-V to the coworker. Transcript at 53-54. Claimant wanted to maintain "a professional relationship" with the dealership, so she bought the CR-V herself. Transcript at 53-54.

(11) On March 24, 2021, claimant used an employer vehicle to transport a community member to a medical appointment and during the trip, made some shopping stops.

(12) In late March 2021, the employer distributed an updated work cellular telephone use policy that was substantively identical to the policy that had been in place since 2018. Shortly thereafter, claimant signed and returned the acknowledgement form of the updated policy, and informed the employer that she had been using her work telephone for personal calls. On April 5, 2021, claimant purchased a personal cellular telephone for her use.

(13) In early April 2021, the employer began an investigation of claimant into allegations of improper use of her work telephone and improper use of the employer's vehicles, among other things. On June 16, 2021, the employer placed claimant on an unpaid suspension for violating the employer's policies regarding personal use of the employer's vehicles, and using work cellular telephones to make personal calls. Claimant's June 16, 2021 suspension was the first time any of the employer's employees were disciplined for making personal stops while using the employer's vehicles to provide transportation services for community members or to take the vehicles in for maintenance. The suspension was also the first time claimant was disciplined for making personal calls on her work telephone.

(14) On June 24, 2021, the employer learned of claimant's March 3, 2021 purchase of the CR-V. On June 30, 2021, claimant provided a written statement to the employer that explained the events that led to her purchasing the CR-V. On July 1, 2021, the employer discharged claimant for violating their vehicle procurement conflict of interest policy.

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) (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 order under review concluded that claimant violated the employer's vehicle procurement conflict of interest policy with wanton negligence and that claimant's conduct constituted misconduct because claimant's wantonly negligent violation was not an isolated instance of poor judgment. Order No. 21-UI-177108 at 3-4. The record supports the order's conclusion that claimant violated the employer's vehicle procurement conflict of interest policy with wanton negligence because claimant was aware of the policy and, with indifference to the consequences of her actions, knew or should have known her conduct probably violated that policy. However, the record does not support the conclusion that claimant's wantonly negligent violation was not 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 vehicle procurement conflict of interest policy was an isolated instance of poor judgment. Claimant’s wantonly negligent conduct of participating in the procurement with knowledge of the coworker’s financial interest in purchasing the CR-V was an isolated act. Further, claimant did not engage in a pattern of other willful or wantonly negligent behavior. With respect to claimant making shopping and social stops while using employer vehicles on December 26, 2020, December 29, 2020, late January or early February 2021, and March 24, 2021, claimant’s conduct did not amount to willful or wantonly negligent behavior. At hearing, claimant and two additional witnesses testified that it was commonplace for drivers to make personal stops without preapproval, and the record shows that the employer did not discipline anyone for doing so until they placed claimant on unpaid leave on June 16, 2021. Transcript at 40, 64-65, 70, 73. Thus, the preponderance of evidence supports that claimant did not willfully violate the employer’s standards of behavior on these occasions, nor does the record show that she knew or should have known on those occasions that her conduct would probably result in a violation of the policy prohibiting personal use of the employer’s vehicles.

Likewise, the employer failed to meet their burden to show that claimant’s use of her work telephone to make personal calls was a willful or wantonly negligent violation of the employer’s policy regarding the use of work telephones. More likely than not, claimant’s use of her work telephone for personal purposes was the result of a mistaken belief that the employer condoned that conduct given that she had not been disciplined for using her work telephone to make personal calls from the point she became aware of the policy in 2018 until June 16, 2021. The record further suggests that claimant did not act with indifference to the consequences of her actions in that claimant’s use of the work telephone for

personal calls was rare because she did not “really have a life outside of work,” and given her limited personal life, some of her personal calls likely constituted cases of emergencies, which were not prohibited by the policy. Transcript at 34. For these reasons, claimant’s March 3, 2021 violation of the vehicle procurement conflict of interest policy was an isolated act because the employer failed to meet their burden to show that the March 3, 2021 violation was a repeated act or part of a pattern of other willful or wantonly negligent behavior.

Turning to the remaining factors that apply to determine whether an “isolated instance of poor judgment” occurred, claimant’s conduct did not exceed mere poor judgment because the employer failed to show that it violated the law or was tantamount to unlawful conduct. Nor did claimant’s conduct constitute an irreparable breach of trust or otherwise make a continued employment relationship impossible. That is because although claimant participated in the procurement with knowledge of the coworker’s financial interest in buying the CR-V from the dealership once traded in, the employer did not assert or show that claimant’s participation in the procurement with knowledge of the coworker’s interest resulted in an unfair procurement transaction. There is no indication in the record that the employer received less than fair market trade in value for the CR-V and other car, or paid more than a fair market price for the new vehicles that were procured.

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

DECISION: Order No. 21-UI-177108 is set aside, as outlined above.

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

DATE of Service: November 24, 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 desisyong ito.

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

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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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