

EMPLOYMENT APPEALS BOARD DECISION
2021-EAB-0952

Reversed
No Disqualification

PROCEDURAL HISTORY: On June 4, 2021, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant was discharged for misconduct and therefore disqualified from receiving unemployment insurance benefits effective April 25, 2021 on the basis of the work separation (decision # 101855). Claimant filed a timely request for hearing. On October 14, 2021, ALJ Logan conducted a hearing, and on October 21, 2021 issued Order No. 21-UI-177745, affirming decision # 101855. On November 9, 2021, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Safeway Stores Inc. employed claimant as a deli clerk from September 19, 2012 until April 29, 2021.

(2) The employer had a drug, cannabis and alcohol policy that prohibited employees from being at work or acting within the scope of their employment while under the effects of drugs, cannabis or alcohol while working. The employer considered their policy a “zero-alcohol tolerance policy.” Transcript at 8. The employer provided the policy to claimant upon hire and claimant was aware of the policy for that reason and as a matter of common sense.

(3) In early April 2021, claimant typically worked the closing shift at the employer’s store on Monday through Friday.

(4) On or about April 11, 2021, the employer suspended claimant for leaving the workplace during the middle of a shift the previous day, after claimant became frustrated, decided to quit, “grabbed [her] stuff” and left the workplace. Transcript at 15. The next day, claimant decided to return for her scheduled shift and at that time was told that she would be suspended, rather than discharged.

(5) Shortly before April 25, 2021, claimant’s supervisor learned that claimant’s suspension from work had ended, put her on the work schedule, and scheduled claimant to work on Sunday April 25, 2021.

(6) On Sunday, April 25, 2021, claimant did not realize that she was scheduled to work that day because typically she had Sundays off. That morning, claimant did some yard work, and while doing so, consumed several beers. In the late afternoon, claimant reviewed her work schedule and realized that she was to report for work that day around 4:00 p.m. She contacted the lead worker in the deli and told her that she would be late in arriving at work. When she arrived at work, claimant told the lead worker that she felt “buzzed” and questioned whether she should work. Transcript at 7. The lead worker told claimant that she would report that claimant was ill and that she had sent claimant home. Claimant then left the workplace without working.

(7) The next day, the deli lead reported to a store director that she had sent claimant home the day before because when claimant arrived at work, claimant had told her that she was “buzzed” and “probably shouldn’t be working.” Transcript at 6.

(8) The employer conducted an investigation, and on April 29, 2021, terminated claimant’s employment after concluding that she had reported to work on April 25, 2021 while under the influence of alcohol.

(9) The employer had never disciplined claimant for conduct related to the use or effects of drugs, cannabis or alcohol in the workplace prior to April 25, 2021.

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). Isolated instances of poor judgment are not misconduct. OAR 471-030-0038(3)(b). 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).

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).

Order No. 21-UI-177745 concluded that the employer discharged claimant for misconduct, reasoning that claimant's conduct on April 25, 2021 constituted a wantonly negligent violation of the employer's attendance expectations, which could not be excused as an isolated instance of poor judgment based on claimant's April 11, 2021 suspension. Order No. 21-UI-17745 at 5. However, the record fails to support the order's conclusions.

The employer discharged claimant after concluding that she had reported for work on April 25, 2021 while under the influence of alcohol in violation of their "zero-alcohol tolerance policy." Transcript at 8. The record shows that claimant was aware of that expectation and probably violated it that day because upon arriving at work she told the lead worker that she felt "buzzed" and questioned whether she should work because of that. However, if claimant did violate that expectation, the record fails to show that she did so consciously. The record shows that early on Sunday, April 25, 2021, claimant did not realize that she was scheduled to work that day and believing that it was a day off, consumed several beers while doing some yard work before becoming aware that she was expected to work. It also shows that by disclosing to her lead worker upon arriving at work that she felt "buzzed" and questioned whether she should work, she was not indifferent to the possible consequences of her actions for the employer. Finally, the record shows that claimant did not perform any work for the employer that day before returning home. Transcript at 13-14. Accordingly, the preponderance of the evidence fails to show that claimant willfully or with wanton negligence violated the employer's "zero-alcohol tolerance policy" on April 25, 2021. Although Order No. 21-UI-177745 concluded that claimant's April 25, 2021 conduct constituted a wantonly negligent violation of the employer's attendance expectations, the record fails to show that the employer discharged claimant for that reason or what those attendance expectations even were. The employer failed to introduce any evidence of their attendance policy at hearing.

Even if claimant's April 25, 2021 conduct in reporting for work feeling "buzzed" was wantonly negligent, it was excusable as an isolated instance of poor judgment. The employer admitted at hearing that they had never previously disciplined claimant for conduct related to the use or effects of drugs or alcohol in the workplace. Transcript at 9. For that reason, claimant's conduct on April 25, 2021 represented a single occurrence of such behavior, rather than a repeated act or part of a pattern of other willful or wantonly negligent behavior under OAR 471-030-0038(1)(d)(A). Although the record shows that the employer suspended claimant on or about April 11, 2021 for leaving work during her shift the previous day, the employer failed to meet their burden to show that claimant's conduct in that instance was a wantonly negligent violation of their attendance policy under OAR 471-030-0038(1)(d)(C). The

record contains no evidence of their policy and shows that claimant left work on the day in question after claimant became frustrated, decided to quit, “grabbed [her] stuff” and left the workplace. Transcript at 15. Without additional evidence, the record fails to show claimant’s mental state at that time, whether claimant left work in conscious violation of the employer’s policy or whether she may have been justified in her decision to leave work when she did. Accordingly, even if claimant’s April 25, 2021 conduct was wantonly negligent, the record fails to show that claimant’s conduct was more than an isolated instance of wantonly negligent conduct.

The record also fails to show that claimant’s April 25, 2021 conduct exceeded mere poor judgment by violating a law, being tantamount to unlawful conduct, creating an irreparable breach of trust in the employment relationship, or otherwise making a continued employment relationship impossible. Although the employer viewed claimant’s conduct as a terminable offense, viewed objectively, claimant’s conduct was not so egregious that it created an irreparable breach of trust or made a continuing employment relationship impossible given that, upon her arrival at work on April 25, 2021, claimant questioned whether she should work because she felt “buzzed” and then left the workplace without working. Therefore, claimant’s April 25, 2021 conduct did not exceed mere poor judgment.

For these reasons, claimant was discharged, not for misconduct, and is not disqualified from receiving unemployment insurance benefits on the basis of this work separation.

DECISION: Order No. 21-UI-177745 is set aside, as outlined above.

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

DATE of Service: December 17, 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

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.

Employment Appeals Board - 875 Union Street NE | Salem, OR 97311
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