State of Oregon
Employment Appeals Board
875 Union St. N.E.
Salem, OR 97311

EMPLOYMENT APPEALS BOARD DECISION
2021-EAB-1073

Affirmed
Late Request for Hearing Allowed
Disqualification

PROCEDURAL HISTORY: On April 19, 2021, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that the employer discharged claimant for misconduct and that claimant was denied unemployment insurance benefits effective February 14, 2021 (decision # 144902). On May 10, 2021, decision # 144902 became final without claimant having filed a timely request for hearing. On May 22, 2021, claimant filed a late request for hearing. ALJ Kangas considered claimant's request, and on June 10, 2021 issued Order No. 21-UI-168500, dismissing the request as late, subject to claimant's right to renew the request by responding to an appellant questionnaire by June 24, 2021. On June 24, 2021, claimant filed a timely response to the appellant questionnaire. On September 8, 2021, the Office of Administrative Hearings (OAH) mailed a letter to the parties stating that Order No. 21-UI-168500 was vacated. On November 5, 2021, OAH mailed notice of a hearing scheduled for November 19, 2021 to consider whether claimant's late request for hearing should be allowed and, if so, the merits of decision # 144902. On November 19, 2021, ALJ Micheletti conducted a hearing, and on November 24, 2021 issued Order No. 21-UI-180541, allowing claimant's late request for hearing and affirming decision # 144902. On December 10, 2021, claimant filed an application for review of Order No. 21-UI-180541 with the Employment Appeals Board (EAB).

WRITTEN ARGUMENT: Claimant's December 10, 2021 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 December 10, 2021 argument to the extent it was based on the record. EAB did not consider claimant's December 30, 2021 written argument when reaching this decision because she did not include a statement declaring that she provided a copy of her argument to the opposing party or parties as required by OAR 471-041-0080(2)(a) (May 13, 2019).

EAB considered the employer's written argument when reaching this decision.

Based on a *de novo* review of the entire record in this case, and pursuant to ORS 657.275(2), the portion of the order under review allowing claimant's late request for hearing on decision # 144902 is **adopted**. The remainder of this decision addresses that portion of the order under review concluding that the employer discharged claimant for misconduct.

FINDINGS OF FACT: (1) Open Dental Software Inc. employed claimant in their call center as a support technician from September 10, 2019 to February 19, 2021. Claimant had been working remotely for the employer since October 2020.

(2) The employer maintained a written policy requiring employees to be engaged in work-related tasks which "benefit[ted] . . . the company" while on duty (beneficial work policy). Transcript at 32; Exhibit 2 at 40. To the extent an employee might seek a cup of coffee, use the bathroom, or chat with another about "work topics," the beneficial work policy allowed and encouraged such actions but required that "a balance must be struck so the [employer] is receiving a reasonable return on the wages it pays the employee." Transcript at 32-33. In a separate policy related to the beneficial work policy, the employer also directed that the employer's phones were for business use, that all telephone calls were recorded, and that although employees were allowed to use the employer's telephones for personal reasons, the employee must first "clock out" before engaging in personal conversation no matter how short the call. Exhibit 2 at 51. Although the phone policy did not require employees to clock out when "texting," as long as the texts were short and limited in frequency, they were prohibited from using their cell phone for any other purpose unless they were clocked out. Exhibit 2 at 51. Claimant was aware of these policies and understood them.

(3) On March 5, 2020, the employer counseled claimant for violating the beneficial work policy after she placed herself in an "available" call status for 17 minutes, even though she was not taking customer calls during that time, and then asked a coworker to "reset [her] clock" so that it would appear that she had been working during those 17 minutes. Exhibit 2 at 5; Transcript at 38. Claimant asked the coworker to reset her clock because "[she] was not wanting (sic) to get in trouble." Transcript at 53. Claimant acknowledged that her actions were unacceptable and violated the employer's beneficial work policy.

(4) On July 31, 2020, the employer issued a written warning to claimant for making multiple social media posts on Facebook over the course of four days while she was on duty. Claimant later acknowledged that using her cell phone to make Facebook posts under these circumstances constituted unacceptable behavior and violated the employer's policy. Transcript at 59.

(5) On February 16, 2021, claimant attempted to contact a coworker to discuss the possibility that she might transfer from the employer's call center to their conversions department. The coworker returned claimant's call later that day and the two spoke for 19 minutes. During the recorded, 19-minute conversation, claimant and the coworker spoke predominantly about personal matters, work-related gossip, and their work-related grievances. Claimant and the coworker spoke about the possibility of claimant joining the conversions department for less than a minute of the 19-minute call. Exhibit 3 at 10:10 to 10:52. Claimant remained on the clock and in a duty status during the duration of this 19-minute call.

(6) On February 19, 2021, the employer discharged claimant for violating the beneficial work policy with her February 16, 2021 call.

CONCLUSIONS AND REASONS: The employer discharged claimant 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 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 employer discharged claimant for violating their beneficial work policy on February 16, 2021 when she had a 19-minute telephone conversation with a coworker that the employer believed provided no beneficial work-related benefit. Although claimant asserted at hearing that she believed that she had complied with the policy by balancing the beneficial work-related aspects her call with those parts of the

discussion that did not have a beneficial work-related component, the record shows the predominant areas of discussion involved work gossip and personal work grievances, with less than a minute of the conversation dedicated to a discussion of transfer opportunities in the conversion department. Furthermore, the record shows that claimant was aware of the employer's expectation that while personal matters could be discussed using the employer's telephones, such conversations could only occur after the claimant had clocked out and in this instance she had not done so. Claimant was aware of, and understood, the employer's beneficial work policy and she knew or should have known that by not clocking out prior to her call and then spending the overwhelming part of her conversation discussing matters that provided no meaningful work-related benefit to the employer, she probably would be violating the employer's beneficial work-policy and their reasonable expectations. Claimant's conduct demonstrated an indifference to the consequences of her actions, and therefore was, at best, wantonly negligent.

Claimant's conduct on February 16, 2021 cannot be excused as a good faith error. Here, the record shows that claimant was aware of the employer's policy and had otherwise received documented warnings on at least two prior occasions about the importance of performing beneficial work-related activities while on the clock. In light of this evidence, and given that the substance of her February 16, 2021 conversation overwhelmingly involved matters with no meaningful work-related benefit, the preponderance of the evidence shows that claimant's conduct on that date was not the result of a good faith error in her understanding of the employer's expectations.

Claimant's conduct also cannot be excused as an isolated instance of poor judgment. The record shows that in addition to claimant's February 16, 2021 phone call, claimant had previously engaged on at least two occasions in conduct that violated the employer's beneficial work policy. On March 5, 2020, the record shows that claimant placed herself in an "available" work status, when she was not taking customer calls, then tried to have a coworker assist her with resetting her status clock so she would not get in trouble with the employer. Claimant acknowledged both at the time of her conduct and at hearing that her actions had violated the employer's policy, and the record shows that they otherwise reflected a conscious disregard for the interests of the employer. Transcript at 53. Likewise, on July 30, 2020, the record shows that the employer counseled claimant for making multiple Facebook posts while on the clock that provided no work-related benefit to the employer. Claimant knew or should have known that this conduct probably violated the employer's beneficial work policy, and her conscious decision to engage in such conduct shows that she was indifferent to the consequences of her actions. Based on these two prior wantonly negligent violations of the employer's expectations, the record shows that the final incident was part of a pattern of wantonly negligent behavior, and therefore is not excusable as an isolated instance of poor judgment.

For the above reasons, claimant was discharged for misconduct, and is disqualified from receiving unemployment insurance benefits effective February 14, 2021.

DECISION: Order No. 21-UI-180541 is affirmed.

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

DATE of Service: <u>January 18, 2022</u>

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 – 本判决会影响您的失业救济金。 如果您不明白本判决， 请立即联系就业上诉委员会。 如果您不同意此判决，您可以按照该判决结尾所写的说明，向俄勒冈州上诉法院提出司法复审申请。

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 ໄດ້ໂດຍປະຕິບັດຕາມຄຳແນະນຳທີ່ບອກໄວ້ຢູ່ຕອນທ້າຍຂອງຄຳຕັດສິນນີ້.

Arabic

هذا القرار قد يؤثر على منحة البطالة الخاصة بك، إذا لم تفهم هذا القرار، إتصل بمجلس منازعات العمل فورا، 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 دستورالعمل موجود در پایان آن، از دادگاه تجدید نظر اورگان درخواست تجدید نظر کنید.

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