EO: 200
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State of Oregon
Employment Appeals Board
875 Union St. N.E.
Salem, OR 97311

169
DS 005.00

EMPLOYMENT APPEALS BOARD DECISION
2022-EAB-0004

Affirmed
No Disqualification

PROCEDURAL HISTORY: On October 28, 2021, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that the employer discharged claimant, but not for misconduct, and that claimant was not disqualified from receiving unemployment insurance benefits based on the work separation (decision # 125627). The employer filed a timely request for hearing. On December 15, 2021, ALJ L. Lee conducted a hearing, and on December 20, 2021 issued Order No. 21-UI-182273, affirming decision # 125627. On December 24, 2021, the employer filed an application for review with the Employment Appeals Board (EAB).

WRITTEN ARGUMENT: The employer submitted written argument on December 27, 2021 and January 14, 2022. In those submissions, the employer requested that EAB receive additional evidence into the record relating to documents the ALJ held the record open to receive, but which the employer did not submit in time to be considered before Order No. 21-UI-182273 was issued and the record closed. The employer's request is denied.

At the December 15, 2021 hearing, the employer's owner testified that he found, in the midst of the hearing, a written warning issued to claimant for an incident occurring on October 18, 2020. Transcript at 71. When asked why the owner had not submitted the warning in advance of the hearing, the owner testified that he did not know or have a good answer. Transcript at 72. The ALJ requested the owner send the warning, along with other documents to serve as exemplars of claimant's signature, to the Office of Administrative Hearings (OAH) and claimant to enable the ALJ to potentially admit the documents as an exhibit. Transcript at 74, 76. The ALJ stated to the owner, "Today is Wednesday. It's gonna be an easy fax, send it to me by Friday[,]" to which the owner responded that "it'll be sent up late – later today, Your Honor." Transcript at 81. The ALJ replied, "Okay. We'll change it to today, end of business today[,]" meaning end of business on December 15, 2021. Transcript at 82. The owner then stated that he would send the documents via mail, and the ALJ expressed that doing so was "fine[,]" since it would accomplish service on claimant. Transcript at 82. The owner then sent the documents by mail on December 16, 2021 rather than on December 15, 2021. December 27, 2021 Written Argument at 1; January 14, 2022 Written Argument at 1. The documents were not received by OAH by the time

Order No. 21-UI-182273 was issued on December 20, 2021, and the record was closed at that time. Order No. 21-UI-182273 at 1.

Under OAR 471-041-0090(b) (May 13, 2019), a "party may request that EAB consider additional evidence, and EAB may allow such a request when the party offering the additional evidence establishes that: (A) The additional evidence is relevant and material to EAB's determination, and (B) Factors or circumstances beyond the party's reasonable control prevented the party from offering the additional evidence into the hearing record." The employer failed to satisfy this standard because they did not show that factors beyond their reasonable control prevented them from offering the evidence into the hearing record. This is because it was within the owner's reasonable control to submit the documents before hearing, and when asked why he did not, he stated that he did not know or have a good answer. It was also within the owner's reasonable control to submit the documents by close of business on December 15, 2021, as he stated he would, but failed, to do, or to fax them to OAH before December 20, 2021 so that they could be considered before Order No. 21-UI-182273 was issued and the record closed. Because the employer failed to meet the standard set forth by OAR 471-041-0090(b), their request that EAB receive additional evidence into the record is denied.

Additionally, because the employer did not include a statement declaring that they provided a copy of the December 27, 2021 argument to the opposing party or parties as required by OAR 471-041-0080(2)(a), EAB considered it as a request to receive additional information but did not otherwise consider it when reaching this decision. EAB considered the employer's January 14, 2022 written argument as both a request for consideration of additional information and written argument, and considered the argument to the extent it was based on information received into evidence at the hearing.

FINDINGS OF FACT: (1) Eclipse Security Professionals LLC employed claimant as an onsite security officer from September 16, 2020 until October 23, 2020.

(2) The employer expected claimant to report for his shifts at client work sites and, if he was required to leave a work site during a shift to make a work call, to return to the work site after completing the call. Claimant understood this expectation.

(3) On October 23, 2020, claimant was scheduled for a 7:00 p.m. to 5:00 a.m. shift at a client work site in an area of Portland, Oregon that was unfamiliar to him. Claimant, who was unhoused and did not own a car, took a bus near the work site and then walked a half mile to it. When he arrived for his shift, claimant found the work site to be confusing because it featured several large buildings and freight trucks. The employer had instructed claimant to look for a building labeled 18, but when claimant thought he identified building 18, he could not find the entrance to the building. Claimant attempted to call his patrol supervisor for help but soon after their conversation began, claimant's cell phone ran out of power and the call ended abruptly. Claimant had a charger but nowhere to plug it in to charge his cell phone, so he walked a mile to a gas station, and used an outlet there to charge his cell phone.

(4) At about 10:30 p.m., claimant called his patrol supervisor again while at the gas station. Claimant expressed his confusion about the work site and asked the patrol supervisor for a ride back to the work site. The patrol supervisor did not respond to claimant's request for a ride but asked claimant to confirm that he was going back to the work site. Claimant told the patrol supervisor he would return to the work site and the call ended.

(5) Claimant intended to take a bus back to the work site, but discovered that busses in the area had stopped running for the evening. Claimant decided not to walk back to the work site because he was tired and frustrated that the patrol supervisor had not offered him a ride. Instead of walking back to the work site, claimant walked back to his tent where he lived, about a mile and half away. Claimant did not call the patrol supervisor back to inform her he was not returning to the work site.

(6) Soon after the cell phone conversation at the gas station, the patrol supervisor went to the work site to verify claimant was there. The patrol supervisor waited for some time at the work site and concluded claimant did not intend to return. The patrol supervisor called the employer's owner and explained the situation to him. The owner then called claimant but did not reach him. The owner believed claimant had also previously failed to report to a shift without notice on October 18, 2020, and concluded that discharging claimant was warranted given his failure to return to the work site on October 23, 2020. Before midnight that evening, the owner placed another call to claimant and left a voicemail stating that claimant's employment was terminated.

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).

Claimant violated the employer's expectation that he return to the work site after completing his call with the patrol supervisor. The record shows that on that on October 23, 2020, claimant informed his patrol supervisor that he would return to the work site but, after he learned that busses had stopped running, changed his mind and decided not to return to the work site without notifying the employer of his decision. Claimant instead walked back to his tent, which was farther away than the work site, because he was tired and frustrated that the patrol supervisor had not offered him a ride. This evidence is sufficient to conclude that claimant failed to return to the work site consciously and with indifference to the consequences of his actions. Claimant knew or should have known this would probably result in a violation of the employer's expectation. As such, claimant's conduct on October 23, 2020 constituted a wantonly negligent violation of the standards of behavior the employer had a right to expect.

However, under OAR 471-030-0038(3)(b), claimant's wantonly negligent conduct did not constitute misconduct if it was 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 employer's expectation that he return to the work site was an isolated instance of poor judgment and therefore not misconduct. Claimant's conduct was an isolated act. Other than the one instance on October 23, 2020, the record does not show by a preponderance of the evidence that claimant had previously engaged in any willful or wantonly negligent violation of a known employer policy or expectation. At hearing, the parties disputed whether claimant had previously failed to report to a shift without notice on October 18, 2020, with the owner stating that claimant had no-call, no-showed on that date, and claimant denying that he had failed to report for a shift that day. Transcript at 6, 58-59. Because the evidence on that disputed issue was equally balanced, the party with the burden of persuasion – here, the employer – failed to satisfy their evidentiary burden. As a result, the employer did not establish that claimant failed to report to a shift without notice on October 18, 2020.

Application of the remaining criteria to the record evidence also supports the conclusion that claimant's failure to return to the work site was an isolated instance of poor judgment. Claimant's violation of the employer's expectation that he return to the work site was a conscious decision that resulted in a violation of the employer's standard of behavior. Claimant's conduct did not exceed mere poor judgment because it did not violate the law or constitute an act tantamount to unlawful conduct. Nor did the employer show that claimant's failure to return to the work site as he stated he would do created an irreparable breach of trust in the employment relationship or otherwise made a continued employment relationship impossible. While claimant did not follow through on what he stated he would do, the record does not show that claimant intended to deceive the employer about his intentions given that his decision to not return to the work site was made only after the call with the patrol supervisor ended and claimant realized that busses had stopped running. While claimant did not call the patrol supervisor to inform her that he had changed his mind about returning to the work site, the record suggests this

decision was driven by claimant's frustration at not being offered a ride, rather than an intent to deceive. Viewed objectively, the employer did not show that claimant's failure to return to the work site was an irreparable breach of trust or constituted a circumstance that made a continued employment relationship impossible.

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-182273 is affirmed.

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

DATE of Service: February 2, 2022

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.

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 ໄດ້ ໂດຍປະຕິບັດຕາມຄຳແນະນຳທີ່ບອກໄວ້ຢູ່ຕອນທ້າຍຂອງຄຳຕັດສິນນີ້.

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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