

EMPLOYMENT APPEALS BOARD DECISION
2022-EAB-0202

Reversed
Disqualification

PROCEDURAL HISTORY: On December 10, 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 # 84640). The employer filed a timely request for hearing. On January 18, 2022, ALJ Roberts conducted a hearing at which claimant failed to appear, and on January 19, 2022 issued Order No. 22-UI-184310, affirming decision # 84640. On February 4, 2022, the employer filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Brainwave Computers employed claimant as a front-end specialist from fall 2020 to November 22, 2021. Claimant's job responsibilities included speaking with customers about their computer issues and then preparing detailed repair "tickets" that documented those issues so that the employer's computer repair technicians could repair the issues. Transcript 1 at 7.¹

(2) The employer expected their employees to provide quality work, and to refrain from making false reports about their workplace safety, as a matter of common sense.

(3) Prior to November 8, 2021, the employer had warned claimant on 10 to 15 occasions about deficiencies in the way he was completing repair tickets. Claimant had been preparing tickets that lacked specific information regarding the repairs needed to the computers. Due to the missing information, the employer had to call the customers back to obtain accurate repair information. Claimant responded to the warnings by telling the employer that the deficient tickets were the result of distractions caused by his post-traumatic stress disorder [PTSD] issues from his prior military service and ongoing custody issues with his children. Claimant told the employer he would prepare the tickets properly going forward.

¹ The record includes two hearing transcripts due to technical difficulties during the January 18, 2022 hearing. Both transcripts are from the January 18, 2022 hearing and they are sequential in their order. The first transcript states on its cover page that the hearing began at "2:34 p.m." (hereinafter "Transcript 1"). The second transcript bears no time stamp on its cover page (hereinafter "Transcript 2").

(4) On November 8, 2021, the employer warned claimant about his continued failure to provide specific information on his repair tickets about the repairs customers needed. The employer came to believe that claimant did not “care[] if he got it right.” Transcript 2 at 4.

(5) On November 19, 2021, claimant had a discussion with a technician coworker. At some point in the discussion, the technician became frustrated with claimant and told claimant that his “input wasn’t welcome.” Transcript 2 at 11. Claimant continued to “press[]” the discussion, and the technician told claimant to “leave [them] alone” and to “give [them] some space.” Transcript 2 at 11. Claimant continued to discuss the issue, and the technician “threw up his hands,” said, “This is ridiculous,” and left the work area to “cool down.” Transcript 2 at 11. After the technician left the area, claimant “laughed and then went back to what he was doing.” Transcript 2 at 9.

(6) Later that same day, claimant reported to the employer that based on his incident with the coworker he felt unsafe in the workplace. The employer reviewed store video from the incident and determined from what they saw that claimant had caused the incident by “antagonizing” the technician. Transcript 2 at 8. The employer suspected that claimant’s report of feeling unsafe was inaccurate, and that claimant had lied because “[claimant] knew he had crossed the line” with his behavior and might evade discipline if he portrayed himself as “the victim.” Transcript 2 at 10. When the employer told claimant they believed claimant’s report had been inaccurate, claimant “didn’t outright deny it.” Transcript 2 at 8. The employer also determined during their investigation that claimant continued to complete repair tickets that lacked adequate specificity such that the employer’s technicians could perform necessary repair work without having to contact customers.

(7) On November 22, 2021, the employer discharged claimant for making an inaccurate report about his workplace safety and because of the continued inadequacy of the repair tickets he prepared.

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 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 order under review concluded that the employer discharged claimant but not for misconduct. Order No. 22-UI-184310 at 3-4. The order reasoned that as to the November 19, 2021 incident, [w]hile it may have been preferable for claimant to discontinue talking to [the technician] about work matters," claimant's conduct during the November 19, 2021 incident did not amount to a willful or wantonly negligent violation of any standards the employer had a right to expect. Order No. 22-UI-184310 at 4. The order also determined that as to claimant's repeated failures to prepare adequate repair tickets, although "the employer believed that claimant did not care whether . . . he filled the tickets out correctly," claimant's deficient ticket preparation was just as likely the result of his PTSD and child custody issues as it was due to claimant's indifference. Order No. 22-UI-184310 at 4. The order concluded therefore that the employer failed to show that claimant engaged in misconduct. Order No. 22-UI-184310 at 4. The record does not support the order under review's conclusions.

The record shows that the employer discharged claimant because he falsely reported that he felt unsafe at work after the November 19, 2021 incident, and because he did not show improvement in preparing repair tickets. As to the November 19, 2021 incident, claimant's actions during the incident itself may not have violated a reasonable expectation of the employer since they objectively reflect a minor disagreement between employees. However, because the record shows that claimant caused the incident to occur, continued to "antagonize" his coworker during the incident, and laughed at the incident's conclusion, it is unreasonable to conclude that in the aftermath of the incident claimant would have feared for his safety while in the presence of the coworker. Moreover, because claimant could not have reasonably feared for his safety under these circumstances, claimant's conscious decision to report to the employer thereafter that he did, in fact, fear for his safety, amounted to an inaccurate report and constituted a violation of the standards of behavior the employer had a right to expect. Notably, when confronted about the veracity of his report, claimant did not deny that it was untrue. As such, the

preponderance of the evidence supports the conclusion that claimant falsely reported that he felt unsafe at work and, by so doing, knew or should have known that he had violated the employer's reasonable expectations that employees would not make false reports related to safety.

As to claimant's failure to make improvements in preparing repair tickets, the preponderance of the evidence shows that after being told about the deficiencies in how he prepared repair tickets, and telling the employer that he would improve his work quality in this area, claimant continued to prepare inadequate repair tickets. In so doing, the record supports the conclusion that claimant consciously disregarded the reasonable expectations of his employer regarding the preparation of repair tickets, and supports the employer's belief that claimant did not "care[] if he got it right." Claimant alleged to the employer that PTSD or child custody issues affected his work performance. However, claimant did not appear at the hearing to provide detail regarding that assertion, and the record does not otherwise show that either of these issues (or both) prevented him from meeting the employer's reasonable expectations in preparing repair tickets after the employer warned claimant about his work performance on November 8, 2021.²

Claimant's conduct cannot be excused as an isolated instance of poor judgment. With respect to claimant's work quality violations in preparing repair tickets, the record shows that claimant's failures in this area were not isolated, because the employer coached claimant on the issue on 10 to 15 occasions prior to his discharge. Furthermore, the record shows that claimant failed to improve the specificity in his repair tickets after his last warning on November 8, 2021. Although the record contains only one incident of claimant making an inaccurate safety report to the employer, the record shows that claimant's conduct created an irreparable breach of trust in the employment relationship. The employer testified that because they believed claimant had lied in making the report, they could no longer continue their employment relationship with claimant. Transcript 2 at 9. When coupled with the evidence showing that claimant did not deny when asked whether his report was false, the employer's testimony that they could no longer employ claimant because he lied is objectively reasonable. As such, claimant's false report was conduct that exceeded mere poor judgment and does not fall within the exculpatory provisions of OAR 471-030-0038(3). Because claimant's conduct cannot be excused as an isolated instance of poor judgment, claimant's conduct was misconduct. Claimant was therefore discharged for misconduct and is disqualified from receiving unemployment insurance benefits effective November 21, 2021.

DECISION: Order No. 22-UI-184310 is set aside, as outlined above.

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

DATE of Service: April 7, 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,

² Nor does the preponderance of the evidence show that any PTSD or child custody issues played a role in claimant's decision to file the inaccurate report that he felt unsafe in the workplace.

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 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 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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