

EMPLOYMENT APPEALS BOARD DECISION
2022-EAB-0333

Affirmed
Disqualification

PROCEDURAL HISTORY: On September 10, 2021, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant quit working for the employer without good cause and was disqualified from receiving unemployment insurance benefits effective August 8, 2021 (decision # 85821). Claimant filed a timely request for hearing. On March 3, 2022, ALJ Micheletti conducted a hearing, and on March 8, 2022 issued Order No. 22-UI-188110, modifying decision # 85821 by concluding that claimant quit work without good cause and was disqualified from receiving benefits effective August 15, 2021. On March 10, 2022, claimant filed an application for review with the Employment Appeals Board (EAB).

WRITTEN ARGUMENT: Both claimant's and the employer's arguments contained information that was not part of the hearing record, and did not show that factors or circumstances beyond their reasonable control prevented them 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 the parties' respective arguments to the extent it was based on the record.

FINDINGS OF FACT: (1) Red Action, Inc. employed claimant as an assistant manager from October 2020 until August 17, 2021.

(2) From October 2020 through May 2021, the employer required their employees to wear a mask in order to comply with a state mandate designed to slow the spread of COVID-19. Claimant complied with the requirement, though wearing a mask was uncomfortable and made him sometimes feel as if he could not breathe.

(3) From May 2021 through early August 2021, after the state relaxed their mask mandate, the employer rescinded their mask requirement for employees. During this period, claimant informed his manager and other employees that he would not wear a mask again if the mask mandate returned.

(4) On August 11, 2021, the Governor of Oregon reinstated the statewide mask mandate, effective August 13, 2021. In compliance with the mandate, the employer again required their employees to wear masks effective August 13, 2021. The employer was concerned that any failure by them to comply with the statewide mandate might result in Oregon Occupational Safety and Health or the Oregon Health Authority “coming after [them].” Transcript at 17.

(5) On August 13, 2021, claimant called out sick from work. Because claimant was scheduled for vacation the following week, and in light of his prior anti-mask comments to coworkers, the employer emailed claimant to ask whether he would be returning to work after his vacation and, if so, whether he would wear a mask. Claimant responded that he planned to return to work and requested a meeting with the employer regarding the mask issue. Claimant’s vacation plans were subsequently cancelled and claimant requested a meeting with the employer for August 17, 2021 to discuss the mask issue and work scheduling.

(6) On August 17, 2021, the employer and claimant had a meeting to discuss the employer’s mask policy. During the meeting, claimant informed the employer that he would not wear a mask due to the discomfort it caused, but offered no medical basis for his refusal to wear one. The employer responded by telling claimant that because he would not comply with their mask policy, they would not schedule him for any more shifts. Even though claimant told the employer he would not wear a mask, claimant “still had the intention of . . . working for them.” Transcript at 12.

CONCLUSIONS AND REASONS: The employer discharged claimant for misconduct.

Nature of the work separation. If the employee could have continued to work for the same employer for an additional period of time, the work separation is a voluntary leaving. OAR 471-030-0038(2)(a) (September 22, 2020). If the employee is willing to continue to work for the same employer for an additional period of time but is not allowed to do so by the employer, the separation is a discharge. OAR 471-030-0038(2)(b). “Work” means “the continuing relationship between an employer and an employee.” OAR 471-030-0038(1)(a). The date an individual is separated from work is the date the employer-employee relationship is severed. OAR 471-030-0038(1)(a).

At hearing, the employer testified that they believed claimant quit work at the August 17, 2021 meeting by telling the employer that he would not wear a mask, which forced the employer to remove claimant from the work schedule. Transcript at 17. According to the employer, claimant knew that based on his refusal, “he was not going to be able to work [for the employer] again.” Transcript at 17. However, the employer’s testimony supports a conclusion that claimant was discharged, and did not quit, because it shows that it was the employer that severed the employment relationship by removing claimant from the work schedule after he refused to wear a mask. Furthermore, the record shows that even though claimant told the employer that he was unwilling to wear a mask, he did not intend to quit his employment. Because the record shows that despite his mask refusal, claimant was willing to keep working for the employer, but was prevented from doing so when the employer removed him from the work schedule, claimant’s separation from work is properly construed as a discharge.

Discharge. 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). “[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 employer discharged claimant because he informed them on August 17, 2021 that he would not comply with the employer’s reinstated masking requirement. The employer’s decision to reinstitute a masking requirement was a reasonable policy in light of the threat posed by COVID-19, as well as the employer’s legitimate concern that a failure to comply with the statewide masking mandate might result in the government taking disciplinary action against them.

At hearing, claimant argued that he did not violate the employer’s masking policy because, despite his August 17, 2021 statement to the employer that he would not wear a mask, he never *actually* showed up for a scheduled day of work and refused to wear a mask during a period when the policy was in effect. However, claimant testified that he was not willing to follow the masking policy, and the record shows that he otherwise gave “[e]very indication” to the employer during the August 17, 2021 meeting was that he “was never gonna wear the mask again.” Transcript at 6-7, 18. Likewise, claimant testified to his

understanding at the time of the meeting that the employer might discharge him if he “expressed an unwillingness” to wear a mask. Transcript at 7. In light of these circumstances, claimant’s refusal to wear a mask, as expressed at the July 17, 2021 meeting, was a willful disregard of the employer’s reasonable interest in not being sanctioned for a violation of the statewide masking mandate.

Claimant’s conduct is not excusable as an isolated instance of poor judgment. Claimant’s conduct exceeded mere poor judgment because his refusal to wear a mask made a continued employment relationship impossible. The record shows that the employer’s masking requirement was consistent with a statewide mandate, and that the employer had reasonable concerns about the potential for sanctions should one of their employees be discovered at work without a mask. Under the circumstances, claimant’s refusal to wear a mask exposed the employer to potential disciplinary action and therefore made a continued employment relationship impossible. As such, claimant’s conduct exceeded mere poor judgment and cannot be excused 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 August 15, 2021.

DECISION: Order No. 22-UI-188110 is affirmed.

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

DATE of Service: May 19, 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.

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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 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.

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