

EMPLOYMENT APPEALS BOARD DECISION
2022-EAB-0363

Modified
Disqualification Effective Week 18-21

PROCEDURAL HISTORY: On June 1, 2021, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that the employer discharged claimant for misconduct, disqualifying claimant from receiving unemployment insurance benefits effective May 2, 2021 (decision # 102237). Claimant filed a timely request for hearing. On March 8, 2022, ALJ Frank conducted a hearing, and on March 10, 2022 issued Order No. 22-UI-188398, modifying decision # 102237 by concluding that claimant quit working for the employer without good cause and was disqualified from receiving benefits effective April 4, 2021. On March 14, 2022, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Tyree Oil, Inc. employed claimant as a truck driver from 2019 until May 7, 2021.

(2) In December 2020, claimant made a work-related error that led the employer to issue him a written warning. Prior to receiving the warning, claimant reported a back and/or knee injury to the employer and pursued a workers' compensation claim. Claimant's medical provider placed claimant on a work restriction, which included that he not lift anything over five pounds. Claimant was not diagnosed with any permanent or long-term impairment.

(3) Due to his injury, the employer placed claimant on a leave of absence.¹ The employer instructed claimant that he was required to maintain weekly contact with his manager and/or the employer's human resources (HR) department during his leave. Claimant was aware of, and understood, the employer's communication expectations.

(4) On Monday, January 18, 2021, Thursday, February 18, 2021, and Thursday, February 25, 2021, in response to text messages from the manager, claimant checked in with his manager.

¹ The record shows that in late March 2021, claimant turned down an opportunity to perform office work with the employer, compatible with his work restrictions, due to his concerns over working in an office environment during the COVID-19 pandemic. Audio Record at 21:06 to 22:41.

(5) From February 2021 to May 2021, the employer's HR department repeatedly attempted via email to communicate with claimant. In each attempt, they reminded claimant that he needed to maintain contact with the employer and provide updates. On Thursday, April 8, 2021, claimant responded to an email from the HR department. In that email, the HR department had sought an update from claimant related to a March 6, 2021 doctor's appointment, and had sought to "reset[] expectation[s]" with claimant regarding his weekly communication requirement. Audio Record at 11:30. Claimant's April 8, 2021 email response was his last recorded contact with the employer.

(6) On May 2, 2021, the employer's HR department attempted to make contact with claimant via email, but received no response.

(7) On May 7, 2021, the employer terminated claimant's employment based on his failure to maintain weekly communication with the employer while on leave. Had claimant made weekly contact with the employer, per the employer's expectation, the employer would not have terminated claimant's employment claimant.

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).

The order under review concluded that claimant voluntarily quit work on April 8, 2021 due to job abandonment because claimant ceased making contact with the employer, and therefore demonstrated that he was unwilling to continue working for the employer, after that date. Order No. 22-UI-188398 at 3. However, the record does not support that conclusion. As an initial matter, the record shows that on April 8, 2021, claimant communicated with the employer and it therefore can be inferred that, as of that date, claimant remained willing to continue working for the employer for an additional period of time. Thereafter, the employer attempted to make contact with claimant on May 2, 2021, which shows that the employer was still willing to allow claimant to work for the employer if he complied with their weekly communication expectation. However, the record shows when claimant failed to respond to the employer's May 2, 2021 communication or otherwise contact the employer, the employer determined on May 7, 2021 that they would not allow claimant to continue working for the employer, and severed the employment relationship on that date. The record therefore establishes that the employer discharged claimant.

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 due to his failure to maintain weekly communication with the employer during his medically-related leave of absence. The record shows that claimant was aware of, and understood, this expectation. At hearing, claimant testified that, contrary to the employer’s position, he had made contact with the employer “every Friday since the injury had occurred.” Audio Record at 16:44. However, claimant offered no corroborating records to support this testimony. Furthermore, the record shows that of the four documented contacts between the employer and claimant from January 2021 to April 2021, none of those contacts actually occurred on a Friday, contrary to claimant’s testimony. Under these circumstances, the preponderance of the evidence supports the conclusion that although claimant made some infrequent contact with the employer from January 2021 through early April 2021, claimant violated the employer’s reasonable expectation that he make *weekly* contact with the employer during his leave of absence. Claimant’s failure in this regard reflected an indifference to the consequences of his actions under circumstances where he knew, or should have known, that he was violating the standards of behavior the employer had a right to expect.

Claimant's failure to maintain weekly communication with the employer was not an isolated instance of poor judgment. The record indicates that throughout the months of February to May 2021, the employer's HR department made multiple unsuccessful attempts to communicate with claimant and remind him of the employer's expectation that he maintain weekly contact with the employer. The last such attempt – an email from the HR department to claimant on May 2, 2021 – went unanswered by claimant, resulting in his subsequent May 7, 2021 discharge by the employer. This evidence supports the conclusion that claimant's failure to make weekly contact with the employer was not a single or infrequent occurrence and therefore not an isolated instance of poor judgment.

Claimant's conduct also cannot be excused as a good faith error. The record fails to show that claimant sincerely believed that the employer would condone his failure to communicate weekly with the employer. Nor did he have a sincere basis for believing that his sporadic contact with the employer would not violate the employer's reasonable expectations.

For these reasons, claimant was discharged for misconduct and is disqualified from receiving unemployment insurance benefits effective May 2, 2021.

DECISION: Order No. 22-UI-188398 is modified, as outlined above.

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

DATE of Service: May 27, 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 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.

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