

EMPLOYMENT APPEALS BOARD DECISION
2022-EAB-0477

Reversed
No Disqualification

PROCEDURAL HISTORY: On February 18, 2022, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant was discharged for misconduct and was disqualified from receiving unemployment insurance benefits effective January 23, 2022 (decision # 144533). Claimant filed a timely request for hearing. On March 28, 2022, ALJ Demarest conducted a hearing, and issued Order No. 22-UI-189795, affirming decision # 144533. On April 18, 2022, claimant filed an application for review with the Employment Appeals Board (EAB).

WRITTEN ARGUMENT: EAB considered claimant's written argument when reaching this decision.

FINDINGS OF FACT: (1) Panel Processing of Oregon Inc. employed claimant as a fabricator on the employer's graveyard shift for a four to six month period, which ended on January 28, 2022. During claimant's employment, only males worked the graveyard shift.

(2) The employer expected their male graveyard shift employees not to use the women's bathroom for any purpose. The employer also expected their employees not to take items from the employer's vending machine without paying for them. Although the employer did not express these expectations to their employees in either their employee handbook, or via another directive, the employer maintained these expectations as a matter of common sense.

(3) Prior to January 20, 2022, claimant had used the women's bathroom on one or two occasions to remove his thermal pants because they would become too hot for claimant to wear in his work area. Prior to these occasions, claimant had been told by coworkers that the stalls in the women's bathroom had more space than the men's bathroom stalls and, given claimant's height (six feet, two inches), he preferred the extra space the women's stalls provided. Claimant's graveyard shift coworkers, including the graveyard shift lead, also told claimant that they used the women's bathroom. For these reasons, and because there were no women on the graveyard shift, claimant believed it was acceptable for him to use the women's bathroom to change his clothes.

(4) Over the course of a four to five month period prior to January 20, 2022, the employer came to believe that male employees were improperly using the women's bathroom during the graveyard shift which would cause the toilets in the women's bathroom to overflow when used by the women the following shift.

(5) On January 20, 2022, the employer placed a video camera in their breakroom and positioned its lens so that it would show the identity of any male employee who entered the women's bathroom during the graveyard shift that evening.

(6) On January 21, 2022, at 3:30 a.m., claimant entered the women's bathroom to change out of his thermal pants. Claimant exited the women's bathroom one to two minutes later and then went into the men's bathroom. After exiting the men's bathroom, claimant went to a vending machine in the breakroom, shook the machine until an item dropped to the bottom of the machine, retrieved the item, and then left the breakroom. Claimant did not place any money in the vending machine prior to shaking it. Claimant provided the item he retrieved from the vending machine, a package of peanut M&M's, to a coworker who confirmed to claimant that the candy was theirs.

(7) Between January 24, 2022 and January 28, 2022, the employer suspended claimant pending further investigation. On January 28, 2022, the employer discharged claimant for using the women's restroom during the graveyard shift and for shaking and removing the candy from the vending machine without paying for the candy. Prior to his discharge, the employer had not disciplined claimant for any reason.

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). Isolated instances of poor judgment, good faith errors, unavoidable accidents, absences due to illness or other physical or mental disabilities, or mere inefficiency resulting from lack of job skills or experience 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 claimant was discharged for misconduct because he “violated commonly accepted standards of workplace behavior” when he both entered the women’s bathroom and later removed an item from the employer’s vending machine after shaking it on January 21, 2022. Order No. 22-UI-189795 at 3. The order found claimant’s testimony that he believed he was authorized to use the women’s bathroom not credible and that the evidence did not support a good faith basis for claimant to believe that the employer would condone claimant removing an item from the vending machine without first paying for it (or confirming that someone else had paid for it). Order No. 22-UI-189795 at 3. The order concluded that both of these actions were willful violations of the employer’s expectations and that claimant failed to show that his actions were the result of isolated instances of poor judgment or good faith errors. Order No. 22-UI-189795 at 3. The record does not support these conclusions.

To the extent claimant was discharged for entering the women’s bathroom, the record fails to show that claimant’s action amounted to a willful or wantonly negligent disregard of the employer's interest, such that his actions constituted misconduct. The record shows that claimant worked for the employer during the graveyard shift and that he only worked with other males on that shift. Claimant testified that he used the women’s bathroom to take advantage of the larger stalls to change out of his thermal pants and that he did so only after being informed by other coworkers, including his shift lead, that they too used the women’s bathroom during graveyard shifts.¹ Audio Record at 17:48 to 18:06; 19:56. Likewise, the

¹ The order under review found claimant’s testimony not credible because the shift lead “did not report that using the women’s bathroom by the all-male graveyard shift was a practice of which he was aware.” Order No. 22-UI-189795 at 3. However, the shift lead did not testify at hearing. Instead, the employer’s general manager appeared and testified to a conversation he had with the shift lead. That testimony reflected that the shift lead was never specifically asked by the general manager if they were aware of a practice of male graveyard shift employees using the women’s bathroom. Audio Record at 26:00. Furthermore, even if the question had been asked, and the shift lead had indicated no knowledge of any such practice, this evidence offered by the general manager at hearing would have been hearsay evidence entitled to the same evidentiary weight as claimant’s contrary hearsay testimony that the shift lead told claimant that they too had used the women’s bathroom. Where the evidence in the record is no more than equally balanced, the party with the burden of persuasion – here, the employer – fails to meet their evidentiary burden.

record shows that the employer never implemented any express directive forbidding males from using the women's bathroom under any circumstances, even after they became aware there was a problem with the toilets in the women's bathrooms overflowing from suspected use during the graveyard shift. While it may have been reasonable, generally speaking, for the employer to expect male employees not to enter the women's bathroom without an express directive, under the specific circumstances presented in this case, the employer failed to show that claimant knew or should have known that his conduct in entering the women's bathroom when no females were on shift violated the employer's reasonable expectations.

Furthermore, even if it was assumed that claimant should have known that using the women's bathroom during the all-male graveyard shift would probably violate the employer's reasonable expectations and thus was wantonly negligent, the record shows that claimant's use of the bathroom was a good faith error, which is not misconduct. As previously stated, claimant was informed by other coworkers, including the shift lead, that it was okay for him to use the women's bathroom. Further, the record does not show that the employer provided guidance regarding their expectation once they become aware there was a problem with use of the bathroom during the graveyard shift. Given this evidence, and the testimony regarding the shift lead's approval, the record supports the conclusion that claimant believed, in good faith, that the employer would have condoned him entering the women's bathroom under the specific circumstances presented in this case.

As for the vending machine incident, the employer's expectation that employees would not remove items from their vending machine without first paying for them (or confirming that someone else had paid for them) was reasonable as a matter of common sense, even if candy appeared to have been stuck in the machine mid-transaction. Likewise, even if claimant had first confirmed that a coworker had paid for dangling or stuck candy, it was reasonable for the employer to expect as a matter of common sense that claimant would not shake (and potentially break) the machine to retrieve the candy, but rather would seek the assistance of the employer for this purpose. As such, claimant should have known that by shaking the vending machine to dislodge candy, regardless of the circumstances, he was violating a reasonable standard of behavior the employer had a right to expect.

Although claimant exercised poor judgment in shaking the vending machine and retrieving the candy, the record fails to show that claimant's actions were anything more than an isolated instance of poor judgment. The record shows that prior to January 21, 2022, claimant had not received any employer discipline, and there is nothing in the record showing that claimant had previously attempted to improperly shake the employer's vending machine to retrieve candy. As such, claimant's actions on January 21, 2022 in shaking the vending machine and retrieving the candy constituted a single occurrence. Likewise, because the record shows that claimant retrieved the candy because he believed it had been paid for by a coworker, the preponderance of the evidence fails to support the conclusion that claimant's actions in this one instance made a continuing employment relationship impossible or otherwise exceeded mere poor judgment. As such, the record shows that claimant's action was an isolated instance of poor judgment and not misconduct.

Because the record shows that claimant's discharge did not result from misconduct, claimant is not disqualified from receiving benefits based on the work separation.

DECISION: Order No. 22-UI-189795 is set aside, as outlined above.

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

DATE of Service: July 7, 2022

NOTE: This decision reverses an order that denied benefits. Please note that payment of benefits, if any are owed, may take approximately a week for the Department to complete.

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 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 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
 Phone: (503) 378-2077 | 1-800-734-6949 | Fax: (503) 378-2129 | TDD: 711
www.Oregon.gov/Employ/eab

The Oregon Employment Department is an equal opportunity employer/program. Auxiliary aids and services are available upon request to individuals with disabilities. Language assistance is available to persons with limited English proficiency at no cost.

El Departamento de Empleo de Oregon es un programa que respeta la igualdad de oportunidades. Disponemos de servicios o ayudas auxiliares, formatos alternos y asistencia de idiomas para personas con discapacidades o conocimiento limitado del inglés, a pedido y sin costo.