

EMPLOYMENT APPEALS BOARD DECISION
2022-EAB-0556

Reversed
No Disqualification

PROCEDURAL HISTORY: On March 17, 2022, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant was discharged for misconduct and disqualified from receiving unemployment insurance benefits effective January 16, 2022 (decision # 122229). Claimant filed a timely request for hearing. On May 3, 2022, ALJ Vincent conducted a hearing, and on May 5, 2022 issued Order No. 22-UI-192992, affirming decision # 122229. On May 10, 2022, claimant filed an application for review with the Employment Appeals Board (EAB).

WRITTEN ARGUMENT: Claimant's argument contained information that was not part of the hearing record, and did not show that factors or circumstances beyond claimant's reasonable control prevented him 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 claimant's argument to the extent it was based on the record.

FINDINGS OF FACT: (1) The employer employed claimant as an apprentice wine barrel-maker from September 2019 until January 23, 2022.

(2) On Friday, January 21, 2022, the employer's owner sent claimant a text asking what his work hours were for the previous two weeks. On Saturday, January 22, 2022, claimant responded back that he had worked 64 hours plus two hours of overtime for the first of the two weeks. The employer paid claimant every two weeks, typically for a total of 80 hours for the two workweeks combined. However, for the two weeks preceding January 22, 2022, claimant had missed some shifts due to medical issues. Also, during one of the shifts that occurred those two weeks, claimant left an hour and a half early following an argument with a coworker.

(3) The owner was unsure of the accuracy of the work hours claimant reported in his text. On the night of January 22, 2022, the owner responded to claimant's text by stating, "Not sure about the time. We will go over it on Monday." Exhibit 2 at 8.

(4) Claimant saw the owner's text on the morning of Sunday January 23, 2022. The owner's text bothered claimant because he believed it implied that he had been untruthful in reporting his work hours. That morning, at 8:39 a.m., claimant sent the owner four texts in succession. The first text explained how claimant calculated the work hours he had reported and stated, "Not sure why my hours are being scrutinized now." Exhibit 2 at 9. The next text asked the owner whether he had discussed claimant's job or medical condition with the coworker whom claimant had argued with the day he left his shift early. The third and fourth texts stated, respectively, "Seems like you are trying to push me out" and "You are assuming I am lying about my hours!?" Exhibit 2 at 9. Minutes later, the owner texted back, "Would like to deal with this on Monday. You did not work a full 8 hours on both Fridays of the pay period and overtime is anything over 80 hours." Exhibit 2 at 10.

(5) Claimant understood that the owner wished to discuss the matter on Monday but "wanted to get to the bottom of it" and believed he had the "right to call" the owner. Transcript at 43, 44. Between 8:39 a.m. and 9:23 a.m. on January 23, 2022, claimant attempted to call the owner four times and left two voice mail messages seeking to discuss his work hours.

(6) At 9:23 a.m. that morning, claimant called the owner a fifth time. That time, the owner accepted the call. In a "less than pleasant tone," claimant accused the owner of being intoxicated and of calling claimant a liar. Transcript at 40. The owner felt "verbally attacked" and discharged claimant during the call for the tone of his text and telephone communications and for failing to obey the owner's instructions to discuss the matter on Monday. Transcript at 19.

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).

The record shows that claimant's behavior on January 23, 2022 breached the employer's reasonable expectations with at least wanton negligence. On that day, claimant repeatedly insisted on discussing his work hours when the owner wished to do so at work the next day and because aspects of claimant's text and telephone communications were hostile and rude. The record shows that claimant knew or should have known that insisting on discussing the matter on January 23, 2022 would probably result in a violation of the employer's expectations because the owner informed him, in two separate texts, "we will go over it on Monday" and "Would like to deal with this on Monday." Exhibit 2 at 8, 10. Claimant also knew or should have known, as a matter of civility between an employer and employee, that aspects of his communications on January 23, 2022, including adopting a "less than pleasant tone" in a telephone conversation which claimant described at hearing as "pretty aggressive" and in which he

accused the owner of being intoxicated, would breach the employer's expectations. Transcript at 34, 40. For these reasons, the record evidence is sufficient to conclude that claimant's conduct on January 23, 2022 was a wantonly negligent violation of the employer's expectations.

However, claimant's wantonly negligent conduct on January 23, 2022 was not misconduct because it was an isolated instance of poor judgment. Under OAR 471-030-0038(3)(b), isolated instances of poor judgment are not misconduct. 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 wantonly negligent violation of the employer's expectation was isolated. Claimant's conduct did not amount to a repeated act or pattern of wantonly negligent behavior. Although claimant's breach of the employer's expectations occurred via a series of text and voice mail messages, missed calls, and a telephone conversation, for purposes of OAR 471-030-0038(1)(d)(A), claimant's conduct on January 23, 2022 constitutes a single occurrence in the employment relationship. See *Perez v. Employment Dep't*, 164 Or. App. 356, 992 P.2d 460, 467 (1999) ("[The] isolated instance of poor judgment' analysis focuses on whether the incident was 'a single occurrence in the employment relationship,' . . . and not whether the incident involved more than one component 'act' by the employee.") (quoting *Waters v. Employment Div.*, 125 Or. App. 61, 865 P.2d 368, 369 (1993)).

In *Waters*, the employer discharged the claimant after he left three angry messages on his supervisor's answering machine over the course of an evening. 865 P.2d at 369. EAB concluded the conduct was not an isolated instance of poor judgment because the claimant's messages were "repeated" in nature. *Waters*, 865 P.2d at 369. The Court of Appeals reversed, holding that the multiple messages occurring

over the course of one evening were a single occurrence in the employment relationship. *Waters*, 865 P.2d at 369. Just like the multiple answering machine messages constituted a single occurrence in *Waters*, claimant's multiple messages, missed calls, and telephone conversations occurring over the course of the morning of January 23, 2022 constitutes a single occurrence in the employment relationship, rather than a repeated act or pattern, of willful or wantonly negligent behavior.

Further, the record does not show that claimant's conduct on January 23, 2022 exceeded mere poor judgment. Claimant's conduct neither violated the law nor was tantamount to unlawful conduct. Claimant's conduct on January 23, 2022 also did not amount to an irreparable breach of trust because it did not involve an act of dishonesty, theft, or the like. Further, although claimant's repeated messages and missed calls were insistent and the telephone conversation was "pretty aggressive" with claimant using a tone that was "less than pleasant" and accusing the owner of being intoxicated, the record does not show that claimant's behavior made a continued employment relationship impossible. Transcript at 34, 40. There is no evidence that claimant threatened the owner, for example, or otherwise posed a risk of harm to the owner or to the employer's economic interests such as would make a continued employment relationship impossible. While claimant's behavior on January 23, 2022 would have placed strain on the employment relationship, the record evidence does not support that claimant's conduct on that day made it impossible for the relationship to continue.

For these reasons, claimant was discharged for an isolated instance of poor judgment, and not misconduct. Claimant therefore is not disqualified from receiving unemployment insurance benefits based on the work separation.

DECISION: Order No. 22-UI-192992 is set aside, as outlined above.

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

DATE of Service: July 28, 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 ໂດຍປະຕິບັດຕາມຄໍາແນະນໍາທີ່ບອກໄວ້ຢູ່ຕອນຫ້າຍຂອງຄໍາຕັດສິນນີ້.

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
 Phone: (503) 378-2077 | 1-800-734-6949 | Fax: (503) 378-2129 | TDD: 711
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