

EMPLOYMENT APPEALS BOARD DECISION
2022-EAB-0578

Reversed
No Disqualification
No Descalificación

PROCEDURAL HISTORY: On January 26, 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 January 12, 2020 (decision # 143316). Claimant filed a timely request for hearing. On April 29, 2022, ALJ Lucas conducted a hearing, and on May 5, 2022 issued Order No. 22-UI-192999, affirming decision # 143316. On May 17, 2022, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Community Maintenance Services Inc. employed claimant as a repair technician from October 7, 2019 until January 17, 2020.

(2) The employer expected claimant to obey orders and carry out tasks as directed. Claimant understood this expectation.

(3) Claimant's shifts typically were scheduled from 7:00 a.m. to 4:00 p.m. At 3:30 p.m. on January 17, 2020, near the end of claimant's shift and as he was nearing completion of the project he was working on, the employer contacted claimant and ordered him to go to a different job site to do janitorial work. Claimant did not want to do the janitorial work because he was very tired from the work day, felt that he still "had to do the clean-up of the work where [he] was," and needed to put away his tools before departing for another job site. Transcript at 18. Claimant informed the employer that he would not do the janitorial work.

(4) On January 17, 2020, the employer discharged claimant for disobeying their order to do the janitorial work.

CONCLUSIONS AND REASONS: The employer discharged claimant for an isolated instance of poor judgment, and not 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) (December 23, 2018). “[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) (September 22, 2020).

The order under review concluded that claimant’s refusal to do the janitorial work was misconduct, and not an isolated instance of poor judgment. Order No. 22-UI-192999 at 3. The record does not support that conclusion.

The record shows that when claimant disobeyed the employer’s order to do the janitorial work on January 17, 2020,¹ he breached the employer’s reasonable expectations willfully. It is reasonable for an employer to expect employees to obey orders and claimant understood that the employer expected him to obey orders and carry out tasks as directed. Nevertheless, because claimant was tired, still had to put away his tools, and believed there was clean-up work remaining on the work order he was presently working on, claimant refused to do the janitorial work. Claimant therefore deliberately disobeyed the employer’s orders on January 17, 2020, and his conduct that day was a willful violation of the employer’s reasonable standards of behavior.

However, claimant’s willful violation of the employer’s expectations on January 17, 2020 was an isolated instance of poor judgment, and 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

¹ At hearing, the employer’s witness testified that the employer’s schedulers called claimant on January 16, 2020, informed him he was expected to perform the janitorial services the next day January 17, 2020, and that claimant told the schedulers he would not perform janitorial services the next day. Transcript at 7-8. The employer witness further testified that this led the employer’s owner to send claimant an email on January 16, 2020 notifying claimant that he was discharged. Transcript at 9. Claimant testified that he was ordered to do the janitorial work at the end of his shift on January 17, 2020, that he refused to do the work the same day, that the owner called him and discharged him that day, and that he did not remember receiving an email. Transcript at 13-18, 19. The evidence on these issues was no more than equally balanced between the parties. Where the evidence is no more than equally balanced, the party with the burden of persuasion—here, the employer—has failed to satisfy their evidentiary burden. Consequently, on these disputed matters, EAB based its findings on claimant’s evidence.

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 violation of the employer's expectations to obey orders and carry out tasks as directed was isolated. There is no evidence showing any prior instances of claimant refusing to carry out a task or engaging in a pattern of other willful or wantonly negligent behavior. Further, the record does not show that claimant's conduct on January 17, 2020 exceeded mere poor judgment. Claimant's conduct neither violated the law nor was tantamount to unlawful conduct. Claimant's conduct also did not amount to an irreparable breach of trust because it did not involve an act of dishonesty, theft, or the like. Further, the record does not show that claimant's behavior otherwise made a continued employment relationship impossible.

Claimant refused to perform the janitorial work because he was tired, still had to put away his tools, and believed there was clean-up work remaining on the work order he was presently working on. Moreover, at hearing, claimant acknowledged that helping with cleaning was part of his job. Transcript at 17. Given that claimant recognized that janitorial work was part of his job duties but simply did not wish to do them late in the day on January 17, 2020 for the above-mentioned reasons, the record supports that claimant's refusal to do janitorial work was limited to the January 17, 2020 shift, and was not ongoing in nature. Claimant's refusal to obey the employer's order to perform janitorial work on January 17, 2020 therefore did not make a continued employment relationship impossible.

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-192999 is set aside, as outlined above. *La Orden de la Audiencia 22-UI-192999 se deja a un lado, de acuerdo a lo indicado arriba.*

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

DATE of Service: August 15, 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.

NOTA: Esta decisión revoca una orden judicial que negó beneficios. Por favor tenga en cuenta que, si le deben beneficios, el Departamento puede tomar aproximadamente una semana para pagar esos beneficios.

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.

NOTA: Usted puede apelar esta decisión presentando una solicitud de revisión judicial ante la Corte de Apelaciones de Oregon (Oregon Court of Appeals) dentro de los 30 días siguientes a la fecha de notificación indicada arriba. Vea ORS 657.282. Para obtener formularios e información, puede escribir a la Corte de Apelaciones de Oregon, Sección de Registros (Oregon Court of Appeals/Records Section), 1163 State Street, Salem, Oregon 97310 o visite el sitio web en courts.oregon.gov. En este sitio web, hay información disponible en español.

Por favor, ayúdenos mejorar nuestros servicios completando un formulario de encuesta sobre nuestro servicio de atención al cliente. Para llenar este formulario, puede visitar <https://www.surveygizmo.com/s3/5552642/EAB-Customer-Service-Survey>. Puede acceder a la encuesta usando una computadora, tableta, o teléfono inteligente. Si no puede llenar el formulario sobre el internet, puede comunicarse con nuestra oficina para una copia impresa de la encuesta.



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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