

EMPLOYMENT APPEALS BOARD DECISION
2022-EAB-0596

Reversed
No Disqualification

PROCEDURAL HISTORY: On March 16, 2022, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that the employer discharged claimant, not for misconduct, and that claimant was not disqualified from receiving unemployment insurance benefits based on the work separation (decision # 142644). The employer filed a timely request for hearing. The Office of Administrative Hearings (OAH) scheduled a hearing for April 19, 2022. On that date, ALJ Ramey granted the employer's request to continue the hearing to April 26, 2022 at 3:30 p.m. On April 26, 2022, ALJ Ramey conducted the hearing, and on May 4, 2022 issued Order No. 22-UI-192092, reversing decision # 142644 by concluding that claimant was discharged for misconduct and was disqualified from receiving unemployment insurance benefits effective March 6, 2022. On May 23, 2022, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Werner Gourmet Meat Snacks Inc. employed claimant as a maintenance supervisor from June 11, 2007 until March 9, 2022. The employer manufactured meat products that required the use of ovens with precise specifications.

(2) The employer expected claimant to obey their orders and refrain from doing anything to the employer's ovens that the employer told claimant not to do. The employer also expected claimant to abide by the employer's safety policies, including the proper use of ladders. Claimant understood these expectations.

(3) On June 30, 2021, the employer verbally warned claimant for a comment he made to a female coworker in which he asked the coworker, "what if I snuck into your house and put an Easter basket on your nightstand?" Transcript at 17. The employer informed claimant that the comment was inappropriate and could be considered harassment. Claimant meant the comment to be a joke and did not intend for it to be perceived as claimant having any intentions other than putting a gift on the coworker's nightstand.

(4) In October 2021, claimant made repairs to one of the employer's ovens. In doing so, claimant installed a custom-built part that was mistakenly built at an incorrect size. Claimant's repairs caused the oven to cook the employer's meat products unevenly.

(5) On December 8, 2021, claimant's manager told him to sharpen blades of a machine used to slice meat. Sharpening the blades was a part of claimant's job but he was accustomed to having a supervisor bring the blades to his maintenance workstation, rather than having to find them in the equipment storage area, which was unorganized. Claimant initially resisted sharpening the blades, but did not state that he would not do so. After initial resistance, claimant found the blades and sharpened them, and then performed preventative maintenance on the slicing machine. Claimant received a warning for this incident.

(6) On January 4, 2022, claimant used an A-frame ladder improperly by leaning it against an oven while closed instead of opening the ladder and climbing it with the locks in place and without leaning it against anything. When claimant used the ladder, he "wasn't really aware" he was using it improperly because he forgot to open and lock the ladder and stepped up only one rung before he ceased using it. Transcript at 44. Claimant received a warning for this incident.

(7) On February 11, 2022, the employer discovered that the uneven cooking of the oven claimant made repairs on in October 2021 was the result of claimant's repairs. On the same day, the employer informed claimant that he was not allowed to make any repairs or adjustments to the employer's ovens going forward. Claimant understood this expectation.

(8) On February 26, 2022, another one of the employer's ovens malfunctioned. This oven required adjustments to its programming by inputting a code from the manufacturer. Claimant's manager assigned one of claimant's coworkers to address the malfunctioning oven. Claimant became aware that the oven needed adjustments, called the oven manufacturer, and obtained the necessary code. Claimant's manager heard claimant's call with the manufacturer, and told claimant that the coworker was assigned to work on the oven and that claimant was not to use the code to adjust the oven. Claimant knew he was not allowed to adjust the oven but believed that the coworker, who had decades of oven experience but was a new hire, had requested claimant's help. Claimant then inputted the code and adjusted the oven.

(9) On March 2, 2022, the employer suspended claimant pending an investigation of claimant's adjustment of the oven on February 26, 2022. On March 9, 2022, the employer discharged claimant for disobeying orders by adjusting the oven on February 26, 2022.

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) (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 are not misconduct. OAR 471-030-0038(3)(b)

The order under review concluded that claimant’s adjustment of the oven on February 26, 2022 was misconduct, and not an isolated instance of poor judgment. Order No. 22-UI-192092 at 3-4. The record does not support that conclusion.

The record shows that when claimant disobeyed the employer’s order and adjusted the oven on February 26, 2022, he breached the employer’s reasonable expectations willfully. Claimant understood that he was not permitted to adjust the employer’s ovens because the employer conveyed that expectation to him on February 11, 2022, after claimant’s role in causing one of the employer’s other ovens to cook unevenly came to light. The employer’s expectation was again conveyed to claimant on February 26, 2022, when claimant’s manager told claimant not to use the code to adjust the oven. Nevertheless, believing his coworker had requested his help, claimant deliberately inputted the code he had obtained from the manufacturer and adjusted the oven on February 26, 2022. Claimant therefore deliberately disobeyed the employer’s orders on February 26, 2022, and his conduct that day was a willful violation of the employer’s reasonable standards of behavior.

However, the record fails to establish that claimant’s willful violation of the employer’s expectations on February 26, 2022 was misconduct, and not an isolated instance of poor judgment. 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 violation of the employer's expectations on February 26, 2022 was isolated. The employer gave claimant warnings for several incidents that occurred before February 26, 2022. However, under OAR 471-030-0038(1)(d)(A), in order for claimant's insubordination on February 26, 2022 to be considered an act that was not isolated, the February 26, 2022 violation must amount to a repeated act or be part of a pattern of other willful or wantonly negligent behavior. Analyzing the incidents that occurred before February 26, 2022 along with claimant's willful violation on that date, the record shows that claimant's conduct on February 26, 2022 was not a repeated act.

The nature of claimant's violation on February 26, 2022 was a willful failure to obey the employer's order not to adjust their ovens. The matters for which claimant was warned prior to February 26, 2022 relating to claimant's Easter basket comment and his improper use of an A-frame ladder did not involve disobeying an order and so did not render the February 26, 2022 violation a repeated act. Similarly, claimant's October 2021 repairs to the oven that caused it to cook unevenly was not an act of disobeying orders as the employer prohibited claimant from repairing or adjusting ovens only after his role in causing the oven to cook unevenly came to light on February 11, 2022. Finally, the December 8, 2021 incident for which claimant was ordered to sharpen blades and initially resisted doing so, but then carried out the order and sharpened the blades, also did not amount to disobeying the employer's orders because claimant never stated he would not sharpen the blades¹ and eventually did what he was ordered to do. For these reasons, claimant's insubordination on February 26, 2022 was not a repeated act.

Nor was claimant's conduct on February 26, 2022 part of a pattern of other willful or wantonly negligent behavior. The employer did not meet their burden to show that claimant's Easter basket comment, for which he received a verbal warning on June 30, 2021, was willful or wantonly negligent. Although potentially harassing, the record does not show that claimant willfully or with wanton negligence violated a known employer policy when he made the comment given claimant's un rebutted testimony was that the comment was a joke and he did not intend for it to be perceived as he having any intentions other than putting a gift on the coworker's nightstand. Transcript at 45. The record shows that claimant's October 2021 repairs to the oven that caused it to cook unevenly did not constitute willful or wantonly negligent behavior because it was merely an error due to installing a custom-built part that was mistakenly built at an incorrect size. Finally, the employer did not meet their burden to show that claimant's improper use of the ladder was willful or wantonly negligent. The record shows that claimant "wasn't really aware" he was using the ladder improperly because he forgot to open and lock the ladder and stepped up only one rung before he ceased using it. Transcript at 44. Given that the ladder violation was due to forgetfulness and involved only one rung so likely lasted only seconds, the record does not show that the violation was willful, or that it involved the sort of conscious conduct required to meet the standard for wanton negligence.

Turning to OAR 471-030-0038(1)(d)(D), the record does not show that claimant's conduct on February 26, 2022 exceeded mere poor judgment. Claimant's conduct neither violated the law nor was tantamount to unlawful conduct. Claimant's conduct also did not create an irreparable breach of trust in the employment

¹ At hearing, while the parties agreed that claimant eventually sharpened the blades, claimant's manager testified that when first instructed to do so, claimant stated "I'm not going to do that." Transcript at 19. In contrast, claimant testified that he "never told [the manager] I wasn't going to do it." Transcript at 41. Given that the employer bears the burden of persuasion and that the firsthand accounts of what occurred on this point are equally balanced, this decision's findings on this point is based on claimant's evidence.

relationship 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. There is no indication from the record that claimant's defiance of the employer's orders by adjusting the oven interfered with the employer's interests such as would make a continued employment relationship impossible.

For these reasons, the record fails to establish that claimant's discharge was for misconduct, and not an isolated instance of poor judgment. Claimant therefore is not disqualified from receiving unemployment insurance benefits based on the work separation.

DECISION: Order No. 22-UI-192902 is set aside, as outlined above.

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

DATE of Service: August 12, 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.

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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 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.

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