

EMPLOYMENT APPEALS BOARD DECISION
2022-EAB-0613

Affirmed
No Disqualification

PROCEDURAL HISTORY: On June 18, 2021, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that the employer suspended claimant, but not for misconduct, and that claimant was not disqualified from receiving unemployment insurance benefits based on the suspension (decision # 145354). Also on June 18, 2021, the Department served notice of an administrative decision concluding that the employer discharged claimant, but not for misconduct, and claimant was not disqualified from receiving unemployment benefits based on the discharge (decision # 142638). The employer filed timely requests for hearing on decisions # 145354 and 142638. On May 5, 2022, ALJ Ramey conducted a hearing on decisions # 145354 and 142638, and on May 16, 2022 issued Orders No. 22-UI-193764 and 22-UI-193766, affirming decisions # 145354 and 142638. On May 27, 2022, the employer filed applications for review of Orders No. 22-UI-193764 and 22-UI-193766 with the Employment Appeals Board (EAB).

Pursuant to OAR 471-041-0095 (October 29, 2006), EAB consolidated its review of Orders No. 22-UI-193764 and 22-UI-193766. For case-tracking purposes, this decision is being issued in duplicate (EAB Decisions 2022-EAB-0612 and 2022-EAB-0613).

FINDINGS OF FACT: (1) Oregon Beverage Recycling Cooperative employed claimant from April 2015 until May 24, 2021, most recently as an onsite supervisor at one of their recycling facilities. The employer's facilities included pay stations where empty bottles could be redeemed for cash. Cash was stored in the pay stations, which were secured with padlocks.

(2) The employer maintained a written policy prohibiting employees from leaving the premises before their scheduled shift was over unless they obtained permission to do so from the employer. The employer also maintained a written policy requiring employees to ensure that the facility's pay stations were locked. The employer also maintained a written policy requiring employees to secure any cash not in a locked pay station in either the facility's safe or a locked cash box. The employer provided claimant with copies of these policies.

(3) Despite the employer's written policy about keeping cash in locked containers, claimant's supervisor generally permitted him and other employees at claimant's facility to keep cash in an unlocked container under a desk in the facility's office for short periods of time.

(4) On May 18, 2021, claimant was at work and began to experience emotional distress primarily caused by the loss of his infant daughter some months earlier. The distress made it "very hard and complicated [for claimant] to focus on work." Transcript at 38. Claimant therefore contacted his supervisor and requested to leave his shift early. The supervisor told claimant that he could leave early, but not to do so until the supervisor or another person arrived to relieve him, and that the supervisor would arrive as soon as he could. At that time, the only other employee at the facility was new and inexperienced, and claimant's supervisor was concerned about leaving the new employee alone at the facility. Shortly after speaking to the supervisor, claimant left the facility to pick up a different employee to cover his shift, brought that employee back to the facility about 15 minutes later, and then left for the day.

(5) At some point before he left on May 18, 2021, claimant attempted to secure the locks on the pay stations, but was unable to do so because they were not functioning properly. As a result, the locks on the pay stations were not secured when claimant left. Claimant had previously asked his supervisor to fix this problem, but the problem had not been resolved by that day. Additionally, at some point before claimant left work that day, he took cash that would not fit into the safe and stored it in an unlocked container under the desk in the facility's office. Claimant believed that it was permissible to leave the cash there because the supervisor had previously told him that it was okay to do so. The door to the office was locked when claimant left. When the supervisor arrived at the facility shortly after claimant left, he discovered that the pay stations were not locked, and that claimant had left cash under the desk in the office.

(6) On May 19, 2021, the employer suspended claimant to investigate claimant's apparent violation of the employer's policies the previous day.

(7) On May 24, 2021, the employer discharged claimant due to his conduct on May 18, 2021. Although the fact that claimant left his shift early before the supervisor arrived was part of the employer's consideration in deciding to discharge claimant, the employer would not have discharged claimant that day if claimant had not also violated their cash-handling policies.

(8) Prior to May 18, 2021, the employer had never disciplined claimant for violating their policies.

CONCLUSIONS AND REASONS: The employer suspended and discharged claimant, but not for misconduct.

ORS 657.176(2)(a) and (b) require a disqualification from unemployment insurance benefits if the employer suspended or 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 suspension or discharge case, the employer has the burden to establish misconduct by a preponderance of evidence. *See 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).

Suspension. The employer suspended claimant on May 19, 2021 in order to investigate claimant’s apparent violations of the employer’s policies the previous day. The purpose of the suspension was to *investigate* claimant’s conduct, rather than to *discipline* him for a policy violation. Therefore, the employer did not suspend claimant from work due to a willful or wantonly negligent violation of the employer’s standards of behavior. Because the employer suspended claimant for investigatory purposes and not misconduct, claimant is not disqualified from receiving benefits based on the suspension from work.

Discharge. The employer discharged claimant for his conduct on May 18, 2021, in briefly leaving a new employee alone at the facility, leaving the locks on the pay stations unsecured, and leaving cash in an unlocked container in the facility’s office. The employer has not met their burden to show that claimant’s conduct constituted misconduct. On that day, claimant contacted his supervisor and requested to leave work early because he was experiencing mental distress. Claimant was told by his supervisor not to leave until the supervisor or another person arrived to relieve claimant. The record shows claimant willfully disregarded this instruction by leaving the facility before the supervisor or another employee arrived because he felt that the new employee was sufficiently trained to be left alone for a short period of time. Transcript at 39–40. Because claimant consciously violated the employer’s reasonable expectation, claimant’s decision to leave the facility before relief arrived constituted a willful violation of the employer’s standards of behavior.

Next, claimant left cash in an unlocked container in the office when he left the facility. This was a violation of the employer’s *written* policy. However, the record also shows that claimant’s supervisor had previously allowed him to leave cash in that location. Claimant testified he understood that he could place the cash there so long as the door to the office was closed,¹ and, as a result, he believed leaving the cash under the desk on May 18, 2021 was permissible. Transcript at 44. At hearing, claimant’s supervisor clarified that while such a practice might be permissible “for a short temporary [period of time] if the machine was down and [they] had to fix the machine,” someone would still need to be “present to be able to supervise,” and it was not appropriate to leave the cash there without remaining onsite. Transcript at 47. The record does not show that the employer ever communicated to claimant the specific requirement to remain onsite if cash is left under the desk. Given that claimant left the otherwise-unsecured cash in a locked room, which he believed complied with the employer’s expectations, the employer did not meet their burden to show that claimant knew or should have known that leaving the cash under the desk before leaving for the day probably violated the employer’s expectations, or that claimant was indifferent to those expectations. Thus, while claimant’s conduct here might have been negligent, it did rise to the level of *wantonly* negligent as defined under OAR 471-030-0038(1)(c), and therefore was not misconduct.

¹ The record suggests that the door to the office was locked, as it locked automatically when closed. *See Exhibit 1* at 2.

Further, when claimant left the facility early that day, claimant did not secure the locks on the pay stations. Claimant failed to secure the locks because they were not working properly, and he therefore was unable to do so. However, claimant knew or should have known that leaving the machines unlocked and then leaving for the day could leave the employer vulnerable to theft of the cash in the machines. Had claimant made any efforts to mitigate this risk, such as notifying his supervisor of the issue before he left, such efforts would have demonstrated that he was *not* indifferent to the consequences of his failing to secure the locks, even if the equipment failure prevented him from following the employer's written policy. Because he did not do so, his actions constituted a wantonly negligent disregard of the employer's interests.

However, claimant's conduct on May 18, 2021 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 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 violations of the employer's expectations on May 18, 2021 were isolated and did not amount to a repeated act or pattern of willful or wantonly negligent behavior. Although claimant's breach of the employer's expectations occurred via a series of actions on May 18, 2021, for purposes of OAR 471-030-0038(1)(d)(A), claimant's conduct on May 18, 2021, constitutes a single occurrence in the employment relationship. *See Perez v. Employment Dep't*, 164 Or. App. 356, 992 P.2d 460, 467 (1999) (claimant's multiple violations of the employer's expectations over two days was a single occurrence when considered within the context of an otherwise impeccable 13 year employment relationship). The record shows that prior to May 18, 2021, claimant had never been disciplined for matters relating to violations of the employer's policies, and the record does not otherwise show that claimant had previously engaged in behavior that could be considered

misconduct. In the context of claimant's long tenure with the employer, in which he did not otherwise engage in willful and wantonly negligent behavior, claimant's conduct that day, all of which occurred in short succession and which stemmed from the mental distress from which he was suffering, constitute a single occurrence of willful or wantonly negligent behavior.

Further, the record does not show that claimant's conduct on May 18, 2022 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 made a continued employment relationship impossible. There is no evidence that claimant threatened the owner, or otherwise posed a risk of harm to the employer. Therefore, claimant's willful or wantonly negligent behavior on May 18, 2021 constituted an isolated instance of poor judgment, and was not misconduct.

For the above reasons, claimant was suspended and discharged, but not for misconduct, and therefore is not disqualified from receiving benefits based on the suspension or the discharge.

DECISION: Orders No. 22-UI-193764 and 22-UI-193766 are affirmed.

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

DATE of Service: August 23, 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 desisyong ito.

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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