

EMPLOYMENT APPEALS BOARD DECISION
2022-EAB-0839

Reversed
No Disqualification

PROCEDURAL HISTORY: On April 19, 2022, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that the employer discharged claimant for misconduct, disqualifying claimant from receiving benefits effective March 27, 2022 (decision # 111018). Claimant filed a timely request for hearing. On July 7, 2022, ALJ Janzen conducted a hearing, and on July 12, 2022 issued Order No. 22-UI-198023, affirming decision # 111018. On August 1, 2022, claimant filed an application for review with the Employment Appeals Board (EAB).

WRITTEN ARGUMENT: Claimant submitted written arguments on August 22, 2022 and September 30, 2022. Claimant's August 22, 2022 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 August 22, 2022 argument to the extent it was based on the record. Because claimant's September 30, 2022 argument was not received by EAB within the time period allowed under OAR 471-041-0080(1) (May 13, 2019), the September 30, 2022 argument was not considered by EAB when reaching this decision. OAR 471-041-0080(2)(b).

FINDINGS OF FACT: (1) Treager Pellet Grills LLC employed claimant as a retail account manager from February 10, 2020 until April 1, 2022.

(2) The employer expected claimant to report for scheduled shifts unless he received approval to miss work in advance or had a medical emergency. The employer also expected claimant to be truthful in his communications with the employer and his managers. Claimant understood the employer's expectations.

(3) On March 15, 2022, the police arrested claimant based on charges stemming from allegations of domestic abuse made by his former romantic partner. The police took claimant to jail. While in jail, claimant was allowed to make some phone calls. However, he did not have his employer's telephone number memorized and was not allowed access to his cellular phone or any other means to get the employer's telephone number. As a result, claimant did not call the employer to request approval for

absences or otherwise inform them of his circumstances. Claimant used the calls he was allowed to make to call his parents, who helped claimant retain a lawyer and eventually get out of jail.

(4) Claimant was absent from work on March 16, 2022 and March 17, 2022 due to being in jail. The police released claimant from jail on March 17, 2022.

(5) Claimant returned to work on March 18, 2022. Sometime shortly thereafter, claimant's territory manager asked claimant why he was absent from work on March 16, 2022 and March 17, 2022. Claimant informed the manager, falsely, that he missed work on those days because he was not feeling well and was dealing with family issues. Claimant gave the manager a false reason for his absences because his attorney had advised claimant not to mention his arrest to the employer, and claimant thought his arrest was private and he should not have to disclose it. Claimant also believed that the allegations against him were false but, because of their severity, if the employer learned of them the employer would terminate claimant's employment based on the allegations alone.

(6) In late March 2022, the employer learned that claimant had been arrested for charges stemming from allegations relating to domestic abuse, and that claimant was absent from work on March 16, 2022 and March 17, 2022 because he was in jail.

(7) On April 1, 2022, the employer discharged claimant for being absent from his scheduled shifts on March 16, 2022 and March 17, 2022 without approval, and for giving the employer a false reason for why he was absent from work on those days. Prior to his discharge on April 1, 2022, claimant had no history of violating any workplace policy or employer expectation.

(8) On April 28, 2022, the charges against claimant stemming from the allegations of domestic abuse were dismissed without claimant entering a plea because the charges were unsubstantiated.

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 order under review concluded that claimant was discharged for misconduct because he violated the employer's expectation that he be truthful in his communications with the employer, and claimant's truthfulness violation was not an isolated instance of poor judgment because it was an irreparable breach of trust. Order No. 22-UI-198023 at 3-4. For the reasons that follow, the record shows that claimant's conduct was an isolated instance of poor judgment, and therefore did not amount to misconduct.

The employer discharged claimant for being absent from his scheduled shifts on March 16, 2022 and March 17, 2022 without approval, and for giving the employer a false reason for why he was absent from work on those days. The employer's attendance policy, which claimant understood, required claimant to report for his scheduled shifts unless he received approval to miss work in advance or had a medical emergency. Claimant's absences on March 16, 2022 and March 17, 2022 were not willful violations of the employer's attendance policy because claimant was absent those days without approval due to being detained in jail, not because he intended to be absent. Claimant's absences also were not wantonly negligent because when claimant missed work without approval on March 16, 2022 and March 17, 2022, he was not indifferent to the consequences of his actions. Claimant was absent without approval those days because he had been jailed based on charges that were later determined to be unsubstantiated. In addition, the record shows that claimant could not contact the employer to request approval for the absences because, although the jail permitted some calls, claimant did not have his employer's telephone number memorized, and was not allowed access to his cellular phone or any other means to get the employer's telephone number. The record therefore fails to show that claimant violated the employer's attendance policy willfully or with wanton negligence.

On the other hand, the record supports that claimant willfully violated the employer's expectation that he be truthful in his communications with the employer. The record shows that claimant understood the employer expected him to be truthful in his communications with his managers. Yet, shortly after March 18, 2022, claimant's territory manager asked claimant why he had been absent and claimant responded, falsely, that he missed work on March 16, 2022 and March 17, 2022 because he was not feeling well and was dealing with family issues. Although claimant gave the manager untruthful information because his lawyer advised him not to disclose his arrest to the employer, among other reasons, claimant understood the employer's expectation and deliberately breached it by giving the manager a false reason for his absences. Accordingly, claimant willfully violated the employer's expectation regarding truthfulness.

However, claimant's willful violation was not misconduct because it was an isolated instance of poor judgment. Per 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 willful violation was isolated. Prior to his discharge on April 1, 2022, claimant had no history of violating any workplace policy or employer expectation. Further, as discussed above, claimant's violations of the employer's attendance policy on March 16, 2022 and March 17, 2022 were not willful or wantonly negligent. Thus, claimant's breach of the employer's expectation that he be truthful in his communications was a single occurrence rather than a repeated act or pattern of other willful or wantonly negligent behavior, and therefore was isolated.

Furthermore, claimant's conduct did not exceed mere poor judgment. Claimant's giving of untruthful information to his territory manager about why he had been absent did not violate the law, nor was it tantamount to unlawful conduct. Moreover, the record fails to show that claimant's conduct created an irreparable breach of trust in the employment relationship. Although claimant's conduct involved an instance of dishonesty, it did not involve theft, cheating, or the provision of false information for personal gain. Instead, claimant was dishonest because his lawyer had advised him to avoid disclosing the arrest, he thought his arrest was private and he should not have to disclose it, and he thought the allegations against him were false but could nevertheless lead the employer to discharge him if they learned of them. Viewed objectively claimant's breach of trust was driven by a desire to avoid drawing attention to allegations that claimant believed were false and which were eventually determined to be unsubstantiated, the record supports that the ability of the employer to trust claimant was not harmed to such a degree as to require that the employment relationship be severed. *See Callaway v. Employment Dep't.*, 225 Or App 650, 202 P3d 196 (2009) (a determination of whether a claimant's conduct caused a breach of trust is objective, not subjective, and the employer cannot unilaterally announce a breach of trust if a reasonable employer in the same situation would not); *see accord Isayeva v. Employment Dep't.*, 266 Or App 806, 340 P3d 82 (2014).

Finally, the record does not show that claimant's conduct otherwise made a continued employment relationship impossible. There is no indication, for example, that claimant's conduct harmed the employer's business interests, exposed them to liability, or interfered in any way with their ability to meet their regulatory or contractual obligations.

For the above reasons, the employer discharged claimant for an isolated instance of poor judgment, and not misconduct. Claimant is not disqualified from receiving benefits based on the work separation.

DECISION: Order No. 22-UI-198023 is set aside, as outlined above.

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

DATE of Service: November 4, 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.

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 ໄດ້ໂດຍປະຕິບັດຕາມຄຳແນະນຳທີ່ບອກໄວ້ຢູ່ຕອນທ້າຍຂອງຄຳຕັດສິນນີ້.

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
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www.Oregon.gov/Employ/eab

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