

EMPLOYMENT APPEALS BOARD DECISION
2022-EAB-1092

Affirmed
Disqualification

PROCEDURAL HISTORY: On October 27, 2021, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that the employer discharged claimant for misconduct, and that claimant was disqualified from receiving unemployment insurance benefits effective July 18, 2021 (decision # 80023). Claimant filed a timely request for hearing. On September 26, 2022, and October 12, 2022, ALJ Amesbury conducted a hearing, and on October 13, 2022, issued Order No. 22-UI-205146, affirming decision # 80023. On October 31, 2022, claimant filed an application for review with the Employment Appeals Board (EAB).

WRITTEN ARGUMENT: EAB did not consider claimant's written argument when reaching this decision because he did not include a statement declaring that he provided a copy of his argument to the opposing party as required by OAR 471-041-0080(2)(a) (May 13, 2019).

FINDINGS OF FACT: (1) Laguna Industries LLC employed claimant as an office worker from October 2, 2019, until July 20, 2021.

(2) The employer expected their employees to begin work on time and to notify the employer promptly if they would potentially be late. These policies were known to claimant and written in the employer's policy manual, which claimant received during his employment. Claimant's punctuality was particularly important to the employer because he was responsible for answering the telephone and other employees' activities depended on claimant performing this duty as scheduled.

(3) On April 27, 2021, after several disputes over claimant's attendance, the employer reiterated their expectations to claimant including that he was to begin work at 8:00 a.m. each day and must notify the employer before the start of the workday if he would be absent or late. Exhibit 1 at 4.

(4) On July 13, 2021, July 15, 2021, and July 19, 2021, claimant was late to work and did not notify the employer before the start of the workday.

(5) After claimant arrived late without notice on July 19, 2021, claimant provided the explanation that his back hurt and he unexpectedly needed additional time before leaving for work. The employer advised claimant orally and in writing that he must notify them as soon as he realized there was a potential of arriving late. Exhibit 4 at 19.

(6) On July 20, 2021, claimant arrived for work at 8:06 a.m. and did not attempt to notify the employer that he might be late. Claimant's commute typically took from ten to twenty minutes, and he left his home at approximately 7:50 a.m. on this occasion. Later that day, the employer discharged claimant for failing to notify them he would potentially be late that morning.

CONCLUSIONS AND REASONS: The employer discharged claimant for misconduct.

ORS 657.176(2)(a) requires a disqualification from unemployment insurance benefits if the employer discharged claimant for misconduct connected with work. OAR 471-030-0038(3)(a) (September 22, 2020) defines misconduct, in relevant part, as a willful or wantonly negligent violation of the standards of behavior which an employer has the right to expect of an employee, or an act or series of actions that amount to a willful or wantonly negligent disregard of an employer's interest. OAR 471-030-0038(1)(c) defines wanton negligence, in relevant part, as 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. The employer has the burden to prove misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976). Isolated instances of poor judgment, good faith errors, or absences due to illness or other physical or mental disabilities are not misconduct. OAR 471-030-0038(3)(b).

The employer had the right to expect their employees to arrive at work on time, and to notify them when they might be late. Claimant understood these expectations because they were written in the employer's policy manual, which claimant received during his employment, and they were again stated to him in writing on April 27, 2021, and July 19, 2021. Claimant violated these reasonable expectations on July 20, 2021, when he left for work at approximately 7:50 a.m. to begin a commute that would last from ten to twenty minutes without notifying the employer that he would potentially be late. Claimant testified that he did not notify the employer because he believed he would arrive by 7:59 a.m. that day. October 12, 2022 Transcript at 9. Claimant was therefore conscious of the time he was leaving for work and the range of time in which he might arrive. Claimant knew or should have known before he began driving that not only was there a potential he would arrive to work late under these circumstances, but that his late arrival was a near certainty. The mere potential of arriving late triggered a duty to inform the employer of the situation, and claimant knew or should have known his failure to do so would probably result in a violation of the employer's reasonable expectations. This indifference to the consequences of his failure to notify the employer as required demonstrates at least a wantonly negligent disregard of the employer's interest, and constitutes misconduct unless an exception applies.

Tardiness is considered absence from part of a work shift, and such absences due to illness or physical disabilities are excepted from the definition of misconduct. However, this exception is inapplicable to the misconduct analysis here because claimant was discharged not for being absent from the first minutes of his shift, but for failing to notify the employer of that potential absence. The employer denied

that claimant would have been discharged for his tardiness on July 20, 2021 had he provided proper notice of it. September 26, 2022 Transcript at 24. Therefore, claimant was not discharged for an absence due to illness or physical disability and the exception does not apply.

Isolated instances of poor judgment are also excluded from the definition of misconduct. To be considered 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. OAR 471-030-0038(3)(b)(A). Claimant failed to notify the employer that he might be late to work on four occasions of tardiness from July 13, 2021, through July 20, 2021. Claimant was specifically warned on the day prior to his discharge that his failure to notify the employer of potential tardiness violated the employer's expectations, under circumstances nearly identical to claimant's conduct the following day. Claimant's repetition of that conduct on July 20, 2021 cannot be considered a single or infrequent occurrence, and cannot be excused as an isolated instance of poor judgment.

Similarly, good faith errors are not misconduct. Claimant contended that he thought there was a "gray area" of at least fifteen minutes after the start of a shift during which the employer did not expect to be notified of tardiness. October 12, 2022 Transcript at 7. The employer clarified with claimant that this belief was false on July 19, 2021, when they advised him that his awareness of even the potential of arriving after 8:00 a.m. required him to notify them of that possibility. Further, a good faith error analysis must focus on the conduct, not the result. *See Freeman v. Employment Dep't.*, 195 Or App 417, 98 P3d 402 (2004) (the issue is not whether claimant believed in good faith that the employer would condone his loss of license, but whether it was good faith error for claimant to believe he was not under the influence of intoxicants when he drove home). While claimant testified he did not notify the employer he would potentially be late on July 20, 2021, because he erroneously believed he would be on time, this error was not made in good faith. Claimant's commute routinely took from ten to twenty minutes, depending on traffic. He began driving to work that day at approximately 7:50 a.m. At the time he left home, there was no good faith reason for claimant not to believe he would potentially arrive to work late. Accordingly, claimant's conduct cannot be excused as a good faith error.

Because claimant's failure to notify the employer of potentially arriving to work late on July 20, 2021 was a willful or wantonly negligent violation of the standards of behavior which an employer has the right to expect of an employee, and because no exceptions under OAR 471-030-0038(3)(b) apply, claimant was discharged for misconduct.

Therefore, the employer discharged claimant for misconduct. He is disqualified from receiving benefits effective July 18, 2021.

DECISION: Order No. 22-UI-205146 is affirmed.

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

DATE of Service: January 4, 2023

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 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.

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