

EMPLOYMENT APPEALS BOARD DECISION
2022-EAB-1191

Affirmed
Disqualification

PROCEDURAL HISTORY: On September 16, 2022, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that the employer discharged claimant for misconduct, and claimant was therefore disqualified from receiving unemployment insurance benefits effective July 24, 2022 (decision # 123335). Claimant filed a timely request for hearing. On November 4, 2022, ALJ Chiller conducted a hearing, and on November 10, 2022 issued Order No. 22-UI-207101, affirming decision # 123335. On November 29, 2022, claimant filed an application for review with the Employment Appeals Board (EAB).

WRITTEN ARGUMENT: Claimant did not declare that she provided a copy of her argument to the opposing party as required by OAR 471-041-0080(2)(a) (May 13, 2019). The argument also contained information that was not part of the hearing record, and did not show that factors or circumstances beyond claimant's reasonable control prevented her from offering the information during the hearing as required by OAR 471-041-0090 (May 13, 2019). EAB considered only information received into evidence at the hearing when reaching this decision. *See* ORS 657.275(2).

FINDINGS OF FACT: (1) Caring for Portland, LLC employed claimant as an in-home caregiver, performing duties such as cleaning, shopping, preparing meals, and assisting with other personal needs from February 9, 2018 until July 29, 2022.

(2) Prior to June 2022, the employer implemented two methods by which their employees were required to clock in and out for their shifts to comply with federally required anti-fraud measures. Employees had to either download an app to their personal phone which would verify via GPS that the employee was at the client's home while clocking in or out, or call an automated toll-free number using the client's phone to verify they were with the client while clocking in or out. The employer's clients agreed to the use of their phones for this purpose when contracting for the employer's services. Claimant was aware of the existence of these requirements in 2021 when they were implemented, and claimant understood that she was not permitted to use her own phone to call the toll-free number by at least early July 2022.

(3) Claimant utilized the app to clock in and out until approximately late 2021. She bought a new phone at that time and told the employer that she could not install the app on the new phone. Thereafter, the employer's scheduler generally clocked claimant in and out in the employer's computer until May 2022, despite the required anti-fraud measures. During this time, claimant refused numerous offers of assistance from the employer to help her install the app.

(4) From May 2022 through July 2022, claimant provided care for two clients, L.M. and P.P. In May 2022, claimant persuaded the employer's scheduler to add claimant's personal phone number to the automated toll-free number system, which resulted in claimant being able to clock in and out for L.M.'s shifts using her own phone without claimant's location being verified, in contravention of the anti-fraud measures. Claimant generally used this method to clock in and out when being paid to care for L.M. during this period.

(5) From June 22, 2022, through July 15, 2022, the employer sent claimant nine emails regarding the need to use one of the two approved methods of clocking in and out because the scheduler continued to clock claimant in and out of her shifts with P.P. Claimant continued to refuse the employer's assistance to install the app or to use the clients' phones to call the automated system.

(6) On July 5, 2022, the employer texted and emailed with claimant about claimant's objections over not being able to use her personal phone to clock in or out for P.P.'s shifts using the toll-free number. The employer reiterated that she was not allowed to use her personal phone to clock in or out via the toll-free number and that she needed to use the client's phone to call the number.

(7) On July 9, 2022, claimant replied to the previous exchange that she felt asking to use the clients' phones was "inappropriate" and "dangerous due to COVID." Transcript at 72. Claimant did not thereafter attempt to use one of the required methods of clocking in or out.

(8) On July 27, 2022, claimant texted the employer that she would be unable to care for P.P. that afternoon as scheduled due to a family emergency. The employer attempted to notify P.P., and in doing so, discovered that claimant had clocked in at 9:15 a.m. that day as working for L.M. by using her personal phone to call the toll-free number. The employer then called L.M., who said that he had been at a doctor's appointment that morning and that claimant had notified him that she would not be working with him that day due to a family emergency. He told the employer that he "had not seen her that day and did not plan to." Transcript at 9. Claimant used her personal phone to call the toll-free number to clock out after 3:00 p.m. that day.

(9) The employer's discovery of what they believed to be claimant clocking in and out for hours she did not actually work on July 27, 2022, prompted them to audit claimant's time records. Though aware of claimant's unwillingness to clock in or out of P.P.'s shifts using one of the required methods, the employer's managers were apparently unaware until this audit that claimant had also been clocking in and out of L.M.'s shifts through the toll-free number using her personal phone, which circumvented the anti-fraud measures.

(10) Shortly after this discovery, on July 27, 2022, the employer notified claimant that she needed to come to their office immediately to discuss her employment and removed claimant from the work schedule. Claimant did not appear by 5:00 p.m. on Friday, July 29, 2022, and the employer mailed

claimant a letter notifying her that she was discharged for violation of company policies and “overall misconduct.” Exhibit 1 at 1. This referred to claimant’s refusal to use the required methods of clocking in and out and the employer’s suspicion that claimant did not actually work on July 27, 2022, despite clocking in and out that day.

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

The employer discharged claimant because she willfully refused to use the required methods for clocking in and out, which led to a dispute over whether claimant actually worked hours claimed. The

employer had the right to expect that their employees would clock in and out via the methods they prescribed. This expectation was reasonable because anti-fraud measures incorporated into these methods were required under federal law. Claimant acknowledged that she was aware of this expectation as early as June 2022, though she denied knowing it applied to L.M.'s shifts. Transcript at 52. More likely than not, any potential ambiguity in claimant's mind about this expectation, particularly with regard to P.P., was resolved through correspondence of July 5, 2022, when the employer stated that claimant must use the client's phone to use the toll-free number and may not use her personal phone to do so. Transcript at 71-72. Claimant responded to the employer on July 9, 2022 that she refused to use the clients' phones and provided excuses for not doing so. She continued using unapproved methods of clocking in and out until July 27, 2022, when a dispute arose over whether claimant clocked in and out for hours not worked. This was precisely the type of situation the required methods of clocking in and out were designed to avoid.

The employer concluded that claimant's concern that she felt asking for a client's phone was inappropriate to be unfounded, as the clients agreed to it as part of their contract with the employer, and the client would therefore have properly raised such objections directly with the employer. Similarly, the employer concluded that claimant's concern that using a client's phone for a few minutes a day was "dangerous due to COVID" was without merit. The record supports the employer's conclusions here. Claimant's duties included cleaning, shopping, and preparing meals for clients, which likely involved touching numerous objects throughout the client homes, in addition to providing care that involved physical contact with the clients themselves. Even if claimant's concerns *were* valid, claimant could have instead used the app, which she declined to do, despite numerous offers of assistance from the employer to resolve any issues with her phone. Claimant refused to follow the reasonable directives of the employer, and by doing so, willfully violated the standards of behavior which an employer has the right to expect of an employee. Therefore, claimant's actions were properly characterized as misconduct.

Further, claimant's conduct cannot be excused as an isolated instance of poor judgment. Claimant willfully refused to use the required methods for clocking in and out daily for more than two months. She continued to do so after receiving nine emails during this period instructing her on the requirements. This constitutes a repeated act, which does not fall under the definition of an "isolated instance." Accordingly, claimant's misconduct cannot be excused under the provisions of OAR 471-030-0038(3)(b).

Therefore, the employer discharged claimant for misconduct, and claimant is disqualified from receiving unemployment insurance benefits effective July 24, 2022.

DECISION: Order No. 22-UI-207101 is affirmed.

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

DATE of Service: February 3, 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.

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
 Phone: (503) 378-2077 | 1-800-734-6949 | Fax: (503) 378-2129 | TDD: 711
www.Oregon.gov/Employ/eab

The Oregon Employment Department is an equal opportunity employer/program. Auxiliary aids and services are available upon request to individuals with disabilities. Language assistance is available to persons with limited English proficiency at no cost.

El Departamento de Empleo de Oregon es un programa que respeta la igualdad de oportunidades. Disponemos de servicios o ayudas auxiliares, formatos alternos y asistencia de idiomas para personas con discapacidades o conocimiento limitado del inglés, a pedido y sin costo.