

EMPLOYMENT APPEALS BOARD DECISION
2023-EAB-0016

Affirmed
Disqualification

PROCEDURAL HISTORY: On October 25, 2022, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant quit working for the employer without good cause and was disqualified from receiving unemployment insurance benefits effective September 11, 2022 (decision # 100102). Claimant filed a timely request for hearing. On December 6, 2022, ALJ Sachet-Rung conducted a hearing, and on December 8, 2022 issued Order No. 22-UI-209228, reversing decision # 100102 by concluding that claimant was discharged, not for misconduct, and was not disqualified from receiving unemployment insurance benefits based on the work separation. On December 22, 2022, the employer filed an application for review with the Employment Appeals Board (EAB).

WRITTEN ARGUMENT: The employer did not declare that they provided a copy of their 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 the employer's reasonable control prevented them 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) Brent Wright INC employed claimant as a vehicle detailer from September 13, 2022 until September 16, 2022.

(2) Claimant was required to report to work at 7:45 a.m. each day. The employer maintained a policy that required employees to call or email if they were unable to work their assigned shift. Claimant knew of and understood this policy.

(3) Claimant did not receive any warnings or other disciplinary measures from the employer.

(4) On September 16, 2022, claimant arrived to work at 7:39 a.m. Shortly thereafter, he received a call from his doctor reminding him that he had medical appointments at 9:00 a.m. and 12:00 p.m. that day. These appointments were located between two and three hours away from claimant's work, and

claimant left for them immediately after receiving this call. Given the distance from the employer's business, it was not possible for claimant to return before the end of his shift.

(5) Claimant's manager was speaking with other employees and clients when claimant received the call from his doctor, and claimant believed it inappropriate to interrupt this meeting. As a result, claimant did not notify anyone when he left work before his shift began. Claimant intended to call the employer on his way to his appointment, but "got hung up with my doctor calling me and driving." Transcript at 6. The employer called claimant multiple times on September 16, 2022, but claimant did not answer and never returned the employer's calls.

(6) On September 16, 2022, after the employer was unable to contact claimant and did not receive any callback from claimant, the employer's owner concluded that claimant had quit and directed payroll to "produce a final check and mail it out." Transcript at 13.

(7) On September 17, 2022 or September 18, 2022, claimant received this check that was marked final. Prior to receiving this check, claimant intended to return to work on his next scheduled shift on September 19, 2022 and explain his absence on September 16, 2022. Transcript at 6.

(8) On September 19, 2022, claimant did not show up to work for the employer.

CONCLUSION AND REASONS: The employer discharged the claimant for an isolated instance of poor judgment, and not misconduct

Nature of the work separation. If the employee could have continued to work for the same employer for an additional period of time, the work separation is a voluntary leaving. OAR 471-030-0038(2)(a) (September 22, 2020). If the employee is willing to continue to work for the same employer for an additional period of time but is not allowed to do so by the employer, the separation is a discharge. OAR 471-030-0038(2)(b). "Work" means "the continuing relationship between an employer and an employee." OAR 471-030-0038(1)(a).

The record shows that the work separation was a discharge that occurred on September 16, 2022. On that day, the employer's owner contacted payroll and had them issue claimant a final paycheck. The employer issued this check because they believed claimant had voluntarily quit when he left the employer's premises before his shift began on September 16, 2022. Claimant did not notify the employer that he was leaving for doctor's appointments, did not call the employer at all on this day, and did not answer or return multiple calls from the employer. While the employer viewed these actions as claimant quitting, they did not necessarily demonstrate claimant's unwillingness to continue working. Claimant testified that he was willing to continue working for the employer and that he intended to explain his absence to the employer at the start of his shift on September 19, 2022. Transcript at 6-7. Further, claimant testified that he had intended to contact the employer but forgot. Transcript at 9. Given that claimant was still willing to continue working for the employer, the record shows that his absence on September 16, 2022 did not constitute a voluntary quit.

The employer's issuance of a final check severed the employment relationship and demonstrated that the employer was no longer willing to allow claimant to work. When claimant received this check in the

mail, he understood that he was discharged and therefore did not return to work on September 19, 2022. Accordingly, the separation is properly considered a discharge.

Discharge. 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). “[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 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 he left work prior to the beginning of his shift and failed to notify the employer that he was doing so. The employer reasonably expected that their employees would notify the employer if they were unable to work an assigned shift. Claimant was aware of this policy, and yet when he left work on September 16, 2022 before his shift began, he did not notify the employer that he was leaving and that he would not return. Claimant had the ability to notify the employer of his absence by informing someone before he left, or by calling the employer from his car or the doctor’s

office. Claimant's failure to do so demonstrated indifference to the consequences of his actions, as claimant knew or should have known that his failure to notify the employer would result in a violation of the employer's policy. Therefore, claimant's failure to notify the employer that he would be absent was, at best, wantonly negligent.

Despite the fact that claimant breached a reasonable expectation of the employer with at least wanton negligence, the record shows that this was an isolated instance of poor judgment. First, claimant's action was isolated. This was the only instance in the record of claimant being absent or failing to notify the employer of an absence. Further, the record shows that claimant had never received any prior warnings or disciplinary measures from the employer. Given that this was a singular occurrence, the record shows that the incident was isolated. This incident also involved judgment because claimant made the conscious decision to leave the employer's location without notifying anyone that he was leaving and would not return. Given that this was a wantonly negligent violation of the employer's policy, the record also shows that claimant's actions involved poor judgment.

However, claimant's actions did not exceed mere poor judgment. Failing to notify an employer of an absence does not violate any law, nor is it tantamount to unlawful conduct. Additionally, there is nothing in the record to show that claimant's actions created an irreparable breach of the employer's trust. Claimant's failure to notify the employer did not involve fraud, theft, deception, providing false information, or any level of dishonesty on claimant's part. As such, there is nothing to show that the employer could no longer trust claimant. Lastly, claimant's conduct did not otherwise make a continued employment relationship impossible. The record does not show that claimant's failure to notify the employer of his absence harmed the employer's business interests. It did not expose the employer to liability, or interfere with the employer's ability to meet their business obligations. Therefore, the record does not show that claimant's failure to notify the employer of his absence exceeded mere poor judgment.

For these reasons, the record shows that claimant was discharged for an isolated instance of poor judgment, and not misconduct. Therefore, claimant is not disqualified from receiving benefits based on the work separation.

DECISION: Order No. 22-UI-209228 is affirmed.

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

DATE of Service: February 24, 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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