

EMPLOYMENT APPEALS BOARD DECISION
2023-EAB-0072

Reversed
No Disqualification

PROCEDURAL HISTORY: On November 18, 2022, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant was discharged for misconduct and disqualified from receiving unemployment insurance benefits effective October 16, 2022 (decision # 92941). Claimant filed a timely request for hearing. On December 19, 2022, ALJ Sachet-Rung conducted a hearing, and on December 22, 2022 issued Order No. 22-UI-210748, affirming decision # 92941. On January 10, 2023, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Laurel Hill Center, Inc. employed claimant as a supportive housing case manager from July 18, 2022 until October 21, 2022.

(2) The employer expected that their employees would finish working all scheduled shifts unless excused earlier by their supervisor or other “designated person,” and that they would accurately report hours worked on their timecards. Transcript at 38. Claimant was aware of these expectations by having reviewed them in an employee handbook when she began working for the employer.

(3) Claimant’s regular work schedule was 10:00 a.m. to 8:30 p.m., Wednesday through Saturday. Claimant’s shift lead, a care coordinator, worked the same schedule as claimant. Claimant believed the shift lead to be the “designated person” for purposes of seeking to be excused early under the employer’s attendance policy when claimant’s supervisor was not working. The employer did not consider the shift lead to be a “designated person.” Claimant’s supervisor worked customary business hours.

(4) The employer’s payroll cutoff was the fifteenth of each month. Employees recorded their hours worked by manually entering their start and end times for each day into computerized timecards. Claimant understood that if the fifteenth of a month fell on a weekend, employees were to enter their expected time worked for the fifteenth on the preceding Friday. In those instances, management would review and approve the timecards on the next business day after the fifteenth. Claimant mistakenly

believed that this review and approval took place *prior* to the fifteenth, and that timecards for the fifteenth could therefore not be changed after the preceding Friday.

(5) On October 12, 2022, claimant mentioned to her coworkers that she had been contemplating going to a family member's birthday party that evening but was hesitant to do so because of her estrangement from another relative who would be there. These coworkers encouraged claimant to leave work an hour early to attend the party. Claimant's supervisor had already left for the day. Claimant advised the shift lead, who did not object to her leaving early, and claimant left work an hour prior to the end of her shift to attend the party. Claimant accurately recorded her hours worked on the timecard for that day.

(6) On October 15, 2022, claimant mentioned to her coworkers that she had been contemplating going to a family member's funeral that afternoon, but was similarly hesitant to do so due to the estrangement from the other relative who would be there. These coworkers encouraged claimant to leave work to attend the funeral, which was scheduled for 1:00 p.m. Claimant's supervisor was not working because it was a Saturday. Claimant asked for and received permission to leave early from the shift lead, and left work at 12:30 p.m. Claimant did not return to work that day. She did not adjust the end time of her shift on the timecard, which she had filled out the day prior as 8:30 p.m., because she thought it was too late to do so since it was the day of the payroll cutoff.

(7) On October 17, 2022, the shift lead reported to claimant's supervisor that claimant had been leaving work early, including on October 12, 2022 and October 15, 2022.

(8) When she left work early on October 15, 2022, claimant intended to inform her supervisor of this absence when claimant next returned to work on October 19, 2022. Claimant knew she needed to correct the timecard to accurately reflect when she left work that day. Both claimant and her supervisor worked on October 19, 2022, but claimant failed to notify the supervisor of the timecard discrepancy that day because the workplace was unusually busy, so claimant planned to talk to her supervisor about it at a meeting that was already scheduled for the following day.

(9) On October 20, 2022, claimant's scheduled meeting with her supervisor was postponed by the supervisor to the following day. Though claimant and her supervisor both worked that day, claimant did not notify the supervisor of the timecard discrepancy and claimant still intended to discuss it at the rescheduled meeting the following day.

(10) On October 21, 2022, before the rescheduled meeting, the employer discharged claimant because they felt claimant left early on October 12, 2022 and October 15, 2022 without permission, and intentionally overstated the time worked for October 15, 2022 on her timecard.

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. 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 order under review concluded that claimant was discharged for misconduct because she willfully, or with at least wanton negligence, left work early on October 15, 2022 without permission and inaccurately reported her hours worked that day, and that this was not an isolated instance of poor judgment because it exceeded mere poor judgment. Order No. 22-UI-210748 at 4. The record does not support these conclusions.

The employer discharged claimant because they believed that she left work early without permission on two occasions and failed to accurately report the hours she worked on October 15, 2022. The employer reasonably expected that their employees would complete working all scheduled shifts unless excused earlier by their supervisor or other “designated person,” and that they would accurately report hours worked on their timecards. This policy was stated in the employee handbook which claimant received at the beginning of her employment. The employer considered claimant’s supervisor’s supervisor to be the only “designated person” referred to in the policy, though the policy did not explicitly state who a “designated person” was. Transcript at 53. Claimant’s supervisor testified that the shift lead did not have the authority to permit an employee to leave early and was not a “designated person.” Transcript at 53. The shift lead also testified that he did not have this authority. Transcript at 25. However, the shift lead

testified that claimant had often asked him to leave early, and his “usual response every single time” was, “[A]s long as [claimant’s supervisor] knows,” “just make sure you check with [claimant’s supervisor],” or “as long as you check in with [claimant’s supervisor].” Transcript at 28. The shift lead also admitted allowing all employees on the shift to leave early at his suggestion “numerous times,” but did not recall an instance where it was more than five minutes before the scheduled end of shift. Transcript at 31-32.

In contrast, claimant testified that she understood the shift lead to be the “designated person” from whom she should seek permission to leave early because her supervisor told her, “[I]f we ever needed anything, that’s who we go to[.]” Transcript at 38. Claimant further testified that she asked the shift lead for permission to leave early on October 12, 2022 and October 15, 2022, and that he granted it. Transcript at 29. She denied that the shift lead merely deferred to her supervisor, as the shift lead had testified. Transcript at 29.

The record shows claimant did not seek preapproval from her supervisor to attend the family functions because she remained ambivalent about attending them until persuaded by her coworkers to do so during the days of the events. Both parties’ accounts of whether the shift lead granted claimant permission to leave early on these two occasions and whether the shift lead had apparent authority to grant such permission were no more than equally balanced. Because the employer bears the burden of establishing misconduct by a preponderance of evidence, they have failed to show that claimant did not reasonably believe that the shift lead had the authority to permit her to leave work early, and that claimant did not obtain permission from him prior to leaving early on October 12, 2022, and October 15, 2022. To the extent claimant was incorrect in inferring that the shift lead was a “designated person” within the meaning of the employer’s attendance policy, claimant was no more than merely negligent because the statements of her supervisor and the shift lead reasonably led her to that inference. Accordingly, the employer has not shown that claimant committed misconduct by leaving early on those occasions.

Nonetheless, the record shows that claimant allowed her timecard for October 15, 2022 to overstate the hours she actually worked as a result of her leaving early that day. Claimant testified that she filled out her timecard for October 15, 2022 the day prior as a result of the payroll cutoff falling on a Saturday, and the timecard therefore reflected her working the full scheduled shift even though she did not complete it. Transcript at 40. Claimant believed she could not correct the timecard herself upon leaving early because she thought the timecards were approved in advance when the fifteenth of the month fell on a weekend. Transcript at 40-41. However, claimant’s supervisor testified that management did not approve timecards in that situation until the next business day following the weekend. Transcript at 16. Regardless of when the timecards were reviewed or approved, the record shows claimant knew, when she left work early on October 15, 2022, that her time worked would be misreported to the employer for that day and that she needed to correct it.

Claimant testified that she did not immediately notify her supervisor about the timecard discrepancy because she was prohibited from attempting to communicate with her supervisor outside of their respective work hours, and would have gotten “in trouble” if she had so much as left a written note for the supervisor to read on Monday morning. Transcript at 47-48. The supervisor denied that there was any reason for claimant to believe such a communication was prohibited. Transcript at 56. The supervisor’s testimony in this regard is entitled to greater weight, as claimant offered no logical explanation for why the employer would institute such a policy. Therefore, more likely than not, there

was nothing prohibiting claimant from reporting the timecard discrepancy to her supervisor in this manner before claimant left work on October 15, 2022. However, even if claimant sincerely believed she could not communicate with the supervisor from Saturday until Wednesday, when they were next scheduled to work together, claimant still delayed reporting the time card discrepancy beyond Wednesday and Thursday, during which both she and the supervisor were present at work. Claimant's explanations for these delays, that they were busy and that a meeting was cancelled, evinced claimant's lack of urgency in resolving the matter and demonstrated that claimant was indifferent to the consequences of her failure to immediately report the discrepancy. Claimant knew or should have known that her inaction was likely to result in claimant being overpaid, which was therefore a wantonly negligent disregard of the employer's interests and reasonable expectations and constitutes misconduct.

Nonetheless, an isolated instance of poor judgment does not constitute misconduct under the law. Conduct is "isolated" if it is a single or infrequent occurrence. OAR 471-030-0038(1)(d)(A). Because claimant's actions in leaving early on October 12 and 15, 2022 amounted to no more than mere negligence, they are not considered past instances of willful or wantonly negligent behavior and are not misconduct. As the employer has not established any other prior instances of willful or wantonly negligent behavior, the record shows that claimant's failure to correct the October 15, 2022 timecard was an isolated act.

However, an isolated instance of poor judgment that exceeds mere poor judgment cannot be excused. OAR 471-030-0038(1)(d)(D). Acts that violate the law, that are tantamount to unlawful conduct, and that create irreparable breaches of trust in the employment relationship or otherwise make a continued employment relationship impossible exceed mere poor judgment. Here, claimant's actions did not exceed mere poor judgment. Claimant's testimony demonstrated that she intended to notify the employer of the timecard discrepancy on October 21, 2022 at a scheduled meeting with her supervisor, but was prevented from doing so because the employer discharged her prior to that meeting. Transcript at 42. The employer did not rebut, by a preponderance of evidence, claimant's contention that the timecard originally went uncorrected due to claimant's misunderstanding of when timecards could be modified, and that she ultimately intended to report the issue to her supervisor to avoid being overpaid. Accordingly, claimant's actions constituted an isolated instance of poor judgment that did not exceed mere poor judgment and were not misconduct.

For these reasons, claimant was discharged, but not for misconduct, and she is not disqualified from receiving unemployment insurance benefits based on the work separation.

DECISION: Order No. 22-UI-210748 is set aside, as outlined above.

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

DATE of Service: March 8, 2023

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.

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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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.