

EMPLOYMENT APPEALS BOARD DECISION
2023-EAB-0595

Late Request to Reopen Allowed
Reversed
No Disqualification

PROCEDURAL HISTORY: On October 21, 2022, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant was discharged for misconduct and therefore was disqualified from receiving unemployment insurance benefits effective October 2, 2022 (decision # 151231). Claimant filed a timely request for hearing. On December 5, 2022, ALJ Clemons conducted a hearing at which the employer failed to appear, and on December 9, 2022 issued Order No. 22-UI-209437, reversing decision # 151231 by concluding that claimant was discharged, but not for misconduct, and was therefore not disqualified from receiving benefits based on the work separation. On December 29, 2022, Order No. 22-UI-209437 became final without the employer having filed a request to reopen the December 5, 2022 hearing or an application for review with the Employment Appeals Board (EAB).

On March 6, 2023, the employer filed a late request to reopen the hearing. On May 12, 2023, ALJ Clemons conducted a hearing, and on May 22, 2023 issued Order No. 23-UI-225600, allowing the employer's late request to reopen the December 5, 2022 hearing, canceling Order No. 22-UI-209437, and affirming decision # 151231. On May 24, 2023, claimant filed an application for review of Order No. 23-UI-225600 with the Employment Appeals Board (EAB).

Based on a *de novo* review of the entire record in this case, and pursuant to ORS 657.275(2), the portion of the order under review allowing the employer's late request to reopen the December 5, 2022 hearing is **adopted**. The remainder of this decision addresses claimant's separation from work.

FINDINGS OF FACT: (1) Ben the Builder, Incorporated employed claimant as a general construction worker from June 1, 2021 until October 6, 2022. Claimant's duties frequently included site cleanup and waste removal from the employer's construction sites. Claimant drove a company-owned dump truck for these purposes.

(2) Claimant and his coworkers typically worked on multiple jobsites over the course of a day or week. In order to bill labor costs to the correct customer, the employer utilized a timekeeping system which

allowed employees to enter their time and assign their various work hours to the customers or jobs they worked on during a given shift. The employer generally permitted employees to make corrections or adjustments to their timesheets until either the end of a workweek or the end of the employer's pay period. Claimant typically made such adjustments to his timecard, as necessary, at the end of his workdays.

(3) The employer did not generally allow claimant to decide, on his own, what tasks he would perform or in what order. If, in the course of a shift, claimant felt there was an unassigned task that would be useful for him to perform, he would typically seek verbal approval from a supervisor before taking on the additional task.

(4) Throughout claimant's employment, the employer felt that claimant did not always properly follow instructions regarding work tasks, and that claimant needed closer supervision as a result. In December 2021, the employer "reminded [claimant] that he is supposed to follow instructions given by his supervisors and not make independent decisions about what needs to be done." Exhibit 6 at 5.

(5) On October 6, 2022, claimant attended the employer's daily morning meeting, where he was assigned his tasks for the day. One of those tasks required claimant to pick up a load of construction waste from a particular jobsite, bring it to the dump outside of town, and then proceed to the next jobsite on the list. However, after claimant picked up the load from the jobsite as assigned, he decided to pick up an additional load of waste from another jobsite, which caused about a 20-minute delay in his schedule due to the detour. That jobsite was a house owned by his sister, who was also the employer's customer. However, claimant was not assigned to pick up waste from his sister's house that day. After he picked up the load of waste from his sister's home, he proceeded to empty his truck at the dump as scheduled.

(6) Claimant did not seek the employer's approval before picking up the load of waste from his sister's house because he felt that doing so was "negligible," and that he therefore did not need to seek approval. May 12, 2023 Transcript at 46. Claimant also felt that picking up the additional load would save the employer money, as the dump charged by the truckload rather than weight. Claimant was mistaken in this belief, however, as he did not factor in the additional labor costs that the employer incurred.

(7) When claimant set out to his sister's house, claimant's timecard was charging time to the previous customer's account. Claimant did not change the timecard to bill his sister's customer account when he picked up the additional load because he typically made such adjustments to his timecard at the end of the workday.

(8) Later that day, claimant returned to the employer's office to perform additional tasks and to speak to the owner about an unrelated matter. The owner, having learned about claimant's deviation from his assigned tasks and his failure to bill that time to the correct account, discharged claimant for those reasons. The employer discharged claimant in the middle of the day, prior to the end of claimant's shift.

CONCLUSIONS AND REASONS: Claimant was discharged, 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).

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 performed an additional task not assigned to him on his last day of work, and because he failed to accurately bill that time to the appropriate customer. The order under review concluded that claimant’s performance of the additional, unassigned task constituted misconduct because claimant’s conduct “was, at least, wantonly negligent when he failed to follow the employer’s specific instructions regarding his job duties.” Order No. 23-UI-225600 at 5. The order under review further concluded that claimant’s conduct was not an isolated instance of poor judgment “because he had failed to follow the employer’s instructions on a previous occasion and was warned for it.” Order No. 23-UI-225600 at 5. However, the record shows that claimant’s conduct was, at worst, an isolated instance of poor judgment.

As a preliminary matter, one of the employer's witnesses explicitly testified that the employer discharged claimant both due to his decision to detour to his sister's house during his shift on October 6, 2022 *and* because he failed to properly bill his time for that detour. May 12, 2023 Transcript at 25. To the extent that the employer discharged claimant for the latter reason, the employer has not met their burden to show that this constituted misconduct. The record shows that the employer generally permitted employees to adjust their timecards at the end of the week or pay period, but the record does not show that claimant was discharged at either of these points. Furthermore, claimant generally adjusted his timecards at the end of the workday, but was discharged in the middle of the day before he could do so. Thus, claimant's failure, as of the middle of the day on October 6, 2022, to adjust his timecard to reflect the time that should have been billed to his sister's customer account was not a violation of the employer's standards of behavior, and was not misconduct.

To the extent that the employer discharged claimant due to his decision to pick up the extra load of waste from his sister's house, the record does support the conclusion that this constituted a willful or wantonly negligent violation of the employer's standards of behavior. Although claimant testified that he believed that his decision to detour was "negligible," such that he would not be required to seek the employer's approval to do so, claimant offered no reasonable basis for this belief. Particularly in light of the fact that he typically sought permission before deviating from his list of assigned tasks, more likely than not claimant had reason to know that the employer would not approve of his decision to assign himself an additional task without permission. However, the employer has not met their burden to show that claimant's conduct here was part of a pattern of other willful or wantonly negligent behavior such that claimant's conduct did not constitute an isolated instance of poor judgment.

At hearing, one of the employer's witnesses suggested that claimant had previously been warned about behavior similar to the conduct which led to his discharge, testifying "that there were ongoing multitudes of... issues from the very beginning[.]" May 12, 2023 Transcript at 25. However, the witness's account only offered a vague description of what claimant was alleged to have done, and what the employer told claimant in response. *See* May 12, 2023 Transcript at 25, 26. Similarly, in documentary evidence submitted after the hearing, the employer asserted that claimant had been warned about following instructions in December 2021. The document stated that "...it's not acceptable to go home in the middle of the day without informing anyone, and that it's not up to [claimant] to make decisions regarding what should be done at a jobsite when he has been given specific instructions." Exhibit 6 at 5. While these statements suggest that claimant may have violated the employer's expectations in the past, approximately ten months before the final incident, there is not enough evidence in the record to show that claimant's conduct constituted a violation of the employer's expectations that was willful or wantonly negligent.

Because the employer has not met their burden to show that claimant's conduct on October 6, 2022 was part of a pattern of willful or wantonly negligent behavior, claimant's conduct was isolated. Further, the record does not show that claimant's conduct violated the law, was tantamount to unlawful conduct, created an irreparable breach of trust, or otherwise made a continuing employment relationship impossible. Therefore, claimant's decision to pick up the extra load of construction waste for his sister (who was a customer of the employer) was an isolated instance of poor judgment, which is not misconduct.

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

DECISION: Order No. 23-UI-225600 is set aside, as outlined above.

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

DATE of Service: June 29, 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

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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 دستورالعمل موجود در پایان آن، از دادگاه تجدید نظر اورگان درخواست تجدید نظر کنید.

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