EO: 200
BYE: 202442

State of Oregon
Employment Appeals Board
875 Union St. N.E.
Salem, OR 97311

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DS 005.00

EMPLOYMENT APPEALS BOARD DECISION
2024-EAB-0264

Affirmed
No Disqualification

PROCEDURAL HISTORY: On January 9, 2024, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant was discharged, but not for misconduct, and was not disqualified from receiving unemployment insurance benefits based on the work separation (decision # 122741). The employer filed a timely request for hearing. On February 27, 2024, ALJ Strauch conducted a hearing, and on March 4, 2024 issued Order No. 24-UI-249427, affirming decision # 122741. On March 14, 2024, the employer filed an application for review with the Employment Appeals Board (EAB).

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

FINDINGS OF FACT: (1) Travel Centers of America employed claimant as a truck service advisor from March 2023 until June 20, 2023.

(2) The employer expected that their employees would report for work on time and work until the end of their shift unless excused, and that they would notify their manager prior to their shift if they would be absent, within a timeframe established by their manager. Claimant understood these expectations.

(3) On May 8, 2023, claimant was scheduled to work until 11:00 p.m. The other employees working that shift, all service technicians, left work between 10:15 and 10:30 p.m., and encouraged claimant to do the same. Claimant closed the business prior to 10:30 p.m. and left work. Claimant believed that following the technicians' direction to leave early was appropriate because they had seniority over claimant, and because there was "no point" in the business staying open without technicians to service trucks. Transcript at 36. Following this incident, the employer warned claimant not to close the business early or leave work early in the future.

(4) On May 13, 2023, claimant was scheduled to work, but approximately 30 minutes prior to the start of his shift he notified his manager that he would be absent due to illness. The manager had not previously notified claimant that he was expected to report absences at least four hours in advance of the shift. The employer warned claimant against future violations of this expectation.

(5) In early June 2023, claimant asked his manager if he could change some of his scheduled workdays so that he could play in baseball games that conflicted with his work schedule. The manager told claimant that he could change shifts with another employee holding the same job, but only if that employee agreed. Claimant inquired of such an employee, B, but that employee declined to switch shifts and the manager did not approve claimant's request or reschedule his shifts. Claimant did not arrange for another employee to switch shifts. Claimant understood the manager to have said that "if I [claimant] can't get nobody to cover it, then I couldn't go," which claimant interpreted as authorizing him to attend baseball games mid-shift if he could persuade another employee to perform claimant's work while he was gone. Transcript at 30.

(6) On June 12, 2023, claimant asked an employee working that day as a mechanic to cover claimant's duties of working at the counter while claimant went to play in a baseball game, and that employee agreed. Claimant clocked out for his 30-minute lunch break, but was absent for two and a half hours playing baseball before returning to work. After claimant had been gone an hour, an employee called claimant's manager to report that the counter was unattended because claimant failed to return from lunch. The manager arranged for another employee to cover claimant's counter duties until claimant returned. Following this incident, the employer warned claimant that he had violated their expectations by leaving work in the middle of a shift without the manager's permission.

(7) On June 14, 2023, claimant asked his manager if he could be absent from work on Sunday and Monday, June 18 and 19, 2023. On June 15, 2023, the manager told claimant that he could have Sunday off, but that another employee needed to agree to cover claimant's Monday shift in order to approve claimant having that day off. On Saturday, June 16, 2023, the manager called claimant and told him that he was unable to secure coverage for Monday and that claimant would have to work as scheduled. Claimant replied, "I'll be there on Monday." Transcript at 29. At the time of the call, claimant knew he would have to arrange for the care of his children on Monday while he was at work. He thereafter attempted to secure childcare for that shift by contacting friends with children of their own, but none were available, and the children's mother was out of town.

(8) On Monday, June 19, 2023, claimant was scheduled to work beginning at 2:00 p.m. Because claimant did not have childcare, he did not report for work as scheduled. At approximately 3:17 p.m., claimant's manager texted claimant, "Are you coming in today?" Transcript at 32. Prior to this, claimant and the manager had not communicated since claimant told the manager on Saturday that he would "be there on Monday." On Monday evening, claimant's children's mother became available to care for the children, and claimant arrived at work at 7:19 p.m.

(9) On June 20, 2023, upon claimant's arrival at work, the employer discharged claimant for his tardiness the previous day and for his failure to notify the employer in advance of the shift that he would be tardy or absent.

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 was late for work on June 19, 2023, and failed to notify the employer that he would be late. The employer expected that their employees would not be late for work, would work until the end of their shift, and that they would notify their manager four hours in advance if they would be late or absent from work. Claimant was aware of these expectations, except for the four-hour time frame for reporting tardiness or absences, through receiving a copy of the employer's attendance policy at hire.

Claimant did not dispute that he was several hours late for his shift on Monday, June 19, 2023. However, claimant was late because he had no alternative childcare despite his efforts over the previous two days to secure such care. To the extent the employer's attendance policy did not allow for an instance of tardiness under these circumstances, the employer's expectation in this regard was not one which an employer necessarily has the right to expect of an employee. A conscious decision not to comply with an unreasonable employer policy is not misconduct. OAR 471-030-0038(1)(d)(C). Therefore, claimant's late arrival at work because he had to care for his children was not misconduct. Nonetheless, the employer's expectation that claimant would notify them that he was going to be late for his shift, when claimant had the foreknowledge and ability to do so, was reasonable. The record shows that claimant violated that expectation with wanton negligence.

Claimant testified that he had no record of texting his manager, which was their typical means of communication, between telling the manager on Saturday that he would be at work on Monday, and the manager's 3:17 p.m. text on Monday asking if claimant was "coming in today." Transcript at 32-33. The manager testified that he learned of claimant's absence Monday when the employee claimant was supposed to relieve at 2:00 p.m. called the manager to report that claimant had not reported to work. Transcript at 20-21. Claimant could not recall whether he called the manager, either on Sunday or Monday prior to the scheduled start of his shift. Transcript at 33. In contrast, the manager's testimony about how he learned of claimant's absence, combined with the timing and phrasing of the manager's text, show that, more likely than not, the two had not spoken on the phone or otherwise discussed the possibility of claimant being late or absent from work prior to the scheduled start of his shift. The record does not reveal why claimant failed to notify his manager that he would be late or absent that day, and given that claimant anticipated difficulty finding childcare during this shift as early as Saturday, indifference to the consequences of his failure to notify the employer can be inferred. Claimant knew or should have known his failure to notify the employer that he would be late or absent would violate the employer's policy based on his having received a copy of that policy and having been warned the previous month for a similar violation. Accordingly, claimant was wantonly negligent in his failure to notify the employer. However, for the reasons explained below, this was an isolated instance of poor judgment and therefore not misconduct.

Claimant knew that he was going to be late for or absent from work on Monday prior to the start of his shift, and therefore his failure to notify the employer at that time was, more likely than not, a conscious decision that involved judgment. Because this decision was made with indifference to the consequences and with knowledge that it would likely violate the employer's attendance policy, it involved poor judgment. Further, the decision did not exceed poor judgment by, for example, making a continuing employment relationship impossible. Therefore, whether this was an isolated instance of poor judgment turns on whether the employer has shown that this was not a single or infrequent occurrence of willful or wantonly negligent behavior.

The employer presented evidence regarding three instances in May and June 2023 in which they allege claimant violated their attendance policies. First, on May 8, 2023, claimant was scheduled to work until 11:00 p.m. but closed the business and left between 10:15 and 10:30 p.m., according to his testimony. Transcript at 36. Claimant explained that he did so because the technicians who service the customers' vehicles, all of whom had worked for the employer "for years and years" and were also scheduled to work until 11:00 p.m., told claimant, "'[J]ust go ahead and close up,' because they were leaving." Transcript at 36-37. Claimant followed this direction based on the seniority of these employees and their

apparent authority, and claimant's belief that there was "no point" in keeping the business open without any technicians to service vehicles. Transcript at 36. To the extent the employees' directions to claimant were contrary to the employer's written policies, claimant's decision to rely upon the employees' directions evinced only simple negligence. The employer has not shown by a preponderance of evidence that claimant knew or should have known that he was expected to disregard the direction of the more senior employees, and leave the business open until 11:00 p.m. despite the business' inability to service vehicles after the technicians departed. Therefore, the employer has not shown willful or wantonly negligent behavior on this occasion.

Second, on May 13, 2023, claimant notified his manager 30 minutes prior to the scheduled start of his shift that he would be absent due to illness. The employer's written attendance policy states, "A Team Member who will be absent from work for any reason must notify his or her Manager within the time parameters established by his or her Manager." Exhibit 2 at 1. The manager's testimony suggested he believed that claimant had been informed that the "parameters" he established required four hours' notice. *See* Transcript at 19. In contrast, claimant testified he had not been informed of any specific time prior to the start of a shift by which he had to notify his manager that he would be late or absent. Transcript at 34-35. As the evidence in this regard is no more than equally balanced, the employer has failed to meet their burden of showing that, more likely than not, claimant knew or should have known that notifying the manager of his absence on this occasion only 30 minutes prior to the shift would violate the attendance policy. Therefore, the employer has not shown willful or wantonly negligent behavior on this occasion.

Third, on June 12, 2023, claimant clocked out for an authorized 30-minute lunch break, but then played baseball for two hours and thirty minutes before returning to work. Prior to June 12, 2023, claimant sought permission from his manager to switch the days of his shifts so that he could play in this game and other baseball games. The manager replied that he would approve such a request if another employee agreed to the switch. The manager testified that claimant then asked B to switch shifts, but B declined, and that the manager therefore denied claimant's request. Transcript at 13-14. The manager further testified that he received a call on June 12, 2023 from an employee reporting that claimant "left and didn't come back" and that the counter where claimant was supposed to be working was unattended. Transcript at 14-15. The manager had to arrange for a technician to attend to the counter until claimant returned.

Claimant did not dispute that he had asked for schedule changes to participate in baseball games, but his testimony indicated that his understanding of the relevant conversations was that claimant had permission to leave during a shift and return to work after the game as long as another employee would "cover it," and not that he was required to find another employee willing to swap an entire shift. Transcript at 30. Claimant also testified that he only left to play baseball that day after a mechanic, who also performed the same job as claimant at times, said that "he would cover me." Transcript at 30. Given these differing accounts, it is possible that claimant simply misunderstood that his manger conditioned his permission to attend the baseball game on securing coverage for the *entire* shift by another employee who would otherwise not be working that day. Further, it is also possible that the employee who told claimant that he would cover for him in his absence failed to disclose this to his coworkers or the manager, leading to further misunderstanding regarding claimant's whereabouts. Given these possibilities, the evidence is no more than equally balanced as to whether claimant acted with indifference to the consequences of his actions, and as to whether he knew or should have known that

the conditional permission extended by the manager to attend the baseball game did not apply to the circumstances under which claimant left work that day. Accordingly, the employer has not shown by a preponderance of evidence that claimant acted willfully or with wanton negligence on this occasion.

For these reasons, the three prior incidents cited by the employer, while evincing ordinary negligence in some respects, were not proven to constitute willful or *wantonly* negligent behavior. Thus, claimant's failure to notify the employer in advance of his shift that he would be late or absent on June 19, 2023 was isolated, and therefore an isolated instance of poor judgment, which is not misconduct. As such, claimant was discharged, but not for misconduct, and is not disqualified from receiving unemployment insurance benefits based on the work separation.

DECISION: Order No. 24-UI-249427 is affirmed.

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

DATE of Service: April 22, 2024

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 – 本判决会影响您的失业救济金。 如果您不明白本判决， 请立即联系就业上诉委员会。 如果您不同意此判决，您可以按照该判决结尾所写的说明，向俄勒冈州上诉法院提出司法复审申请。

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

Employment Appeals Board - 875 Union Street NE | Salem, OR 97311
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