EO: Intrastate
BYE: 21-Jun-2025

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

224
DS 005.00

EMPLOYMENT APPEALS BOARD DECISION
2024-EAB-0688

Reversed
No Disqualification

PROCEDURAL HISTORY: On July 19, 2024, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant was discharged by the employer, but not for misconduct, and was not disqualified from receiving benefits based on the work separation (decision # L0005247337). The employer filed a timely request for hearing. On September 12, 2024, ALJ Goodrich conducted a hearing, and on September 16, 2024 issued Order No. 24-UI-266183, reversing decision # L0005247337 by concluding that claimant was discharged for misconduct and was disqualified from receiving benefits effective June 9, 2024. On September 29, 2024, claimant filed an application for review with the Employment Appeals Board (EAB).

WRITTEN ARGUMENT: Claimant's argument contained information that was not part of the hearing record, and did not show that factors or circumstances beyond claimant's reasonable control prevented him from offering the information during the hearing. Under ORS 657.275(2) and OAR 471-041-0090 (May 13, 2019), EAB considered only information received into evidence at the hearing when reaching this decision.

FINDINGS OF FACT: (1) System One Holdings, LLC employed claimant until June 14, 2024 through their staffing agency on a work assignment supporting their client, a fiber-optic telecommunications company. The supervisor overseeing claimant's day-to-day work was an employee of the client company, while several of the employer's employees supervised claimant in terms of handling personnel matters and had the authority to terminate claimant's assignment.

(2) The employer expected that their employees would be courteous in their communications with others. Claimant understood this expectation.

(3) On November 2, 2023, one of claimant's supervisors, W., had a conversation with claimant in which claimant was warned that his communications with W. "[had] been unprofessional and he need[ed] to ensure that he is not unprofessional with others or [W.]." Transcript at 27. In the interaction with W. that

led to this warning, claimant "was venting a little bit of frustration" but had not yelled or acted in a way that claimant believed would be considered discourteous. Transcript at 41-42.

(4) On or shortly before December 15, 2023, the client informed claimant that he would have to work in-office rather than remotely on Fridays. On December 15, 2023, one of the employer's employees reported to the employer that claimant had called her, mistakenly believing she was responsible for the new in-office work requirement, and "was yelling [and] expressing his frustration about the requirement[.]" Transcript at 19. The employer contacted claimant's day-to-day supervisor at the client company to relay claimant's complaint about the policy change, and the day-to-day supervisor reported that she "was tired of [claimant's] behavior," which she said included "refus[ing] to do [assigned] work" and "visibly upset[ting]" an engineer that reported claimant failed to do work by yelling at him. Transcript at 23.

(5) Claimant had not refused to do his assigned work, but was unable to do the work prompting the engineer's complaint for reasons beyond claimant's control. Claimant did not yell at the engineer, call him names, or speak to him in a way that claimant believed was discourteous. Claimant did not specifically recall telephoning anyone on December 15, 2023 about the in-office work policy change, but did remember a conversation on that subject taking place and believed that he would not have "raise[d] [his] voice and yell[ed] at somebody and demean[ed] them." Transcript at 44.

(6) On December 19, 2023, a supervisor contacted claimant about the complaint regarding the alleged December 15, 2023 telephone call, and the complaints relayed by claimant's day-to-day supervisor shortly thereafter. The supervisor warned claimant that "[h]e need[ed] to communicate professionally." Transcript at 25. Later that day, claimant called that supervisor back to further refute the contention that he had refused to complete assigned work, and to apologize "if [he] had hurt somebody's feelings in some way." Transcript at 50-51.

(7) The employer's overtime policy required that the client provide an approval form by Sunday of each week to an employee in order for that employee to be paid for overtime worked during the preceding week. During the week of June 9 through 15, 2024, claimant's day-to-day supervisor approved him working overtime during the week. That supervisor was scheduled to go on vacation beginning the afternoon of June 13, 2024 and continuing through Sunday, June 16, 2024. On June 12, 2024, claimant sent a message to the supervisor reminding her of the need to provide him with the overtime approval form before leaving on vacation.

(8) By the early evening of June 13, 2024, claimant believed that his day-to-day supervisor had begun her vacation without having sent him the overtime approval form. At 6:12 p.m., claimant texted his day-to-day supervisor, "Thanks for getting that email out to us fielders today about OT like you promised. Shows our worth to you and the company. Have a wonderful vacation." Transcript at 11. Claimant intended the text to be sarcastic. The supervisor replied that she was still working and still sending the emails out with the approval forms. The supervisor then notified the employer that she desired to end claimant's assignment with immediate effect due to the sarcastic text. The supervisor had reported to the employer on "multiple" occasions, in addition to the occasion leading to the December 19, 2023 warning, that "there were concerns about [claimant's] unprofessional communication with the client or other employees." Transcript at 16-17.

(9) In the early morning of June 14, 2024, prior to the start of claimant's scheduled shift, the employer contacted claimant and advised that they were "discharging [him]. . . because of the text message." Transcript at 35-36. Claimant did not perform work for the client company that day or thereafter. A "couple days" later, claimant spoke with the staffing agency supervisor who had informed him of the work separation, who stated that he would try to get claimant an assignment with another of the employer's clients. Transcript at 57.

CONCLUSIONS AND REASONS: Claimant was discharged, but not for misconduct.

Work separation. Per OAR 471-030-0038(1)(a) (September 22, 2020), "In the case of individuals working for temporary agencies [or] employee leasing companies. . . the employment relationship shall be deemed severed at the time that a work assignment ends." Further, OAR 471-030-0038(2)(b) provides that if an 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.

The employer was a staffing agency, which the rule refers to as an employee leasing company, and claimant's employment with them consisted of an assignment with one of their client companies. Therefore, while the record suggests that the parties may not have considered their employment relationship severed and there may have been work for claimant after June 14, 2024 with another client, claimant was nonetheless discharged on June 14, 2024 by virtue of the employer ending his work assignment for the client on that day.

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) (September 22, 2020). 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.
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> (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 for sending a discourteous text message to his day-to-day supervisor on June 13, 2024. The employer expected that their employees would communicate with others courteously, and claimant was aware of this expectation. The order under review concluded that the text message was a wantonly negligent violation of the employer's communication policy. Order No. 24-UI-266183 at 5. The record supports this conclusion. However, the order under review further concluded that issuance of the November 2, 2023 and December 19, 2023 warnings for similar alleged conduct established that the June 13, 2024 incident could not be excused as an isolated instance of poor judgment. Order No. 24-UI-266183 at 6. The record does not support that the conduct leading to those warnings constituted willful or wantonly negligent violations of the employer's policies.

The employer's witness testified that on June 13, 2024, claimant sent a text message to his day-to-day supervisor that stated, "Thanks for getting that email out to us fielders today about OT like you promised. Shows our worth to you and the company. Have a wonderful vacation." Transcript at 11. Claimant did not dispute the content of the text message as read into the record by the employer. Transcript at 53. Claimant testified that he sent the message believing that his day-to-day supervisor had gone on vacation having neglected to send the overtime approval form, and that he sent the text hoping that she would see it and have the ability to send the form by the Sunday deadline despite being on vacation. Transcript at 52-53. Claimant denied that he was "upset or angry" when he sent the text, though he admitted that he "intended to be sarcastic" in sending it and understood why his supervisor might view it as such. Transcript at 51, 53. Claimant further testified that he did not think that what he wrote was "inappropriate." Transcript at 53.

Claimant knew or should have known that his use of sarcasm in the text message to express displeasure with his supervisor probably violated the employer's prohibition against discourteous communications. Claimant had been warned on November 2, 2023 and December 19, 2023 that other employees, including his day-to-day supervisor, took issue with the tone of his communications with them and others, even though claimant had not believed his communications to be discourteous. Under these circumstances, claimant's failure to consider the effect on the recipient of using sarcasm as he did in the text message demonstrated claimant's indifference to the consequences of his actions. Therefore, the employer has shown that claimant violated their communication policy with wanton negligence by sending the text.

However, this wantonly negligent violation of the employer's policy is not misconduct if excused as an isolated instance of poor judgment. Claimant's decision to send the text message involved judgment, and his decision to use sarcasm to express displeasure with his supervisor evinced that this was poor judgment. Further, as the employer was willing to consider claimant for future assignments with other clients even after ending this assignment due to his conduct, claimant's actions in sending the text message did not exceed mere poor judgment because they were not unlawful, did not involve a breach of trust, and did not make a continuing employment relationship impossible. Therefore, whether claimant's actions in the message can be excused as an isolated instance of poor judgment turns on whether this was a single or infrequent occurrence rather than a repeated act or pattern of other willful or wantonly negligent behavior.

The employer asserted that claimant received warnings on November 2, 2023 and December 19, 2023 about being discourteous after having received complaints from people with whom claimant communicated. The employer's sole witness at hearing did not testify that she personally witnessed claimant communicate in a discourteous manner or otherwise violate the employer's policies. Instead, the employer's witness testified that she reviewed a note from W. that stated that with regard to the November 2, 2023 warning, W. issued it because "at times [claimant's] communication to [W.] has been unprofessional," and the witnesss further stated that she "[didn't] have additional details on exactly what [W. was] referring to." Transcript at 27. With regard to the December 19, 2023 warning, the employer's witness testified that it was precipitated by the witness receiving a complaint from an employee that claimant had been discourteous to that employee in a December 15, 2023 telephone call to complain about a change to the in-person work policy. Transcript at 21-23. Another supervisor then contacted claimant's day-to-day supervisor to relay claimant's complaint about the policy and made notes of that conversation. The employer's witness testified that per the other supervisor's notes, claimant's day-to-day supervisor complained during the conversation that claimant had refused to perform work on a specific occasion and that an engineer had complained about the refusal to perform work, causing claimant to yell at the engineer and making him visibly upset. Transcript at 23. The December 19, 2023 warning was issued in response to this accumulation of complaints.

Claimant gave a contrasting account regarding the warnings and the events preceding them. Claimant testified regarding the November 2, 2023 telephone call with W. that he "disagree[d] somewhat" with the employer's testimony, specifically asserting that he had only been "venting a little bit of frustration," and had not yelled at W. during the call. Transcript at 41-42. Nonetheless, claimant did not rebut that the warning had been issued. Regarding the December 15, 2023 call in which claimant complained about the in-person work policy change, claimant testified, "I didn't disagree that we had a conversation about working Fridays at the office, but I wouldn't raise my voice and yell at somebody and demean them." Transcript at 44. Claimant further denied refusing to complete assigned work, yelling at the engineer who reported that he had refused to complete work, and calling the engineer names. Transcript at 46. Claimant admitted receiving a warning regarding these incidents on December 19, 2023 and having offered an apology later that day "if [he] had hurt somebody's feelings in some way." Transcript at 50-51.

To the extent claimant's first-hand account of the warnings and what precipitated them conflict with the employer's hearsay accounts, claimant's account is entitled to greater weight, and the facts have been found accordingly. Therefore, the employer has not shown by a preponderance of the evidence that claimant willfully or with wanton negligence violated their reasonable expectations on prior occasions

despite issuance of the November 2, 2023 and December 19, 2023 warnings. That claimant was warned on these two occasions not to violate the communications policy he ultimately violated during the final incident on June 13, 2024 is insufficient to establish that, more likely than not, that the alleged discourteous conduct underlying those warnings occurred. Accordingly, claimant's sending of the text message on June 13, 2024, though a wantonly negligent violation, was an isolated instance of poor judgment and not misconduct.

For these reasons, claimant was discharged, but not for misconduct, and is not disqualified from receiving benefits as a result of the work separation.

DECISION: Order No. 24-UI-266183 is set aside, as outlined above.

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

DATE of Service: October 22, 2024

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 ໄດ້ ໂດຍປະຕິບັດຕາມຄຳແນະນຳທີ່ບອກໄວ້ຢູ່ຕອນທ້າຍຂອງຄຳຕັດສິນນີ້.

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.

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