EO: Intrastate
BYE: 06-Dec-2025

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

713
DS 005.00

EMPLOYMENT APPEALS BOARD DECISION
2025-EAB-0094

Affirmed
Disqualification

PROCEDURAL HISTORY: On January 2, 2025, 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 December 8, 2024, through December 6, 2025 (decision # L0008048556). Claimant filed a timely request for hearing. On February 11, 2025, ALJ Murray conducted a hearing, and on February 12, 2025, issued Order No. 25-UI-282923, modifying decision # L0008048556 by concluding that claimant was discharged for misconduct and therefore disqualified from receiving benefits effective November 17, 2024. On February 14, 2025, 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. EAB considered any parts of claimant's argument that were based on the hearing record.

FINDINGS OF FACT: (1) Northwest Pool & Spa, LLC employed claimant as a general laborer from approximately April 2023 through November 22, 2024. Claimant had previously worked for the employer from September 16, 2022, through approximately November 2022, left to work for another company, and then returned to work for the employer again beginning in approximately April 2023.

(2) The employer expected that employees would work eight hours every shift unless directed otherwise or granted permission to leave early. Claimant understood that the employer did not permit employees to leave a shift early without notice. Further, the employer had discussed with claimant "over a few years of working that you can't just come and go as you please[.]" Transcript at 8. The employer considered three violations of these attendance expectations to be grounds for discharge.

(3) On or around December 1, 2023, claimant left for a vacation to Las Vegas, Nevada. Claimant originally intended to be back home before he was required to return to work the following week.

However, claimant "didn't make it back until Tuesday," and as such "missed a day or something of work without notifying" the employer. Transcript at 17. Claimant chose not to notify the employer of his absence because the employer "probably would have said no, and [claimant] already had everything all planned for the vacation[.]" Transcript at 17.

(4) On October 22, 2024, claimant left work early for a court date. Claimant had notified the employer in advance that he needed to leave early. However, claimant "left a little bit earlier than [he] had communicated to leave." Transcript at 22.

(5) On November 22, 2024, claimant was working at a job site with another employee who was frequently argumentative. Claimant was drawn into an argument with the other employee, and claimant felt that it would be unprofessional to carry on an argument at a job site in front of a customer. As such, and as claimant already had other personal errands to complete, he decided to remove himself from the situation and leave the job site, approximately 90 minutes prior to when he was scheduled to finish his shift. Claimant did not ask the employer for permission before leaving the site.

(6) On November 22, 2024, shortly after claimant left, the employer learned that claimant had left the job site early. The employer then reviewed claimant's attendance records, determined that claimant had accrued three violations, and discharged claimant that day because of the attendance violations.

CONCLUSIONS AND REASONS: Claimant was discharged 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, good faith errors, unavoidable accidents, absences due to illness or other physical or mental disabilities, or mere inefficiency resulting from lack of job skills or experience 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 violated their attendance expectations on three occasions. The last of these occasions was on claimant's last day of work, on November 22, 2024. As this was the final incident which led the employer to discharge claimant, it was the proximate cause of the employer's decision to discharge him and therefore the proper focus of the misconduct analysis. *See e.g. Appeals Board Decision* 12-AB-0434, March 16, 2012 (discharge analysis focuses on proximate cause of the discharge, which is generally the last incident of misconduct before the discharge); *Appeals Board Decision* 09-AB-1767, June 29, 2009 (discharge analysis focuses on proximate cause of discharge, which is the incident without which the discharge would not have occurred when it did). *See also* June 27, 2005, Letter to the Employment Appeals Board from Tom Byerley, Assistant Director, Unemployment Insurance Division (the last occurrence of an attendance policy violation is considered the reason for the discharge).

The record contains somewhat conflicting information regarding what the employer's exact attendance expectations were but nevertheless, the record shows that claimant understood that the employer did not permit employees to leave a shift early without notice or miss work without notice. This expectation is also understood as a matter of common sense. At hearing, claimant testified, "I was aware that just leaving without telling them is not showing up for work type thing." Transcript at 20. Claimant also testified that he did not inform the employer that he would be returning from his December 2023 vacation late because he believed that the employer would not have approved the absence if claimant had done so. Transcript at 17. This supports the inference that claimant understood that the employer did not permit employees to take time off of work without notice or preapproval. Thus, the record shows, at minimum, that the employer expected that employees request permission before leaving work before the end of a scheduled shift or taking a day off of work, and that claimant understood these expectations.

The employer alleged that claimant violated these expectations on three occasions: when he returned from vacation late, on or around December 5, 2023; when he left work early for a court date on October 22, 2024; and when he left work early due to an argument with a coworker on November 22, 2024. The record shows that two of these incidents constituted willful or wantonly negligent violations of the employer's attendance expectations.

Regarding the late return from vacation in December 2023, the uncontroverted evidence shows that claimant did not notify the employer that he was taking extra time off from work, which was a violation of the employer's expectations. Further, claimant testified, as noted above, "if I would've asked [the employer] specifically for the extra day off, he probably would've said no, and I already had everything all planned for the vacation, and it was not like I missed several work days[.]" Transcript at 17. This shows that claimant knew or had reason to know that returning from vacation late without prior notice or preapproval from the employer would violate the employer's expectations. Therefore, claimant violated the employer's expectations in this instance willfully or with wanton negligence.

As to claimant's early departure on October 22, 2024, the record does not show that claimant's conduct here was a willful or wantonly negligent violation of the employer's expectations. The parties offered differing accounts of whether the employer approved claimant's time off for that day. The employer testified that claimant did not notify him of claimant's plans to leave early that day, and that the employer only learned about claimant's plans from other employees. Transcript at 9. By contrast, claimant testified that "[t]he thing with the court date was communicated and approved." Transcript at 22. Thus, the evidence as to whether claimant notified the employer in advance of the absence is, at best, equally balanced. The employer therefore has not met his burden to show that claimant did not notify him of the absence prior to leaving early that day. Claimant also left work earlier than he had initially gotten permission for. However, it is not clear from the record how much earlier claimant left, and it is possible that claimant could have reasonably understood the employer's expectations to permit leaving a *de minimis* amount of time earlier than planned. Thus, the record does not show, by a preponderance of the evidence, that claimant's conduct on October 22, 2024, was a willful or wantonly negligent violation of the employer's expectations.

The record does show, however, that claimant's decision to leave approximately 90 minutes early on November 22, 2024, was a willful or wantonly negligent violation of the employer's expectations. Claimant left early that day primarily to avoid further argument with a coworker, as he felt that doing so at a job site in front of a customer would be unprofessional. His decision was also apparently motivated in part by personal matters he wished to attend to, but the record indicates that claimant would most likely not have left work early if not for the argument with his coworker. Claimant did not notify the employer prior to leaving early that day. Claimant's explanation for leaving early suggests that he erroneously believed that doing so was in the best interests of the employer, and that the employer would therefore approve of his conduct. However, the record does not support the conclusion that claimant's conduct that day was a good faith error.

For his conduct to be considered a good faith error, claimant's belief that the employer would condone his conduct must not have only been mistaken, but also reasonable. Thus, claimant's mistaken belief must have been both honest and supported by evidence. *See, e.g., Hood v. Employment Dept.*, 245 Or App 606, 263 P3d 1126 (for conduct to be considered a good faith error, the record must show that the individual made a serious attempt to determine if the belief was true). Here, the record does not indicate that the employer had ever, for instance, told claimant that he could leave a jobsite early without permission to avoid conflict with another employee, or that notifying the employer of such an exit was unnecessary. On the contrary, the record shows, as explained above, that claimant was aware of the employer's expectations that he notify the employer prior to leaving early or otherwise being absent when he was scheduled to be working.

Claimant did not offer an explanation as to why he believed that the employer would permit him to leave early without notice in such an instance, particularly when claimant could presumably have called the employer and asked him either to intervene in the conflict or grant him permission to leave early. Instead, claimant appears to have simply made a decision to end the conflict by leaving, without regard for whether the employer would condone or approve of that decision. Therefore, claimant's having left early on November 22, 2024, without notice to the employer was not a good faith error, but was instead a wantonly negligent violation of the employer's expectations.

Furthermore, claimant's conduct on November 22, 2024, cannot be considered an isolated instance of poor judgment. The record does not show that claimant's conduct that day exceeded mere poor judgment under the provisions of OAR 471-030-0038(1)(d)(D). However, as explained above, claimant violated the employer's attendance expectations with at least wanton negligence twice in the space of less than a year. As such, claimant's conduct was not isolated, and therefore not an isolated instance of poor judgment.

Because claimant was discharged for a willful or wantonly negligent violation of the employer's expectations that was not an isolated instance of poor judgment, he was discharged for misconduct, and is disqualified from receiving unemployment insurance benefits effective November 17, 2024.

DECISION: Order No. 25-UI-282923 is affirmed.

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

DATE of Service: March 14, 2025

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 stated above**. *See* ORS 657.282. For forms and information, visit https://www.courts.oregon.gov/courts/appellate/forms/Pages/appeal.aspx and choose the appropriate form under "File a Petition for Judicial Review." You may also contact the Court of Appeals by telephone at (503) 986-5555, by fax at (503) 986-5560, or by mail at 1163 State Street, Salem, Oregon 97301.

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. If you are unable to complete the survey online and wish to have 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 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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