

EMPLOYMENT APPEALS BOARD DECISION
2025-EAB-0209

Reversed
Disqualification

PROCEDURAL HISTORY: On December 20, 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 unemployment insurance benefits based on the work separation (decision # L0007801011). The employer filed a timely request for hearing. On March 13, 2025, ALJ Bender conducted a hearing at which claimant failed to appear, and on March 20, 2025 issued Order No. 25-UI-286761, affirming decision # L0007801011. On April 4, 2025, the employer filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Lowe's Home Centers, LLC employed claimant as a customer service associate at one of their retail stores beginning in 2024 and through October 1, 2024.

(2) The employer maintained an attendance policy which required employees to arrive at the scheduled start time for their shifts, and considered any arrival past a six-minute grace period to be late. The policy also required employees to notify the store's management of unplanned absences as soon as possible, and no later than one hour after the start of the shift. The employer explained these requirements to all employees at the time of hire.

(3) On or around May 23, 2024, claimant was absent from work and did not notify the employer of his absence that day. On the following day, claimant apologized to the employer and explained that he had not contacted them about his absence the previous day because he was in pain. The employer issued claimant a written warning at that time, and reiterated to him the requirements of the attendance policy.

(4) On June 14, 2024, the employer issued claimant a final written warning because claimant had violated the attendance policy by arriving to work more than six minutes after his scheduled start time on five occasions during the preceding 30-day period. The employer again reiterated the requirements of the attendance policy when they discussed the warning with him.

(5) On September 15, 2024, claimant was absent from work and did not notify the employer of his absence. Claimant never gave the employer an explanation for why he was absent or why he failed to notify them of the absence.

(6) On October 1, 2024, the employer discharged claimant because he failed to notify them of his absence on September 15, 2024.

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 policy on September 15, 2024, when he failed to notify the employer of his absence that day. The employer had previously issued claimant warnings in May and June 2024 regarding violations of their attendance policy, and the warning in May 2024 specifically related to the same exact type of violation as in September 2024. Further, the employer explained the requirements of the attendance policy to all new employees at the time of hire. As such, claimant either knew or should have known that the employer expected him to notify them in accordance with their policy if he was going to miss a shift.

Because claimant did not appear at the hearing or offer any evidence into the record, and did not explain to the employer either why he was absent on September 15, 2024 or why he failed to notify them of the absence, the record contains no evidence of mitigating circumstances that might have contributed to claimant's violation of the attendance policy that day. Therefore, because claimant was aware of both the employer's attendance policy and their recent concerns that he had violated it, the preponderance of the evidence supports the inference that claimant failed to notify the employer of his absence on September 15, 2024 because he did not consider the consequences of failing to do so. As such, this was at least a wantonly negligent violation of the employer's standards of behavior.

Despite the above, the order under review concluded that claimant's conduct on September 15, 2024 was an isolated instance of poor judgment, and therefore not misconduct. Order No. 25-UI-286761 at 3. The record does not support this conclusion.

In particular, the order under review reasoned that claimant's previous failure to notify the employer of the absence in May 2024 was not misconduct because it was an absence due to illness. Order No. 25-UI-286761 at 3. This is a misreading of OAR 471-030-0038(3)(b). While that provision of the rule does except absences due to illness from the definition of misconduct, claimant's violation of the employer's policy in that instance was not the absence itself, but the failure to notify the employer of the absence. As such, claimant's conduct in the May 2024 incident is not of the type contemplated by OAR 471-030-0038(3)(b), and that provision does not apply to that incident. Further, the only explanation in the record for why claimant failed to notify the employer of his absence on that date was because he was in pain. Without more information about that situation, the record does not show that claimant was unable to contact the employer to notify them of his absence. Therefore, as with the September 15, 2024 incident, above, it is reasonable to infer that claimant was aware of the employer's attendance policy but failed to comply with it because he disregarded the consequences of his noncompliance. As such, claimant's failure to notify the employer of his absence in May 2024 also was at least a wantonly negligent violation of the employer's standards of behavior.

The record contains little information about claimant's five late arrivals in May or June 2024 which led to the final warning on June 14, 2024, just a few weeks after the warning in May 2024. Given the recent warning and the lack of any mitigating information, it is reasonable to infer here, as well, that claimant was acting without regard for the consequences of his actions in repeatedly failing to arrive to work on time. Therefore, the five late arrivals in May and June 2024 also were wantonly negligent violations of the employer's standards of behavior.

For an incident to be considered an isolated instance of poor judgment, it must be isolated, meaning “a single or infrequent occurrence rather than a repeated act or pattern of other willful or wantonly negligent behavior.” Here, claimant’s failure to notify the employer of his absence on September 15, 2024 repeated his conduct in May 2024, and he had also engaged in a pattern of other (albeit similar) wantonly negligent behavior by arriving to work late several times in May and June 2024. As such, claimant’s conduct on September 15, 2024 was not isolated, and cannot be excused as an isolated instance of poor judgment. Claimant’s failure to notify the employer of his absence that day therefore was misconduct.

For the above reasons, claimant was discharged for misconduct, and is disqualified from receiving benefits effective September 29, 2024.

DECISION: Order No. 25-UI-286761 is set aside, as outlined above.

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

DATE of Service: May 9, 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.

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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 الاستئناف بأوريغون و ذلك باتباع 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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