

EMPLOYMENT APPEALS BOARD DECISION
2018-EAB-1056

Reversed
Disqualification

PROCEDURAL HISTORY: On September 20, 2018, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant, but not for misconduct (decision # 91057). The employer filed a timely request for hearing. On October 25, 2018, ALJ Frank conducted a hearing at which claimant failed to appear, and on November 2, 2018, issued Order No. 18-UI-119122, affirming the Department's decision. On November 9, 2018, the employer filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Stein Oil Co., Inc. employed claimant from August 5, 2016 until August 3, 2018 as a station manager at its retail gas convenience store in Gladstone, Oregon.

(2) The employer expected claimant to refrain from working in its car washes without proper training and the employer's permission. The employer also expected claimant to prepare an employee work schedule two weeks in advance of the employees' shifts for the store he managed so that employees would report to work to operate the store. Claimant understood that the employer expected him to prepare a schedule for employees to notify them in advance of their shifts when they were scheduled to work.

(3) There was no car wash at the gas convenience store that claimant managed. Claimant had not received training from the employer regarding how to operate its car washes or car wash safety. The employer had never given claimant permission to operate one of its car washes.

(4) On July 31, 2018, the employer gave claimant a written warning for failing to prepare an employee work schedule for July 30, 2018 through August 13, 2018. Exhibit 1. The employer counseled claimant about the importance of posting a schedule to ensure employees reported to operate the gas convenience store that claimant managed. Exhibit 1.

(5) On August 1, 2018, claimant went to one of the employer's car washes and worked operating the car wash for two hours without the employer's permission.

(6) As of August 3, 2018, claimant still had not prepared an employee work schedule for August 4 through August 13, 2018, or even just for Saturday, August 4, 2018. The gas store claimant managed was open on August 4. The employer's receptionist called claimant and asked him to prepare a schedule. Claimant stated that he would not prepare a schedule at that time because it was a Friday and he only prepared schedules on Sundays.

(7) On August 3, 2018, the employer discharged claimant because he operated one of the employer's car washes without the required training or authorization, and because he failed to prepare an employee work schedule.

CONCLUSIONS AND REASONS: We disagree with the ALJ and conclude that the employer discharged claimant for misconduct.

ORS 657.176(2)(a) requires a disqualification from unemployment insurance benefits if the employer discharged claimant for misconduct connected with work. OAR 471-030-0038(3)(a) (January 11, 2018) defines misconduct, in relevant part, as a willful or wantonly negligent violation of the standards of behavior which an employer has the right to expect of an employee, or an act or series of actions that amount to a willful or wantonly negligent disregard of an employer's interest. OAR 471-030-0038(1)(c) defines wanton negligence, in relevant part, as 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. The employer carries the burden to show claimant's misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976). Isolated instances of poor judgment and good faith errors are not misconduct. OAR 471-030-0038(3)(b).

In Order No. 18-UI-119122, the ALJ found as fact that the employer discharged claimant because he violated the employer's expectation that he refrain from working in the employer's car wash without training or the employer's permission.¹ The ALJ concluded that the violation was not misconduct because the record did not show that claimant knew he was required to complete safety training before working in the employer's car wash, that the circumstances that lead to claimant working in the car wash were not "compelling," or that the incident was more than an isolated instance of poor judgment.²

The fact that the record does not show why claimant operated the car wash on August 1 does not prompt us to infer that there was a "compelling" reason for claimant to do so, and is not dispositive of whether or not he should be disqualified from benefits. However, we agree with the ALJ that the record fails to show that claimant knew or should have known that the employer expected him to complete safety training before he operated the employer's car wash, although the absence of this information in the record may be due to the ALJ's failure to inquire of the employer's witness if claimant knew or should have known of the employer's policy, or how claimant would have known of the policy. However, because this record does not show a conscious disregard of a known policy or expectation, to the extent the employer discharged claimant for operating the car wash, we agree it did not discharge claimant for misconduct. However, the ALJ did not address the employer's second reason for discharging claimant.

¹ Order No. 18-UI-119122 at 2.

² *Id.* at 3.

The employer's witness testified that the employer would have discharged claimant for failing to prepare an employee work schedule even if he had not worked in the car wash on August 1. Audio Record at 13:20 to 14:17. Therefore, we must determine whether, to the extent the employer discharged claimant for failing to prepare the schedule, it discharged claimant for misconduct.

The employer reasonably expected claimant, as manager for its gas convenience store, to make an employee work schedule in advance of the employees' shifts. Claimant knew or should have known the employer's expectation as a matter of common sense and because of the warning he received on July 31 directing him to prepare a schedule in advance of the employees' shifts. It defies logic that claimant would not have known that the employer expected him to prepare a schedule, at minimum, for the weekend of August 4 and 5, 2018. Moreover, the record shows that claimant made a conscious decision not to prepare the schedule because, when the employer's receptionist asked him to do so on August 3, claimant told the receptionist that he would not prepare a schedule until Sunday, August 5. Claimant's failure to prepare the schedule was a willful violation of the employer's expectation.

Claimant's conduct cannot be excused as an isolated instance of poor judgment or a good faith error under OAR 471-030-0038(3)(b). For conduct to be considered an isolated instance of poor judgment, it must be a single or infrequent occurrence rather than a repeated act or pattern of other willful or wantonly negligent conduct. OAR 471-030-0038(1)(d)(A). Claimant failed to prepare the required schedule on July 30, and after being warned, failed again to prepare a schedule by August 3. His conduct was, therefore, not isolated. Additionally, some conduct, even if isolated, may not be excused if it exceeded mere poor judgment by causing an irreparable breach of trust or making a continued employment relationship impossible. OAR 471-030-0038(1)(d)(D). Here, claimant's refusal to comply with the employer's directive to prepare a schedule was insubordinate. Moreover, that same refusal placed the employer's business at risk for having no employees to report to work on August 4 and 5, and until he created a schedule. Under those circumstances, viewed objectively, claimant's refusal to prepare a schedule made it impossible for the employer to trust claimant to perform essential managerial work tasks any longer and created an irreparable breach of trust in the employment relationship. Claimant's conduct therefore cannot be excused because it exceeded mere poor judgment. Nor can claimant's conduct be excused as a good faith error. The record does not show that claimant reasonably believed, or had a factual basis for sincerely believing, the employer would condone his inaction, particularly after being warned on July 31 that he must prepare a schedule, and told to do so on August 3.

The employer discharged claimant for misconduct. Claimant is disqualified from receiving unemployment insurance benefits based on his work separation until he has earned four times his weekly benefit amount from work in subject employment.

DECISION: Order No. 18-UI-119122 is set aside, as outlined above.

J. S. Cromwell and D. P. Hettle;
S. Alba, not participating.

DATE of Service: December 14, 2018

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 desisyong ito.

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 Asuntos Laborales. Si no está de acuerdo con esta decisión, puede presentar una Petición 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 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 دستور العمل موجود در پایان آن، از دادگاه تجدید نظر اورگان درخواست تجدید نظر کنید.

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