

EMPLOYMENT APPEALS BOARD DECISION
2019-EAB-0095

Affirmed
No Disqualification

PROCEDURAL HISTORY: On November 19, 2018, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant, but not for misconduct (decision # 90248). The employer filed a timely request for hearing. On January 7, 2019, ALJ Snyder conducted a hearing, and on January 9, 2019, issued Order No. 19-UI-122368, affirming the Department's decision. On January 24, 2019, the employer filed an application for review with the Employment Appeals Board (EAB).

EAB considered the employer's written argument in reaching this decision.

FINDINGS OF FACT: (1) Apria Healthcare, LLC, employed claimant from September 12, 2017 until November 5, 2018 as a delivery technician.

(2) The employer expected claimant to complete his customer service deliveries in a timely manner and to contact the employer for assistance if he encountered barriers to completing his deliveries. The employer also expected claimant to keep all oxygen and other cylinders properly secured in his delivery truck. The employer also expected claimant to keep a record of the products he delivered and an inventory of the products he had on his truck on a printed sheet.

(3) Claimant's managers warned claimant on April 16, May 3, May 11, May 14, May 17, and June 11, 2018 that his delivery documentation was incomplete, including missing notes regarding deliveries and truck inventory. Claimant attempted to improve his notetaking.

(4) On May 8, 2018, the employer gave claimant a written warning because on May 7, 2018, claimant did not go to a customer's address or complete their oxygen setup when the customer did not respond to claimant's telephone call regarding the delivery. Exhibit 1 at 18. The employer instructed claimant to attempt all deliveries assigned to him by physically going to the addresses unless the customers rescheduled the deliveries. The employer instructed claimant to contact somebody at the employer's office or a manager if he were to encounter difficulties completing a delivery. The employer also warned

claimant because claimant failed to secure a cylinder tank in his delivery truck on May 8 by leaving the tank in the middle of the truck with nothing securing it. Exhibit 1 at 18. The employer instructed claimant to secure cylinders properly in his truck and retrained claimant on cargo securement on May 10 and 11, 2018. Exhibit 1 at 19.

(5) On June 7, 2018, the employer determined from a test given to claimant that he needed improvement in securing cargo on his delivery truck and understanding the equipment delivery lists.

(6) On June 22, 2018, the employer gave claimant a final written warning because claimant failed to deliver a wheelchair cushion on June 18, 2018 because he mistakenly thought the cushion was a different product. The employer also warned claimant because claimant did not complete the delivery the subsequent day, which was a Sunday when claimant was the only delivery technician working. The employer instructed claimant to complete on Sunday any orders he was unable to complete on Saturday. The employer also reminded claimant to record the products he delivered and the products remaining on his truck. The employer warned claimant that any further violations of its policies could lead to discharge.

(7) On June 23, 2018, claimant called his manager and asked him how to improve his work performance. The manager instructed claimant to communicate with the employer if he had problems completing his route and to improve his delivery and inventory recordkeeping. Claimant subsequently began to take extra time in the warehouse each night after completing his route to review each delivery work order to verify if he had completed the necessary notes correctly. Claimant “checked in” regularly with two managers to review his paperwork, and attempted to improve his performance based on their directions. Transcript at 20.

(8) On October 25, 2018, claimant failed to deliver an “O2 enrichment adapter” to a customer because he had not adequately kept track of the adapters on his truck and did not have one to deliver to the customer that day. Exhibit 1 at 11. Claimant also failed to secure two cylinders properly in his truck.

(9) On November 5, 2018, the employer discharged claimant for failing to deliver an adapter to a customer and properly secure cylinders in his truck on October 25, 2018.

CONCLUSIONS AND REASONS: The employer discharged claimant 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. 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. Good faith errors or mere inefficiency resulting from lack of job skills or experience are not misconduct. OAR 471-030-0038(3)(b).

The employer discharged claimant for violating its expectation that claimant complete his deliveries and secure cylinders in his truck when he failed to do both on October 25, 2018. The employer had the right to expect claimant to meet its expectations and had counseled claimant repeatedly that he must document the items he delivered and had on his truck and must secure the cylinders on his truck. The ALJ concluded that claimant's conduct on October 25 was the result of "good faith error" and not misconduct.¹ We disagree that claimant's conduct was a good faith error as defined by Employment Department law because claimant's conduct did not involve mistakes made with the honest belief that his conduct was of the sort that the employer would deem acceptable. *See accord Goin v. Employment Department*, 203 Or App 758, 126 P3d 734 (2006). However, we conclude that his conduct was not misconduct because it was not a willful or wantonly negligent disregard of the employer's interest, but rather, mere inefficiency resulting from lack of job skills or experience.

The record shows claimant had consistent problems meeting the employer's expectations regarding his recordkeeping and securing the cylinders in his truck. After receiving warnings about his failure to document his deliveries and inventory on his truck, claimant conferred with his managers about how to improve his performance, tried to follow their instructions, and "checked in" with them regularly about his performance regarding documentation. Claimant testified that he was "under the impression" that his performance had improved due to his efforts. Transcript at 29. Given the evidence of claimant's consistent lack of understanding of how to perform his job duties correctly, despite instructions and his own efforts to improve his performance, it is more likely than not that claimant's lack of job skills was the cause of his mistakes on October 25. Moreover, the record does not show that claimant knew or should have known that the cylinders were not secured properly, or that his failure to have adapters in his truck was attributable to conduct that occurred after his final warning on June 22. Mere inefficiency resulting from lack of job skills of experience is not misconduct. Claimant's discharge was not for misconduct, and he is not disqualified from receiving unemployment benefits because of this work separation.

DECISION: Order No. 19-UI-122368 is affirmed.

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

DATE of Service: February 21, 2019

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.surveymonkey.com/s/5WQXNJH>. If you are unable to complete the survey online and wish to have a paper copy of the survey, please contact our office.

¹ Order No. 19-UI-122368 at 3.



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.

Employment Appeals Board - 875 Union Street NE | Salem, OR 97311
 Phone: (503) 378-2077 | 1-800-734-6949 | Fax: (503) 378-2129 | TDD: 711
www.Oregon.gov/Employ/eab

The Oregon Employment Department is an equal opportunity employer/program. Auxiliary aids and services are available upon request to individuals with disabilities. Language assistance is available to persons with limited English proficiency at no cost.

El Departamento de Empleo de Oregon es un programa que respeta la igualdad de oportunidades. Disponemos de servicios o ayudas auxiliares, formatos alternos y asistencia de idiomas para personas con discapacidades o conocimiento limitado del inglés, a pedido y sin costo.