

EMPLOYMENT APPEALS BOARD DECISION
2019-EAB-0209

Affirmed
No Disqualification

PROCEDURAL HISTORY: On January 4, 2019, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 170917). Claimant filed a timely request for hearing. On February 6, 2019, ALJ Janzen conducted a hearing, and on February 7, 2019 issued Order No. 19-UI-124174, reversing the Department's decision. On February 26, 2019, the employer filed an application for review with the Employment Appeals Board (EAB).

The employer submitted a written argument, but failed to certify that it provided the argument to the other parties as required by OAR 471-041-0080(2) (October 29, 2006). The employer's argument also contained information not presented at the hearing, and the employer did not show, as required by OAR 471-041-0090(2) (October 29, 2006), that factors or circumstances beyond its reasonable control prevented it from doing so. For these reasons, EAB did not consider the employer's argument or the new information that it sought to present when reaching this decision.

EVIDENTIARY MATTER: Although the ALJ stated in Order No. 19-UI-124174 that no exhibits were offered or admitted into evidence, the ALJ actually admitted Exhibit 1, which was offered by the employer. Audio at ~7:10. Order No. 19-UI-124174 is hereby corrected to reflect that Exhibit 1 was offered and admitted into evidence.

FINDINGS OF FACT: (1) O'Reilly Auto Parts employed claimant as a parts counterperson from approximately late August 2018 until November 28, 2018.

(2) The employer expected that claimant would not sleep while he was at work and on-the-clock. Claimant understood this expectation as a matter of common sense.

(3) Claimant had depression, anxiety and sometimes experienced psychosis. Claimant's physician prescribed the medicines Abilify, Topamax, and Zoloft to treat claimant's disorders. Abilify had a

sedating effect on claimant and induced sleep in him. For safety reasons, claimant usually avoided driving after he took Abilify.

(4) On November 24, 2018, claimant forgot to take the Abilify and Topamax that he usually took at bedtime. Claimant's sleep was disrupted that night and when he awoke on November 25, 2018 he was tired and felt unusually depressed and anxious. Claimant also thought he was hallucinating. Claimant was scheduled to work on November 25 and, because he drove himself to the workplace, he did not take the medications before work because he wanted to avoid driving while sedated. After arriving at the workplace, claimant took the prescribed doses of Ability and Topamax. In the afternoon at around 2:00 p.m., claimant went to the back room. One of claimant's coworkers reported to the store manager that he had observed claimant dozing in the back room once between 2:00 p.m. and 3:00 p.m. and later at 3:30 p.m. Exhibit 1 at 32. A second coworker reported that he had observed claimant sleeping at 2:37 p.m. and still sleeping at 3:30 p.m. Exhibit 1 at 33. At the times the coworkers reported, claimant was on-the-clock.

(5) Before November 28, 2018, the employer had not issued any disciplinary warnings to claimant or taken any disciplinary steps against him.

(6) On November 28, 2018, the employer discharged claimant for sleeping at work on November 25, 2018.

CONCLUSIONS AND REASONS: The employer discharged claimant but 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. Isolated instances of poor judgment and good faith errors are not misconduct. OAR 471-030-0038(3)(b). The employer has 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).

We assume for purposes of this decision that it was wantonly negligent for claimant to take medications at work on November 25, 2018, that he knew from experience were likely to have a sleep inducing effect on him. Although claimant may have needed to take the medications during work hours, he reasonably could have called in sick and avoided violating the employer's standards by sleeping on the job. However, even if it was wantonly negligent, claimant's behavior on November 25 may be excused from constituting misconduct if falls within the exculpatory provisions of OAR 471-030-0038(3).

OAR 471-030-0038(3)(b) provides that behavior may be excused from being considered misconduct if it was an isolated instance of poor judgment. An "isolated instance of poor judgment" is behavior that is a single or infrequent occurrence rather than a repeated act or pattern of other willful or wantonly negligent behavior. OAR 471-030-0038(1)(d)(A). To qualify as an isolated instance of poor judgment,

the behavior of claimant that is at issue also must not have exceeded mere poor judgment by, among other things, causing an irreparable breach of trust in the employment relationship or making a continued employment relationship impossible. OAR 471-030-0038(1)(d)(D). Here, the employer had taken no disciplinary measures against claimant except for the occurrence for which it discharged claimant on November 25. In addition, no evidence was presented at hearing as to any behaviors of claimant that allegedly were willful or wantonly negligent violations of the employer's standards other than on November 25. Assuming claimant's behavior on November 25 was wantonly negligent, it meets the first prong to be excused as an isolated instance of poor judgment since it was a single occurrence in violation of the employer's standards.

The behavior for which the employer discharged claimant also did not exceed mere poor judgment. Given claimant's description of the circumstances and his symptoms on November 25, it was understandable that he took the medicines while at work. It also was understandable that claimant felt an obligation to attend work despite having taken the medications since he still was a probationary employee. Nothing in the descriptions of claimant and the employer's witness about claimant's behavior on November 25 suggested that it was likely to recur or that, based on it, the employer could not trust claimant to comply with its standards in the future. On these facts, an objectively reasonable employer would not have concluded that claimant's behavior on November 25 exceeded mere poor judgment. Since claimant's behavior met both prongs of the standard to be excused as an isolated instance of poor judgment, it was not misconduct even if it was otherwise wantonly negligent.

The employer did not discharge claimant for misconduct. Claimant is not disqualified from receiving unemployment insurance benefits.

DECISION: Order No. 19-UI-124174 is affirmed.

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

DATE of Service: March 28, 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.

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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 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 ໄດ້ ໂດຍປະຕິບັດຕາມຄໍາແນະນໍາທີ່ບອກໄວ້ຢູ່ຕອນທ້າຍຂອງຄໍາຕັດສິນນີ້.

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 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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