

EMPLOYMENT APPEALS BOARD DECISION
2019-EAB-0404

Affirmed
Disqualification

PROCEDURAL HISTORY: On February 26, 2019, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant voluntarily left work without good cause and was disqualified from benefits effective January 20, 2019 (decision # 141723). Claimant filed a timely request for hearing. On March 29, 2019, ALJ Meerdink conducted a hearing, and on April 5, 2019 issued Order No. 19-UI-127699, concluding the employer discharged claimant for misconduct, and claimant was disqualified from benefits effective January 27, 2019. On April 24, 2019, claimant filed an application for review with the Employment Appeals Board (EAB).

EAB considered claimant's written argument when reaching this decision. Parties to unemployment insurance cases cannot win by default because the party with the burden of proof did not appear at the hearing, as long as the preponderance of the evidence in the record establishes that disqualifying misconduct occurred. Therefore, while claimant is correct that the employer had the burden of proof, the preponderance of the evidence in the record shows that claimant's discharge was for misconduct for the reasons explained below, notwithstanding the fact that the employer did not appear at the hearing.

FINDINGS OF FACT: (1) Keystone RV Company employed claimant as a production worker from November 28, 2017 to approximately January 30, 2019.

(2) On July 27, 2018, Oregon State Police cited claimant for driving while suspended in Clackamas County, Oregon. The citation included an order requiring claimant to appear on August 27, 2018 in the Clackamas County Justice Court.

(3) Claimant was aware of his court date and did not make any effort to appear at it, such as requesting time off work or trying to travel from the Pendleton area to Clackamas County. On August 27, 2018, claimant called the court and asked a court clerk to postpone his appearance date. The clerk told claimant she would pass his request to the judge, after which the call ended. Claimant did not follow up with the clerk or the court about what the judge decided, whether or not his court appearance had been rescheduled, or what he should do next.

(4) The judge denied claimant's request. Since claimant did not appear at court, the judge issued an arrest warrant.

(5) On January 23, 2019, claimant was arrested pursuant to the August 27th warrant. While in jail, claimant missed four days of work. His wife and son notified the employer of claimant's situation, but claimant's absences due to incarceration were not excused and violated the employer's attendance policy. On January 29, 2019, claimant was released from jail.

(6) On January 30, 2019, claimant reported to the workplace. The employer notified claimant that he had been discharged for absenteeism.

CONCLUSIONS AND REASONS: The employer discharged claimant for misconduct.

If the employee could have continued to work for the same employer for an additional period of time, the work separation is a voluntary leaving. OAR 471-030-0038(2)(a) (December 23, 2018). If the employee is willing to continue to work for the same employer for an additional period of time but is not allowed to do so by the employer, the separation is a discharge. OAR 471-030-0038(2)(b).

The Department concluded that claimant voluntarily left work because he was incarcerated. *See* Decision # 141723. However, claimant demonstrated that despite his absences due to incarceration he wanted to continue to work for the employer for an additional period of time because he reported to the workplace seeking additional work the day after he was released from jail. Because claimant was willing to continue working for the employer but was not allowed to do so, the work separation was a discharge.

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) 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.

In this case, the employer discharged claimant for unauthorized absences caused by his arrest and incarceration. The relevant inquiry is, therefore, whether claimant willfully or with wanton negligence created the circumstances that caused his incarceration. *See accord Weyerhaeuser v. Employment Div.*, 107 Or App 505, 812 P2d 44 (1991) (so stating). Claimant willfully or with wanton negligence created the circumstances that caused his incarceration, first by committing the illegal act of driving while suspended, and then by willfully failing to make a required court appearance. Although he had requested that his court appearance be postponed or rescheduled, he did so from Pendleton on the day of a Clackamas County hearing without having made any arrangements or efforts to find out if his court date had been rescheduled, any efforts to travel to Clackamas County if his request was denied, or for information about what he should do next. The warrant for claimant's arrest was the direct result of claimant's intentional and conscious unlawful conduct. Claimant therefore willfully or with wanton

negligence created the circumstances that resulted in his failures to report to work when scheduled for four consecutive shifts.

Claimant's conduct cannot be excused as an isolated instance of poor judgment under OAR 471-030-0038(3)(b). An isolated instance of poor judgment is defined, in pertinent part, as a single or infrequent willful or wantonly negligent exercise of poor judgment that does not exceed mere poor judgment by violating the law or making a continued employment relationship impossible. *See* OAR 471-030-0038(1)(d). Claimant's conduct was not isolated. Claimant's absences all derived from a single event, his arrest, and, once arrested, he did not form a different poor judgment not to report to work on each of the four days he did not report to work. However, he engaged in two separate unlawful acts that led to his incarceration, driving while suspended and then failing to appear at a court hearing, each of which represented a separate willful or wantonly negligent exercise of poor judgment. The exercises of poor judgment were work-connected since the commission of unlawful acts logically can affect an individual's ability to report to work as scheduled.

Even if claimant's conduct were considered an isolated instance of poor judgment, it exceeded mere poor judgment. Claimant's driving while suspended and failing to appear at a court hearing violated the law. And most reasonable employers, when unable to rely upon an individual to report to work when scheduled due to incarceration, and unable to anticipate the individual's continued or future absences from work for incarceration or additional court dates, would consider a continued employment relationship impossible and end the individual's employment.

Claimant's conduct cannot be excused as a good faith error under OAR 471-030-0038(3)(b). Claimant did not sincerely believe that his commission of unlawful acts and resultant inability to report to work were consistent with the employer's attendance policy, and he did not have a basis for believing that the employer would condone his repeated absences from work.

The employer discharged claimant for misconduct. Claimant is disqualified from receiving unemployment insurance benefits because of his work separation.

DECISION: Order No. 19-UI-127699 is affirmed.

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

DATE of Service: May 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 ໂດຍປະຕິບັດຕາມຄໍາແນະນໍາທີ່ບອກໄວ້ຢູ່ຕອນຫ້າຍຂອງຄໍາຕັດສິນນີ້.

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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