

EMPLOYMENT APPEALS BOARD DECISION
2019-EAB-0440

Affirmed
No Disqualification

PROCEDURAL HISTORY: On February 27, 2019, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for an isolated instance of poor judgment which was not misconduct (decision # 153147). The employer filed a timely request for hearing. On April 12, 2019, ALJ Snyder conducted a hearing, and on April 19, 2019, issued Order No. 19-UI-128544, affirming the Department's decision and concluding the employer discharged claimant, but not for misconduct. On May 2, 2019, the employer filed an application for review with the Employment Appeals Board (EAB).

The employer failed to certify that it provided a copy of its argument to the other parties as required by OAR 471-041-0080(2)(a) (October 29, 2006). Therefore, EAB did not consider the argument when reaching this decision.

FINDINGS OF FACT: (1) Asplundh Tree Expert LLC employed claimant as a foreman from July 20, 2015 to January 25, 2019.

(2) The employer had a safety policy that required its tree-felling foremen to strictly follow certain safety rules when felling trees. One such rule was called the "danger zone" rule. Audio Record ~ 9:40 to 10:40. That rule required the foremen to ensure that crewmembers were a specified distance away from a tree to be felled when it was cut down. It also required that a rope be attached to the tree with crewmembers at the other end to ensure that a tree to be felled near a power line would not come into contact with a power line. The employer also expected its foremen to complete individual jobs as quickly as possible. Claimant was aware of the employer's danger zone rule and expectations.

(3) On January 22, 2019, claimant was directing a crew of two employees while assigned to fell a tree near a power line. While making cuts to the base of the tree, claimant determined that based on the angle of the tree, when it was cut down, the tree would fall away from the power line. He also believed that his crew members were a safe distance away from the tree, and cut the tree down without a rope attached to the tree. Later that day, the employer concluded that claimant's crew members were closer to the tree

than allowed under the “danger zone” rule when claimant cut it down, and that a rope had not been attached to the tree. The employer suspended claimant for three days without pay.

(4) On January 25, 2019, the employer discharged claimant, who had been a “great foreman,” for violating the employer’s “danger zone” rule on January 22, 2019. Audio Record ~ 21:00 to 22:30.

(5) Prior to January 22, 2019, claimant had not been warned or disciplined for violating any safety rules or other employer policies.

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) (December 23, 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 are not misconduct. OAR 471-030-0038(3)(b). In a discharge case, the employer has the burden to establish misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

The employer had the right to expect claimant to follow its “danger zone” safety rule at all times because it had discussed the importance of doing so with its foremen at regular intervals since claimant’s hire, which claimant did not dispute. On January 22, 2019, claimant violated that rule by cutting down a tree down without attaching a rope to the tree. Although claimant explained that he had determined that based on the angle of the tree, when it was cut down, the tree would fall away from the power line, he admitted that he did not attach a rope to the tree before doing so. More likely than not, claimant was conscious of his conduct and knew or should have known that even under the circumstances presented, cutting the tree down in violation of the employer’s safety rule would likely violate the employer’s expectation. Claimant’s conduct in cutting the tree down as he did was at least a wantonly negligent violation of the employer’s “danger zone” rule.

At issue then is whether claimant’s conduct was an isolated incident of poor judgment under OAR 471-030-0038(1)(d) and thus excusable 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). The employer did not dispute that claimant had never been warned or disciplined in the past for violating any safety rules or other employer policies. Accordingly, claimant’s violation of the employer’s policy on January 22, 2019 was a single and infrequent occurrence.

Under OAR 471-030-0038(1)(d)(D) certain acts exceed mere poor judgment and are not excusable even if isolated. Acts that violate the law, are tantamount to unlawful conduct, 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). Claimant's violation of the employer's safety rule was not unlawful or tantamount to unlawful conduct and was not so egregious that the employment relationship could not have been rehabilitated and claimant trusted after claimant received a warning against violating any employer safety rule under any circumstances in the future. While claimant's conduct in violating the rule showed poor judgment, viewed objectively, it did not exceed mere poor judgment by creating an irreparable breach of trust in the employment relationship or otherwise make a continued employment relationship impossible. On this record, claimant sincerely believed that the tree would not fall in the direction of the power line and he was attempting to satisfy the employer's other expectation that jobs be completed as quickly as possible. Accordingly, claimant's January 22, 2019 conduct was no more than an isolated instance of poor judgment, and was excusable under OAR 471-030-0038(3)(b).

The employer discharged claimant, but not for misconduct under ORS 657.176(2)(a) and claimant is not disqualified from receiving unemployment insurance benefits.

DECISION: Order No. 19-UI-128544 is affirmed.

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

DATE of Service: June 7, 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.



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 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.

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.