

EMPLOYMENT APPEALS BOARD DECISION
2019-EAB-0531

Affirmed
No Disqualification

PROCEDURAL HISTORY: On April 4, 2019, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 83115). Claimant filed a timely request for hearing. On May 15, 2019, ALJ Frank conducted a hearing, and on May 23, 2019 issued Order No. 19-UI-130461, reversing the Department's decision. On June 7, 2019, the employer filed an application for review with the Employment Appeals Board (EAB).

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

FINDINGS OF FACT: (1) Tree Top Inc. employed claimant to perform maintenance, mechanical, and welding duties from October 18, 2018 until February 26, 2019.

(2) The employer expected claimant to lock and tag out a machine before working on it to prevent its operation. The employer expected each employee who worked on a machine to install their own locks and tags on that machine even if other employees working on it had already locked and tagged it out. The employer also expected employees to lock and tag out machines that were disconnected from all power sources. Claimant understood the employer's expectations. The employer furnished individual locks and tags to all employees who worked on machines.

(3) On February 15, 2019, claimant noticed another employee working on a turbine and began to assist the employee. The employee whom claimant was assisting and other employees had already locked and tagged out the turbine. Claimant did not individually lock out and tag out the turbine because he observed that the turbine was disconnected from its power source and other employees had placed their own locks and tags on it. The production manager walked by the turbine and noticed that, although

claimant was assisting in repairing the turbine, he had not individually locked and tagged it out. On February 15, 2019, the employer suspended claimant for not following its lock out, tag out procedures that day.

(4) Before February 15, 2019, claimant had not failed to lock and tag out machines he worked on.

(5) On February 28, 2019, the employer discharged claimant for not following its lock out, tag out procedures on February 15, 2019.

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. “As used in ORS 657.176(2)(a) . . . a willful or wantonly negligent violation of the standards of behavior which an employer has the right to expect of an employee is misconduct. An act or series of actions that amount to a willful or wantonly negligent disregard of an employer's interest is misconduct.” OAR 471-030-0038(3)(a) (December 23, 2018). “[W]antonly negligent’ means 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.” OAR 471-030-0038(1)(c). 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 evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976)

The reasons that claimant presented for failing to lock and tag out the turbine on February 15, 2019 suggested that such steps were unnecessary to prevent injury since others had already placed their own locks and tags on the turbine and it was disconnected from its power source. However, claimant did not deny that he knew the employer’s policy required him to lock and tag out machines that he was working on even if doing so duplicated safety measures already taken by others, or the machine was incapable of operation. By failing to install his own lock and tag on the turbine on February 15, 2019, when he knew or should have known that the employer’s policy required him to do so, claimant violated the employer’s expectations with at least wanton negligence.

Even though claimant violated the employer’s lock and tag out expectations with wanton negligence on February 15, 2019, it will not constitute misconduct if it was an isolated instance of poor judgment. OAR 471-030-0038(3)(b). The following standards apply to determine whether an “isolated instance of poor judgment” occurred:

(A) The act must be isolated. The exercise of poor judgment must be a single or infrequent occurrence rather than a repeated act or pattern of other willful or wantonly negligent behavior.

(B) The act must involve judgment. A judgment is an evaluation resulting from discernment and comparison. Every conscious decision to take an action (to act or not to act) in the context of an employment relationship is a judgment for purposes of OAR 471-030-0038(3).

(C) The act must involve poor judgment. A decision to willfully violate an employer's reasonable standard of behavior is poor judgment. A conscious decision to take action that results in a wantonly negligent violation of an employer's reasonable standard of behavior is poor judgment. A conscious decision not to comply with an unreasonable employer policy is not misconduct.

(D) Acts that violate the law, acts that are tantamount to unlawful conduct, acts that 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).

OAR 471-030-0038(1)(d). Here, the record does not show claimant failed to comply with the employer's lock and tag out expectations, or other expectations, before the incident at issue on February 15, 2019. Audio at ~22:14. The February 15, 2019 incident for which claimant was discharged was therefore a single or infrequent occurrence of willful or wanton negligent behavior. It meets the first part of the standard to be excused from constituting misconduct.

The next part of the standard for claimant's February 15, 2015 behavior to be excused as an isolated instance of poor judgment requires consideration of whether it exceeded mere poor judgment by creating an irreparable breach of trust in the employment relationship or otherwise making a continued employment relationship impossible. Here, it was not disputed that other employees had already adequately locked and tagged out the turbine before claimant began assisting those employees in repairing it. The evidence did not indicate that, under the circumstances, the turbine presented an actual hazard to claimant or the employees who were working on it. In further mitigation of claimant's behavior that day, as discussed above, claimant had never before violated the employer's lock and tag out procedures, and the evidence in the record does not show that claimant was likely to fail to follow the lock and tag out procedures in the future.

It is understandable that the employer would view a failure to comply with its lock and tag out policy as a matter for serious concern. *See* Employer's Written Argument. However, an objective employer would not have concluded on the facts in this record that an employee who had violated its lock and tag out policy on only one occasion had caused an irreparable breach of trust in the employment relationship or otherwise made a continued employment relationship impossible. Claimant's behavior on February 15, 2019 therefore did not exceed mere poor judgment. Having met all requirements, claimant's wantonly negligent behavior on February 15, 2019 is excused from constituting misconduct as an isolated instance of poor judgment.

The employer discharged claimant, but not for misconduct. Claimant is not disqualified from receiving unemployment insurance benefits.

DECISION: Order No. 19-UI-130461 is affirmed.

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

DATE of Service: July 10, 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 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 محكمة 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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