

EMPLOYMENT APPEALS BOARD DECISION
2019-EAB-0764

Reversed
Disqualification

PROCEDURAL HISTORY: On July 5, 2019, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant, but not for misconduct (decision # 71254). The employer filed a timely request for hearing. On August 7, 2019, ALJ Janzen conducted a hearing at which claimant did not appear, and on August 9, 2019, issued Order No. 19-UI-134844, affirming the Department's decision. On August 13, 2019, the employer filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Klamath Falls City Schools employed claimant as a paraprofessional and head girls' basketball coach at Klamath Union High School (KUHS) from October 2018 until March 11, 2019.

(2) The employer expected claimant to supervise students in an appropriate and safe manner while engaged in her duties as a staff member and coach, including refraining from acting in a manner that could cause harm to a student. The employer's student transportation policy provided that when riding in a staff member's personal vehicle, each student must have their own seat and wear a seat belt. Claimant understood or should have understood the employer's expectations from training during orientation and as a matter of common sense.

(3) In late November 2018, claimant and students on the basketball team she coached traveled to California on a school bus provided by the employer. On November 30, 2018, while in California, claimant transported students in a personal vehicle to a convenience store. There were too few seat belts for all the students transported in the vehicle, so some students rode without seat belts. When claimant went to the store, she left the remaining student players unsupervised at the hotel.

(4) On December 10, 2018, claimant admitted to the principal that she knowingly failed to provide adequate supervision to the students at the hotel and failed to transport students safely in a personal vehicle on November 30. On December 14, 2018, the employer gave claimant a letter of reprimand for

violating the employer's student transportation and student supervision policies. The reprimand stated that another violation of the student supervision policy could result in discharge.

(5) Beginning in December 2018, claimant had "conflicts" with a student on the basketball team she coached. Audio Record at 13:02. The student had played on the varsity team during the previous season when the team had a different coach. Claimant took the student off the varsity team in December because the student allegedly engaged in poor sporting conduct toward her teammates. The student and her family complained to the school that the coach was "harassing" the student and treating her "unfairly." Audio Record at 13:09, 13:20. The student was allowed back on the team.

(6) On February 14, 2019, during a girls' basketball practice in the KUHS gym, claimant threw a basketball at the back of the student with whom she had the "conflicts." The student was unprepared for the throw. Claimant threw the ball approximately thirty feet in a "forceful," "direct" manner at the student. Audio Record at 11:36, 18:56. The student was walking away from claimant and her back was towards claimant. The ball hit the student "straight on" in her right shoulder. Audio Record at 12:24. The student threw her hands up, turned around, and had an expression of surprise on her face. The student went to the office and reported what had occurred to the KUHS dean of students. The dean told the principal about the incident, and they both viewed surveillance video of the incident.

(7) On February 15, 2019, the principal met with claimant to obtain her statement about what occurred on February 14. Claimant provided a verbal account of the February 14 incident that was not consistent with what the principal viewed on the surveillance video, or what the student reported. Claimant told the principal that she had thrown the ball toward the student, yelled a warning to the student, and "lightly" hit the student with the ball. Audio Record at 16:12.

(8) On March 11, 2019, the employer discharged claimant because it determined that claimant's employment was a disruption to the student learning environment at KUHS due to the incident that occurred on February 14, 2019 in her role as the girls' basketball coach.

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

Order No. 19-UI-134844 concluded that because claimant asserted to the employer's principal on February 15, 2019 that claimant warned the student before she threw the basketball at her, claimant's

conduct in throwing the ball at the student was mere negligence, and not a willful or wantonly negligent violation of the employer's reasonable expectations. However, the record establishes that claimant's conduct was at least wantonly negligent on February 14, 2019, and that it was not an isolated instance of poor judgment or a good faith error.

The employer's uncontested evidence at hearing was that claimant threw a basketball directly and forcefully at a student with whom she had had recent conflict while the student's back was turned, hitting the student on the back and alarming her. Claimant knew the employer's expectations that she provide safe supervision of the students she coached. At worst, claimant willfully threw the ball with the intention of hitting the student. However, even had claimant yelled a warning to the student as she alleged to the principal, claimant's conduct was at least wantonly negligent because the record shows she threw the ball directly and forcefully at the student while the student was walking away with her back turned to claimant. As a matter of common sense, claimant knew or should have known the ball might hit the student. Moreover, despite claimant's statement to the principal, had the student been expecting to receive a ball from claimant, or had claimant yelled a warning soon and loud enough for the student to hear, the student's back would not have been turned toward claimant when the ball hit her. Therefore, the preponderance of the evidence shows that, even considering claimant's assertions to the principal, her conduct on February 14 was at least wantonly negligent when she threw the ball at the student.

The record shows that, more likely than not, claimant's conduct was not excusable as an isolated instance of poor judgment. OAR 471-030-0038(1)(d)(A) provides that, to be an isolated instance of poor judgment, 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." *Id.*

Claimant's exercise of poor judgment on February 14, 2019 was not isolated. On November 30, 2018, claimant failed to follow the employer's student transportation and supervision policies. Claimant knew or should have known that driving students in a personal vehicle without seat belts would violate the employer's expectations. She also knew leaving students unsupervised in an out-of-state hotel violated the employer's supervision policy. Her conduct in that incident therefore was wantonly negligent.

Claimant's conduct on February 14 was therefore a second wantonly negligent violation of the employer's supervision policy within a three-month period. Her exercise of poor judgment in the final incident was not a "single or infrequent occurrence," it was a repeated wantonly negligent act. Claimant's conduct therefore was not "isolated," and it was not excusable as an isolated instance of poor judgment.

Claimant's behavior on February 14, 2019 also cannot be excused as a good faith error under OAR 471-030-0038(3)(b). It is implausible that claimant sincerely believed that, after receiving the December 14 letter of reprimand, her conduct on February 14 complied with the employer's expectations regarding safely supervising students.

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

DECISION: Order No. 19-UI-134844 is set aside, as outlined above.

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

DATE of Service: September 19, 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 Empleo. Si no está de acuerdo con esta decisión, puede presentar una Aplicación 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 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.

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