

EMPLOYMENT APPEALS BOARD DECISION
2019-EAB-0901

Reversed
No Disqualification

PROCEDURAL HISTORY: On July 31, 2019, the Oregon Employment Department (the Department) served notice of an administrative decision that stated that claimant “allegedly offered LSD/Acid to a coworker at the workplace,” and concluded that the employer discharged claimant not for misconduct (decision # 120732). Decision # 120732 stated that the laws and rules used to make the decision included ORS 657.176 and OAR 471-030-0038, the laws and rules that generally define the term “misconduct.” The employer filed a timely request for hearing. On August 21, 2019, the Office of Administrative Hearings (OAH) served notice of a hearing on September 4, 2019. The notice identified the issue for the hearing as whether claimant shall be disqualified from the receipt of benefits because of a discharge, and did not refer to or provide a copy of laws and rules pertaining to discharges for drug and alcohol issues. On September 4, 2019, ALJ Seideman conducted a hearing. The parties did not waive their right to notice of drug and alcohol laws and rules during the hearing. On September 6, 2019, ALJ Seideman issued Order No. 19-UI-136171, which did not apply drug and alcohol laws and rules, concluding the employer discharged claimant for misconduct. On September 17, 2019, claimant filed an application for review with the Employment Appeals Board (EAB).

EAB did not consider claimant’s written argument when reaching this decision because they did not include a statement declaring that they provided a copy of their argument to the opposing party or parties as required by OAR 471-041-0080(2)(a) (May 13, 2019).

ORS 657.280(1) provides that hearings on unemployment insurance cases “shall be in accordance with” the applicable administrative rules. OAR 471-040-0015 requires that all parties be notified of the “issue(s) in general.” As a matter of general principle, due process of law and Oregon’s Administrative Procedures Act generally require that notice of a hearing include “reference to the particular sections of the statute and rules involved,” unless the parties have knowingly waived their right to notice. *See e.g.* ORS 183.413; OAR 137-003-0505(1)(b).

The parties were not provided with adequate notice of the laws and rules applicable to this case because the notice of hearing omitted reference to the drug and alcohol laws and rules, and, on this record, the

parties did not consent to waive notice. Ordinarily that might require remand. However, it is not necessary in this case to remand so the parties can receive notice of the drug and alcohol statute and rules because even had the parties received such notice and drug and alcohol law been applied to the facts of this case, the discharge would not be disqualifying. In other words, the outcome of this case would be the same under drug and alcohol laws and rules; claimant would not be disqualified from receiving unemployment insurance benefits based on this work separation. Therefore, we will proceed to decide this case under the general misconduct laws and rules that were included in the decisions and notices provided to the parties.

FINDINGS OF FACT: (1) The Resort at Running Y Ranch employed claimant from June 20, 2017 until June 26, 2019 as a maintenance engineer.

(2) The employer has a drug free workplace policy that prohibits the use, sale, distribution, manufacture or possession of drugs on the employer's premises, including its parking lots. Exhibit 6. Claimant received the policy and understood it. The employer also had a standard of conduct that prohibited "serious misconduct of any kind." Exhibit 7.

(3) Claimant and other employees "periodically" spoke about illegal drugs while at work, and claimant had never received a warning for doing so. Audio Record at 40:55. At about 2:00 a.m. on June 22, 2019, claimant and two coworkers were not working and were "hanging out having some drinks" at the home of one of the coworkers. Exhibit 4. While together, they discussed illegal drug use, including past drug experiences and LSD. Exhibit 4, 5. Claimant understood from their conversation that the two other employees wanted to know if claimant could get LSD.

(4) On June 23, 2019, claimant was not scheduled to work, but the two coworkers he had socialized with the night before were both working. Claimant went to the workplace and approached one of the coworkers who was working in an unoccupied guest room. Claimant asked the coworker if she wanted some LSD. She responded that she did not want any, and claimant left the guest room. Claimant then approached the other coworker, who was working at the hotel's front desk, and asked her if she wanted LSD. She told claimant, "I don't do that," and claimant left the employer's premises. Audio Record at 30:12. Claimant did not show LSD to either coworker. After claimant left the employer's premises, both the employees claimant had spoken to discussed what had occurred with each other. The employee who had been working in the guest room told the front desk employee that she felt "uncomfortable" around claimant at that time. Audio Record at 31:24. The employees told the employer that claimant had offered them LSD.

(5) On June 25, 2019, the hotel manager asked claimant what occurred on June 23. Claimant reported to the manager that he thought the two coworkers had asked him for LSD when he had been consuming alcohol with them on June 22, and he went onto the employer's property on June 23 to ask them if they "wanted it still." Audio Record at 25:02 to 25:17. Claimant told the manager that he did not have any LSD on June 23, but was telling the coworkers that he could get LSD. The manager suspended claimant while he "investigated the situation." Exhibit 1.

(6) On June 26, 2019, the employer discharged claimant for asking two employees if they wanted LSD while on the employer's premises on June 23, 2019.

CONCLUSIONS AND REASONS: The employer discharged claimant 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). 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).

Order No. 19-UI-136171 concluded that claimant’s “possession and offer” of LSD to coworkers on the employer’s premises was a willful disregard of the employer’s standard of conduct, and was not an isolated instance of poor judgment because it was a violation of the law.¹ However, the preponderance of the evidence does support this conclusion.

As a preliminary matter, although claimant was not working when he approached his coworkers about LSD on June 23, he was on the employer’s premises, and spoke to coworkers while they were working. Because such off-duty conduct on the employer’s premises involving coworkers affected or had a reasonable likelihood of affecting the employer’s workplace, claimant’s conduct was connected to work. *Sun Veneer v. Employment Division*, 105 Or App 198, 804 P2d 1174 (1991) (off-duty conduct must affect or have a reasonable likelihood of affecting the employee’s work or the employer’s workplace in order to constitute work-connected misconduct).

The order under review concluded that the two employees claimant spoke to on June 23, “said he said he had [LSD],” and were more credible than claimant.² However, the order does not state, and the record does not otherwise show, a reason to find the evidence from the two employees more credible than claimant’s testimony. The evidence from the employer’s firsthand witness, the front desk supervisor, was no more than equally balanced with claimant’s testimony denying that he possessed LSD on June 23. The front desk supervisor testified at hearing that claimant told her on June 23 that “he had some LSD if [she] wanted some.” Audio Record at 30:08 to 30:10. The witness testified further that, although she did not see any LSD, “to her understanding,” claimant had LSD in his possession at that time. Audio Record at 30:33 to 30:39. However, claimant testified that one of the two coworkers had asked him while they were together on June 22 if he knew where to get some LSD, and that when he spoke with the employees on June 23 he did not have LSD and was “just responding to their request to find out if [he] could get [LSD].” Audio Record at 32:48 to 33:02, 33:26 to 33:38. Claimant also told the manager

¹ Isolated instances of poor judgment are not misconduct. OAR 471-030-0038(3)(b). However, OAR 471-030-0038(1)(d)(D) provides that acts that violate the law . . . exceed mere poor judgment and do not fall within the exculpatory provisions of OAR 471-030-0038(3); Order No. 19-UI-136171 at 3.

² Order No. 19-UI-136171 at 3.

on June 25 that he did not have LSD at work on June 23, but was telling the coworkers that he could get it.

The other employee who claimant approached in the guest room did not testify, and her written statement alleging that claimant stated, "I got some stuff," does not show that claimant had LSD on the employer's premises when he spoke to her. Exhibit 5. Nor do her hearsay statements to the manager outweigh claimant's firsthand, sworn testimony at hearing denying that he possessed LSD at the workplace. The evidence is no more than equally balanced that claimant possessed LSD at work. Therefore, the record does not show by a preponderance of the evidence that claimant had LSD and violated the employer's drug policy by possessing illegal drugs on the employer's premises. Nor did claimant otherwise violate the drug policy, because the record does not show by a preponderance of evidence that he used, sold, distributed,³ or manufactured drugs on the employer's premises.

The next issue is to determine whether claimant knew or should have known that asking two employees on the employer's premises if they wanted LSD was "serious misconduct of any kind" in violation of the employer's standards of conduct, or a violation of the employer's reasonable expectations as a matter of common sense. The employer had a right to expect employees to refrain from offering to get illegal drugs for other employees while working. However, the record does not show that claimant knew or should have known that expectation from the employer's policies or as a matter of common sense. The employer's policies did not expressly prohibit employees from discussing drugs at work. The record shows that claimant and other employees "periodically" discussed drugs at work, and that claimant understood from his conversation with the two employees the night before that they wanted to know if claimant could get LSD. Given that the employer's drug policy does not prohibit discussion about drugs at work, and the apparent willingness in the past of the two employees to discuss LSD with claimant, the record fails to show that claimant's conduct was either a willful or wantonly negligent violation of a known standard of behavior the employer expected of him.

Claimant's discharge was not for misconduct. Claimant is not disqualified from receiving unemployment insurance benefits because of his work separation.

DECISION: Order No. 19-UI-136171 is set aside, as outlined above.⁴

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

DATE of Service: October 23, 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

³ A distributor is a person who delivers. ORS 475.005(12). "Deliver" or "delivery" means the actual, constructive or attempted transfer . . . from one person to another of a controlled substance, whether or not there is an agency relationship. A person is guilty of an attempt to commit a crime when the person intentionally engages in conduct which constitutes a substantial step toward commission of the crime. ORS 161.405.

⁴ This decision reverses an order that denied benefits. Please note that payment of benefits, if any are owed, may take approximately a week for the Department to complete.

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 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 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 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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