

EMPLOYMENT APPEALS BOARD DECISION
2019-EAB-0978

Reversed
No Disqualification

PROCEDURAL HISTORY: On September 11, 2019, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 135230). Claimant filed a timely request for hearing. On October 1, 2019, ALJ L. Lee conducted a hearing, and on October 2, 2019 issued Order No. 19-UI-137415, affirming the Department's decision. On October 14, 2019, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Green Diamond Performance employed claimant from September 24, 2018 through August 16, 2019 as a laborer in the employer's packing department.

(2) The employer expected claimant to refrain from filing a false claim of injury to the employer, the Workers' Compensation Board, or the employer's insurer. Claimant understood this expectation as a matter of common sense.

(3) On Friday, July 12, 2019, claimant was loading a boxcar and accidentally stepped off a pallet. In doing so, his ankle "folded underneath [his] leg, and . . . was really painful." Transcript at 20. Claimant let a coworker finish loading the boxcar, and went to the employer's office to get paperwork for the boxcar. On his way back from the office, a supervisor noticed claimant limping and asked claimant what happened to his ankle, and claimant responded that he "was fine," and would "just walk it off." Transcript at 14. Claimant returned to the boxcar, then used a forklift while working the remaining 2.5 hours of his shift.

(4) Around 11:00 p.m. on July 12, 2019, claimant went to the emergency room due to ankle pain. After waiting for 2.5 hours, claimant left without being seen by medical providers.

(5) On July 13, 2019, claimant went to an urgent care office due to ankle pain. Claimant completed a form when he arrived at the urgent care office, wherein he stated that he injured his ankle by stepping off his porch. At the urgent care, the medical providers took x-rays and gave claimant a doctor's note stating claimant was not to stand or walk for more than 15 minutes per day, for one week.

(6) On July 14, 2019, an orthopedist called claimant and told him his x-rays showed he had an ankle fracture. Claimant called the employer's plant supervisor and told her that he had injured his ankle while working on July 12, 2019. The supervisor told claimant to report to work to complete a worker's compensation claim form on Monday, July 15. Claimant stated that he could not report to work on July 15 because he had an orthopedist appointment that day. On July 15, 2019, claimant met with an orthopedist, who gave claimant a note stating that claimant should be assigned to light duty, deskwork for 30 days.

(7) On July 16, 2019, claimant reported to work, gave the employer his doctor's note from July 15, and completed the worker's compensation claim form, stating that his injury occurred at work on July 12, 2019. The employer investigated claimant's report of injury. The branch supervisor asked claimant's two coworkers on July 12 if they saw the accident. They told the supervisor that claimant was working at the boxcar. They did not see him have an accident, but saw him "hobble around a little bit," before he completed his shift. Transcript at 14. Claimant's supervisor told the branch supervisor that although claimant appeared injured on July 12, he said he was "fine." Transcript at 14. Claimant met with his orthopedist again that day.

(8) On July 17, 2019, claimant gave the employer a new doctor's note from July 16, stating that he was limited to performing desk work, with no standing longer than 15 minutes during an eight-hour shift, from July 22 through September 22, 2019.

(9) On August 7, 2019, the insurer's investigator found evidence in claimant's chart notes from claimant's July 13 urgent care visit that claimant had completed and signed a statement, and told a physician's assistant that he injured his ankle by "stepping off his front porch." Transcript at 12. The investigator confirmed that claimant's residence had a porch with no rails.

(10) On August 13, 2019, the employer's insurer revoked its initial acceptance of claimant's worker's compensation claim, stating that the claim was not "related to [his] work" based on evidence that the claim acceptance was "procured by fraud, misrepresentation or illegal activity." Transcript at 13.

(11) On August 15, 2019, the employer received a notice from its workers' compensation insurer that it was denying claimant's worker's compensation claim as a fraudulent claim based on the information provided to it by its independent investigator. The employer's executive staff met to review the information and decided to discharge claimant based on his filing of a false claim.

(12) On August 16, 2019, the employer discharged claimant "due to filing a false claim." Transcript at 13.

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 and good faith errors are not misconduct. OAR 471-030-0038(3)(b).

Order No. 19-UI-137415 concluded that claimant either gave false information to his personal insurer that his injury occurred at home or, alternatively, filed a false worker’s compensation claim that his injury occurred at work.¹ The order concluded that either way, claimant’s dishonesty, even if it was without the intent to defraud the employer, constituted a breach of trust, rendered a continuing relationship between claimant and the employer impossible, and arguably violated the law.² The order therefore reasoned that claimant’s conduct was not excusable as an isolated instance of poor judgment or good faith error.³ However, the record does not support the conclusion that claimant violated the employer’s expectations by making a false statement to the employer, the employer’s insurer, or the Workers’ Compensation Board to obtain any worker’s compensation benefit or payment. See ORS 656.990(1).

The employer discharged claimant because it concluded, based on its insurer’s investigator’s findings, that claimant filed a fraudulent worker’s compensation claim because his ankle injury was not work related. The evidence is uncontested that claimant reported to an urgent care facility on July 13 that he was injured stepping of his porch at home. However, based on this record, the preponderance of the evidence does not show that claimant filed a fraudulent worker’s compensation claim because the preponderance of the evidence shows that claimant’s injury occurred at work. Claimant testified that his ankle injury occurred at work on July 12. Transcript at 20. Claimant told the employer, and reported on his worker’s compensation claim form that he was injured at work on July 12. Claimant’s supervisor and two coworkers saw claimant in an injured state on July 12. The uncontroverted evidence is that claimant went to the emergency room on July 12 for an ankle injury. Moreover, claimant testified plausibly that he told the urgent care clinic on July 13 that his injury occurred on his home porch because, if it was “just a sprain,” he believed he would return to work the next day. Transcript at 23. The preponderance of the evidence shows claimant’s injury occurred at work on July 12. Claimant did not therefore provide incorrect information to the employer, the employer’s insurance, or the Workers’ Compensation Board.

Even assuming claimant’s conduct of making a false statement to a medical provider about his work-related injury was connected to work, it was not misconduct. *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). Claimant’s conduct was at worst a misguided attempt to act in the employer’s interest by forgoing a worker’s compensation claim for what claimant believed was “just a sprain.” Transcript at 23. The record does not show that claimant knew or should have known that stating his injury occurred at home would probably result in a violation of the employer’s expectations.

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). Here, the employer

¹ Order No. 19-UI-137415 at 4.

² Order No. 19-UI-137415 at 4.

³ Order No. 19-UI-137415 at 4.

did not meet that burden. Therefore, we conclude that the employer failed to establish that it discharged claimant for misconduct. Claimant is not disqualified from receiving unemployment insurance benefits because of his work separation.

DECISION: Order No. 19-UI-137415 is set aside, as outlined above.

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

DATE of Service: November 19, 2019

NOTE: 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.

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 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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