

EMPLOYMENT APPEALS BOARD DECISION
2019-EAB-1073

Affirmed
No Disqualification

PROCEDURAL HISTORY: On September 10, 2019, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that the employer discharged claimant for misconduct (decision # 102357). Claimant filed a timely request for hearing. On October 18, 2019, ALJ Snyder conducted a hearing, and on October 25, 2019 issued Order No. 19-UI-138739, concluding that the employer discharged claimant but not for misconduct. On November 13, 2019, the employer filed an application for review with the Employment Appeals Board (EAB).

With its application for review, the employer presented a written argument. However, the employer did not declare 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). The argument also contained information that was not part of the hearing record, and did not show that factors or circumstances beyond the employer's reasonable control prevented them from offering the information during the hearing as required by OAR 471-041-0090 (May 13, 2019). EAB considered only information received into evidence at the hearing when reaching this decision. *See* ORS 657.275(2).

FINDINGS OF FACT: (1) Landmark Ford Inc. employed claimant as a parts delivery driver from 2014 to August 1, 2019.

(2) On July 31, 2019, claimant was transporting a core motor he had picked up in an employer van. He had just left Damascus, Oregon and was heading down a highway toward his next delivery, when the cars in front of him suddenly stopped. To avoid hitting the car in front of him, claimant violently swerved his vehicle off to the side of the road, barely avoiding a collision with the car in front of him. A dump truck that had been behind claimant almost rear-ended the car claimant swerved to avoid. When claimant came to a stop, he was parallel to the vehicle that had been in front of him and observed its driver, who was shaking. He realized that if he had not swerved out of the way, there would have been a three-car collision involving the dump truck, his van, and the vehicle in front of him, and that he or the other car driver may have been killed or seriously injured. Claimant was "shaken up" by what had just occurred, "almost going into shock," and rather than complete his deliveries, returned to the employer to drop off the motor and his paperwork and go home. Audio Record at 21:00 to 22:00.

(3) When claimant arrived at the employer, he dropped off the motor at its warehouse, went to the office, and told one supervisor that he had not completed his deliveries without any other explanation. Claimant then walked into his direct supervisor's office to turn in his invoices and mileage paperwork. When he turned in the paperwork to that supervisor, he did not tell him that he had almost been in an accident and that he had not completed all of his deliveries. At that point, claimant clocked out and left the building to go home.

(4) As claimant walked away from the employer's building, claimant's direct supervisor, having been informed that not all of claimant's deliveries had been completed, ran outside toward claimant. He yelled at claimant, "What is going on?" to which claimant yelled back that he had "almost got into an accident, . . . was shaken," and "needed to get out of there." Audio Record at 9:00 to 9:40. Claimant then went home.

(5) On August 1, 2019, when claimant reported for work, he was directed to go to his supervisor's office. When he arrived, he was discharged for leaving work without completing his deliveries, not immediately informing the employer with a phone call, and for yelling at his supervisor before leaving work the previous day.

(6) Prior to July 31, 2019, claimant had never been disciplined before by the employer.

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).

The employer had the right to expect claimant to complete his deliveries or to notify the employer he could not complete his deliveries and the reason why he could not complete his deliveries. The employer also had the right to expect claimant to refrain from yelling at his supervisor. Claimant understood those expectations as a matter of common sense, and violated them on July 31, 2019. Assuming that his conduct in doing so was at least wantonly negligent, we conclude it was no more than an isolated instance of poor judgment and not misconduct.

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 assert, and the record does not otherwise show that claimant engaged in other willful or wantonly negligent conduct during his employment. Although claimant's conduct may have involved separate acts in failing to complete his deliveries, failing to notify the employer that he could not complete his deliveries and the reason why, and yelling at his supervisor

when confronted, each of those acts were part of the same episode involving his near collision on the highway and his emotional reaction to that event. Under Oregon case law interpreting OAR 471-030-0038(1)(d)(A), such a series of acts arising from the same episode were considered an isolated instance. *See, e.g., Perez v. Employment Dept*, 164 Or App 356, 992 P2d 460 (1999) (“isolated instance” of poor judgment may consist of a series of acts arising from the same episode); *Bunnell v. Employment Div.*, 304 Or 11, 741 P2d 887 (1987) (refusal to comply with supervisor’s directive and subsequent vulgar response to second request constituted a single instance of poor judgment).

However, some acts, even if isolated, such as those that violate law, are tantamount to unlawful conduct, create an irreparable breach of trust or make a continued employment relationship impossible, are so serious that they exceed mere poor judgment and cannot be excused. OAR 471-030-0038(1)(d)(D). The employer failed to establish that claimant’s conduct was unlawful or tantamount to unlawful conduct, and, viewed objectively, after over four years of employment without any previous discipline, claimant’s conduct was not so egregious under the circumstances that it created an irreparable breach of trust or made a continued employment relationship impossible.

In a discharge case, the employer bears the burden to establish misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976). Because claimant engaged in a single wantonly negligent act on July 31, 2019, and that act did not exceed mere poor judgment, the employer failed to satisfy its evidentiary burden. The employer discharged claimant, but not for misconduct. Claimant is not subject to disqualification from unemployment insurance benefits on the basis of his work separation.

DECISION: Order No. 19-UI-138739 is affirmed.

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

DATE of Service: December 17, 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 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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