

EMPLOYMENT APPEALS BOARD DECISION
2020-EAB-0056

Affirmed
No Disqualification

PROCEDURAL HISTORY: On November 8, 2019, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant was discharged, but not for misconduct (decision # 164814). The employer filed a timely request for hearing. On January 14, 2020, ALJ Vaughn conducted a hearing, and on January 15, 2020, issued Order No. 20-UI-142652, affirming the Department's decision. On January 21, 2020, the employer filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) West Coast Home Solutions, LLC, employed claimant as a Dump Truck Driver from early September 2019 until October 18, 2019. Claimant had twelve years of prior experience driving dump trucks and, as a result, he had received extensive training from previous employers on safely operating a dump truck.

(2) The employer's safety policy required claimant to review the employee handbook and the dump truck operating procedures to ensure that he operated the dump truck in a safe and professional manner, in accordance with the applicable rules of the road and industry standards. As part of claimant's training, he was initially required to operate the dump truck with a member of the employer's staff present so that the employer could ensure that claimant could operate the dump truck in a safe fashion. This initial ride along training lasted 4 hours. From the end of that training forward, claimant operated the employer's dump truck alone. The employer's safety protocol, as well as industry standard, required a dump truck driver to refrain from operating the dump truck anytime the driver felt like he could not do so in a safe and professional manner.

(3) Approximately 2½ weeks prior to his discharge, claimant's dump truck broke down prior to claimant reaching the intended worksite. The employer viewed the breakdown as occurring due to claimant's failure to disengage the transfer case on the dump truck. Claimant viewed the breakdown as the result of a malfunctioning weight gauge in the truck, which incorrectly noted the weight of the load and resulted in claimant operating an overloaded truck. Claimant informed the employer of the broken gauge the day before but the employer instructed claimant to "go ahead and go." Audio Record at 34:17.

(4) In that same timeframe, the employer noted a safety violation that occurred when claimant backed over certain materials at a worksite. Claimant believed that he never backed over any materials at any worksite.

(5) On October 17, 2019, claimant transported a load to a worksite and immediately noticed that there were power lines above the location where he was directed to dump the load. Claimant recognized that he could not safely dump the load alone because he could not both raise and lower the bed from inside the cab of the truck and simultaneously see whether he was at risk of hitting any obstructions during the raising and lowering of the bed. Claimant exited the truck to speak with the crew lead in charge of the workers at the site. Claimant asked the crew lead if one of the workers would spot him as he dumped the load. None of the workers spotted claimant as he proceeded to dump the load, thus, claimant “guesstimated” his movements with the truck. Audio Record at 32:10. After he dumped the load, claimant began pulling the truck forward approximately six inches, while he simultaneously lowered the bed. Pulling the truck forward while lowering the bed ensured that all of the dirt was removed from the bed of the truck, and was consistent with proper operating protocol. Because of claimant’s close proximity to the power lines, claimant hit a power line when he lowered the bed while pulling the truck forward.

(6) On October 18, 2019, the employer discharged claimant for hitting the power line on the previous day.

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’s expectation that claimant would operate the dump truck in a safe and professional manner consistent with industry standard and the rules of the road was reasonable, particularly given claimant’s extensive experience driving dump trucks. Industry standard included the reasonable expectation that claimant would refuse to operate his dump truck in any instance where doing so would create a safety hazard. While claimant did not intentionally hit the power line with his dump truck on October 17, 2019, his actions were nevertheless wantonly negligent because claimant was indifferent to the consequences of operating the truck near a power line without a spotter. Claimant recognized the safety hazard posed by the power line above the dumpsite and he exited the truck and approached nearby work crew members to request a spotter. Instead of ensuring the presence of a spotter prior to raising and lowering the bed of his truck, however, claimant proceeded to guesstimate his movements, raising and lowering the bed of his truck in the face of a known safety hazard (the overhead power lines) where the likelihood of an accident was foreseeable. Claimant’s conscious disregard for the

consequences of his action in raising and lowering his dump truck bed near a power line violated the reasonable standards of behavior that the employer had a right to expect.

Nevertheless, claimant's deviation from this reasonable standard of behavior was not misconduct because the employer failed to meet its burden in demonstrating that it was anything more than an isolated instance of poor judgment. To determine whether conduct was an isolated instance of poor judgment, the following standards apply:

- (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). Although claimant exercised poor judgment by dumping his dump truck load without a spotter in the face of a known safety hazard, his action was isolated. While the employer did reference two prior safety violations, the preponderance of the evidence failed to establish that either prior action amounted to a willful or wantonly negligent violation of the standards of behavior the employer had a right to expect. The employer noted that 2½ weeks prior to his discharge claimant's dump truck broke down while claimant was carrying a load to a worksite. While the employer viewed this breakdown to be the result of claimant's unreasonable failure to disengage the truck's transfer case, claimant viewed the breakdown as the result of a malfunctioning weight gauge on the truck, which resulted in claimant attempting to drive an overloaded dump truck to the worksite. Claimant testified that the day before the breakdown he brought the malfunctioning gauge to the attention of the employer, but he was instructed to proceed with the delivery despite the problem. Because the evidence demonstrating who bears responsibility for this breakdown appears to be equally balanced at best, the employer has failed to meet its burden in demonstrating that the breakdown was the result of claimant's misconduct. Likewise, the employer has failed to demonstrate by a preponderance of the evidence that claimant willfully or with wanton negligence violated any other reasonable expectations of the employer while operating the dump truck during his employment. The preponderance of the evidence demonstrates that claimant's conscience disregard for the foreseeable consequences of his decision to

raise and lower his truck bed on October 17, 2019, was an isolated instance of poor judgment and not misconduct.

Claimant's wantonly negligent exercise of poor judgment on October 17, 2019 also did not exceed mere poor judgment. There is no evidence in the record suggesting that claimant's conduct in dumping his dump truck load without first ensuring the presence of a spotter violated any law or was otherwise tantamount to unlawful conduct. Furthermore, although claimant violated the employer's safety policy, his conduct is mitigated by the fact that he initially recognized the safety hazard that existed, and he sought to eliminate the hazard by seeking the assistance of a spotter. Claimant's error was his failure to ensure that the spotter he might have thought was going to assist was actually going to assist. Under the circumstances presented in this case, no similarly situated reasonable employer would have concluded that this type of miscommunication would cause an irreparable breach of trust in the employment relationship or otherwise make a continued employment relationship impossible.

For these reasons, the EAB concludes that claimant's discharge was not for misconduct. Claimant is not disqualified from receiving unemployment insurance benefits because of his work separation.

DECISION: Order No. 20-UI-142652 is affirmed.

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

DATE of Service: February 19, 2020

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 ໂດຍປະຕິບັດຕາມຄໍາແນະນຳທີ່ບອກໄວ້ຢູ່ຕອນທ້າຍຂອງຄໍາຕັດສິນນີ້.

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 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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