

EMPLOYMENT APPEALS BOARD DECISION
2020-EAB-0209

Affirmed
No Disqualification

PROCEDURAL HISTORY: On January 31, 2020, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct connected with work (decision # 142749). Claimant filed a timely request for hearing. On February 27, 2020, ALJ Snyder conducted a hearing, and on March 4, 2020, issued Order No. 20-UI-145605, concluding that claimant's discharge was not for misconduct. On March 6, 2020, the employer filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Clackamas County employed claimant as a case manager from June 1, 2019 to January 9, 2020. Claimant was on a 12-month probationary period and claimant's job responsibilities included driving, which was "an integral part of fulfilling her role." Transcript at 5.

(2) The employer had a driving policy, EPP 52 (the driving policy), which addressed the employer's expectations for any employee conducting county business which required the employee to either drive a county vehicle or their personal vehicle. The policy assigned points to an employee based on "the severity of [a driving] conviction." Transcript at 6. If an employee exceeded a total of 34 points within an 18-month period, that employee would be ineligible to perform an essential function of her job. For probationary employees, a violation of the 34-point limit could lead to dismissal based on "work or conduct ... found to be unacceptable to the appointing authority...." Exhibit 1 at page 2 and 5 of 8.

(3) At the time of her hire, claimant had two prior driving violations. The first violation occurred in July 2018 and the second violation was in January 2019. Claimant's two prior violations did not place her over the 34-point limit.

(4) New employees were to learn about the driving policy during their new employee orientation process. A supervisor directed claimant to digitally sign a copy of the driving policy despite claimant's concern that she had not had adequate time to read the policy and ask questions. The supervisor told claimant to sign the policy "and we'll talk about it later." Transcript at 13. The supervisor never

followed up with claimant about the driving policy; however, claimant perceived that the driving policy applied to driving county cars during working hours and not personal cars during personal hours.

(5) On September 16, 2019, claimant received a speeding ticket for travelling 74 miles per hour (MPH) in a 55 MPH zone. At the time of her violation, claimant was on her unpaid, hour-long lunch break. Claimant was driving her personal vehicle and she was unaccompanied. Claimant did not dispute that she committed the speeding violation. Claimant pled no contest to the speeding violation and paid the ticket in full. Claimant's speeding conviction increased her point total to 42 points, violating the driving policy's 34-point limit.

(6) On or about December 4, 2019, the employer learned of claimant's speeding conviction and that the violation put claimant over the 34-point limit. It was the employer's understanding that claimant's point total would not drop below the 34-point threshold until June 5, 2020.

(7) On December 17, 2019, the employer conducted an investigatory meeting with claimant. During the meeting claimant expressed her belief that one of her prior citations/convictions had been "dismissed." The employer encouraged claimant to check with the DMV regarding the potential dismissal as it was relevant to her point total.

(8) On December 23, 2019, the employer checked with the DMV to see if there was any change to claimant's driving conviction record, which might impact her point total. The DMV reported no change.

(9) On December 30, 2019, the employer provided claimant a paid administrative leave letter and a proposed dismissal letter. The proposed dismissal letter informed claimant that a meeting would occur on January 2, 2020, where claimant would have an opportunity to refute any of the allegations and/or provide mitigating information.

(10) On January 2, 2020, the employer and claimant met. Claimant requested that the employer consider a suspension or demotion and noted that her July 2018 conviction should drop off her point total in "four or five" days. Transcript at 16. The employer discharged claimant from her probationary employment for violating the driving policy.

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). In a discharge case, the employer has the burden to demonstrate misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

As a preliminary matter, although claimant was off-duty and on a lunch break when she received her September 16, 2019 speeding ticket, claimant's ability to safely operate a vehicle at all times was an integral part of her job responsibilities with the employer. Because such off-duty driving conduct affected or had a reasonable likelihood of affecting the employer's workplace, claimant's conduct was connected with 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); *Holbrook v. Employment Department*, 250 Or App 313, 287 P3d 424 (2012) (claimant's off-duty traffic violations were work connected where her job duties included driving an employer-owned vehicle and employer had an interest and a policy preventing high-risk drivers from operating those vehicles).

The record supports the conclusion that the employer had a driving policy stating its expectations for any employee who operated a county or personal vehicle as part of their job responsibilities. The employer's expectations, as reflected in the policy, included the requirement that employees subject to the policy would not exceed a designated number of points related to driving convictions they received while driving on their personal time. The employer expected employees to review and acknowledge this driving policy as part of their new hire orientation process. Despite these requirements, the record supports the conclusion that the employer provided claimant a copy of the driving policy and told her to sign the acknowledgment, without providing her time to review the policy and ask questions. As a result of her inability to review the policy and/or ask the employer questions related to the driving policy, claimant reasonably believed that the driving policy only applied in situations where claimant was driving while on duty and conducting company business. Because the preponderance of the evidence does not establish that claimant should have known that the employer's driving policy applied to her while she was driving off duty, the employer has failed to meet its burden in establishing that claimant committed misconduct.

For these reasons, the EAB concludes that the employer discharged claimant, but not for misconduct. Claimant is not disqualified from receiving unemployment insurance benefits because of her work separation.

DECISION: Order No. 20-UI-145605 is affirmed.

DATE of Service: April 8, 2020

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

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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