

EMPLOYMENT APPEALS BOARD DECISION
2020-EAB-0663

Reversed
Disqualification

PROCEDURAL HISTORY: On September 2, 2020, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant was discharged for misconduct and disqualified from receiving unemployment insurance benefits effective April 19, 2020 (decision # 91115). Claimant filed a timely request for hearing. On September 23, 2020, ALJ Murdock conducted a hearing, and on September 25, 2020 issued Order No. 20-UI-154448, reversing decision # 91115 and concluding that claimant was discharged but not for misconduct. On October 13, 2020, the employer filed an application for review with the Employment Appeals Board (EAB).

EAB considered the employer's written argument when reaching this decision.

EVIDENTIARY MATTER: EAB has considered additional evidence when reaching this decision under OAR 471-041-0090(1) (May 13, 2019). The additional evidence consists of correspondence regarding claimant's driver's license and a police report and supporting documentation regarding claimant's arrest on April 23, 2019, enclosed with the employer's written argument, which together have been marked as EAB Exhibit 1, and a copy provided to the parties with this decision. Any party that objects to our admitting EAB Exhibit 1 must submit such objection to this office in writing, setting forth the basis of the objection in writing, within ten days of our mailing this decision. OAR 471-041-0090(2). Unless such objection is received and sustained, EAB Exhibit 1 will remain in the record.

FINDINGS OF FACT: (1) Tum-a-Lum Lumber employed claimant as a driver from August 25, 2015 until April 23, 2020.

(2) The employer maintained a policy requiring that all employees report drug-related arrests and convictions within five calendar days of their occurrence. Transcript at 8. At the same time, Federal

Motor Carrier Safety Administration (FMCSA) regulations required claimant to report any suspension or revocation of his commercial driver's license (CDL) by the following business day. Transcript at 8 - 9. The employer advised claimant of these policies at the time they hired him. Transcript at 13.

(3) On April 23, 2019 at approximately 10:30 p.m., claimant was driving his personal vehicle when he was stopped by a Washington State trooper because he was speeding. EAB Exhibit 1 at 10; Transcript at 16 - 20. When claimant stepped out of his vehicle, the trooper observed that claimant strongly smelled of alcohol, was speaking in "slurred, thick tongued speech [sic]," and "dropped [his] insurance card as if he had fat fingers." EAB Exhibit 1 at 10. After failing a field-sobriety test and giving an alcohol breath test above the legal limit, the trooper arrested claimant for driving under the influence (DUI). EAB Exhibit 1 at 10.

(4) On May 3, 2019, the State of Washington Department of Licensing (DOL) served on claimant notice of a hearing regarding the proposed revocation of his driver's license. EAB Exhibit 1 at 2. DOL mailed additional correspondence to claimant regarding the same matter at least three additional times between May and September 2019. EAB Exhibit 1 at 4 - 8. On September 4, 2019, DOL mailed to claimant a decision advising him that his driver's license would be revoked from September 22, 2019 until September 21, 2020. EAB Exhibit 1 at 6.

(5) At some point during or prior to April 2020, the employer's insurance carrier began requiring the employer to implement a continuous license-monitoring program for its CDL drivers. Transcript at 5. The employer subsequently ran reports on claimant's driving history and criminal background, and on April 21, 2020 learned that claimant's license had been revoked and that he had been charged with DUI. Transcript at 5 - 7. Claimant had not reported either the DUI or the license revocation prior to that date. Transcript at 5. As a result of claimant's failure to report these occurrences, the employer discharged claimant on April 23, 2020. Transcript at 4.

CONCLUSIONS AND REASONS: The employer discharged claimant 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) (September 22, 2020). "[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).

Isolated instances of poor judgment are not misconduct. OAR 471-030-0038(3)(b) (September 22, 2020). The following standards apply to determine whether an “isolated instance of poor judgment” occurred:

* * *

(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).

The order under review concluded that claimant’s failure to disclose the DUI and license revocation was not misconduct because the “record is not persuasive that claimant clearly knew he violated the employer’s reasonable standards of behavior with respect to the incident on April 23, 2019 or the events that followed concerning a pending DUI charge”; and that the record “is persuasive that claimant had not known that his driving privileges had been revoked.” Order No. 20-UI-154448 at 3. This conclusion is supported by claimant’s testimony, during which he indicated that he had not been arrested at the traffic stop on April 23, 2019 and therefore did not believe he needed to report it; was not at the time of the traffic stop aware that he had been charged with DUI; and was unaware that his license had been revoked until the employer ran the report on his driving record in April 2020. Transcript at 21, 28, 14.

While the evidence at hearing supports these conclusions, EAB Exhibit 1 calls into question the plausibility of the testimony on which they are premised. The Washington State Patrol police report narratives indicate that claimant showed signs of intoxication during the stop on the evening of April 23, 2019, that he was arrested as a result, and that he was charged with DUI the following day. EAB Exhibit 1 at 13, 33. Further, the correspondence that DOL issued to claimant between May and September 2019 indicates that claimant had specifically sought to contest the then-proposed revocation of his driver’s license, and that said revocation went into effect on September 22, 2019. EAB Exhibit 1 at 9. This evidence cannot be reconciled with claimant’s assertions that he had not consumed alcohol on the evening of April 23, 2019 (Transcript at 18), that he was not arrested that evening, that he had no knowledge of the DUI charge against him at the time, or that he was not aware that his license had been suspended until April 2020. Accordingly, EAB does not find claimant’s testimony on these points to be credible.

In so finding, the question of whether claimant’s failures to notify the employer of his arrest and license revocation amount to misconduct must be reconsidered. The employer admitted at the hearing that while their policy requiring employees to “. . . report drug related arrests within five calendar days of their occurrence . . .” was intended to include alcohol-related arrests, the policy did not explicitly list alcohol. Transcript at 8. Even assuming that the policy did not require claimant to report the arrest, however, the record is clear that his failure to report the revocation was a violation of both the employer’s policies and FMCSA regulations. An employer has the right to expect an employee to report any such license revocations if, as with claimant, the employee’s job duties require them to be licensed, because the employee’s failure to do so could expose the employer to financial and legal risk.

As discussed above, EAB Exhibit 1 demonstrates that claimant was, contrary to his testimony, aware of the license revocation as of September 2019. Because claimant did not admit as much, his motivation for failing to timely report the revocation to the employer must be inferred from the record. His decision to misrepresent the facts surrounding his arrest, criminal charge, and license revocation suggest that the omission was more likely than not intentional.

Further, while intentionally failing to report a license revocation may be the result of poor judgment, it does not meet the criteria for an “isolated instance of poor judgment” as defined under OAR 471-030-0038(1)(d), such that it would constitute an exception to misconduct per OAR 471-030-0038(3)(b). In relevant part, “acts that violate the law [or] are tantamount to unlawful conduct” are not isolated instances of poor judgment. 471-030-0038(1)(d)(D). Thus, because claimant’s failure to report the revocation violated FMCSA regulations, it was not an isolated instance of poor judgment. Instead, because claimant’s conduct constituted an intentional violation of the standards of behavior which the employer had the right to expect of him, claimant was discharged for misconduct and is disqualified from receiving unemployment insurance benefits effective April 19, 2020.¹

DECISION: Order No. 20-UI-154448 is set aside, as outlined above.

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

DATE of Service: November 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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¹ This decision denies payment of your Unemployment Insurance (UI) benefits.

However, you may be eligible for Pandemic Unemployment Assistance (PUA) benefits for the period you are not eligible for other benefits as long as you are unable to work, unavailable for work, or unemployed due to the COVID-19 public health emergency. PUA is a new unemployment benefits program available through the Oregon Employment Department in response to the COVID-19 pandemic.

Visit <https://unemployment.oregon.gov> for more information, to apply for PUA, or to contact the Oregon Employment Department using the “Contact Us” form. You can also apply for PUA by calling 1-833-410-1004, but please be aware that the PUA staff cannot answer questions about this decision that denies payment of regular Unemployment Insurance (UI) benefits.



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 ໂດຍປະຕິບັດຕາມຄໍາແນະນໍາທີ່ບອກໄວ້ຢູ່ຕອນຫ້າຍຂອງຄໍາຕັດສິນນີ້.

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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