

EMPLOYMENT APPEALS BOARD DECISION
2020-EAB-0735

Reversed
No Disqualification

PROCEDURAL HISTORY: On October 6, 2020, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that the employer discharged claimant for misconduct and claimant was disqualified from receiving unemployment insurance benefits effective April 26, 2020 (decision # 92434). Claimant filed a timely request for hearing. On November 10, 2020, ALJ Janzen conducted a hearing, and on November 12, 2020 issued Order No. 20-UI-156310, affirming the Department's decision. On November 23, 2020, claimant filed an application for review with the Employment Appeals Board (EAB).

WRITTEN ARGUMENT: Claimant 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 Claimant'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) Waste Management of Oregon employed claimant as a garbage truck driver from April 27, 2009 until April 27, 2020.

(2) The employer's expectations regarding accidents were contained in its policies and procedures. The employer's policies and procedures required drivers to timely report all accidents or injuries to a supervisor. Drivers could be discharged for failing to report an accident or injury. The employer's accident policy also prohibited drivers from having three or more preventable accidents in a rolling 12-month period. The employer made claimant aware of these expectations during onboarding and in annual trainings. Claimant was aware of and understood the employer's expectations regarding accidents.

(3) For a nine-year period during the time claimant worked for the employer, claimant worked on a manual garbage truck, which required claimant to side load garbage carts by hand. Claimant had one

incident during the nine years he did side load work. He accidentally hit the right turn signal of a vehicle parked on the street. Claimant reported this incident to the employer.

(4) For approximately the last 18 months of his employment for the employer, claimant drove an automated garbage truck. The employer moved claimant from side load work to an automated truck because of a foot injury claimant had sustained. Claimant did not want to drive an automated truck, and believed he was not good at it. The truck was equipped with a mechanical claw, which claimant operated with a joystick. Claimant used the claw to grasp and move garbage carts. Operating the claw required skill. Claimant often had to maneuver the claw into tight spaces between the garbage carts and personal property items on the street. If the space between the carts and personal property items was too close, maneuvering the claw into the space risked making contact with the personal property items, which could cause damage.

(5) On April 3, 2019, claimant made contact with a basketball rim while operating the mechanical claw. Claimant accidentally pushed out slightly on the joystick he used to operate the claw, which resulted in the claw clipping the edge of the rim. Claimant reported this incident to the employer. On June 17, 2019, claimant struck a wooden mailbox pole with the mechanical claw. A customer had placed a garbage cart against the mailbox pole. Claimant thought he had adequate clearance so he tried to maneuver the claw in to grab the cart but a bolt that extended from the claw hit the corner of the pole. Claimant reported this incident to the employer.

(6) On April 15, 2020, claimant hit a street sign pole with the mechanical claw. Claimant was in a rush to pick up a garbage cart with the claw and thought he could fit the claw in safely but accidentally made contact with the pole. Claimant was aware that he hit the pole but did not report the incident to the employer.

(7) On April 27, 2020, the employer discharged claimant for failing to report the April 15, 2020 incident.

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) (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). Isolated instances of poor judgment are not misconduct. OAR 471-030-0038(3)(b) (September 22, 2020). 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).

The final incident that caused the employer to discharge claimant on April 27, 2020 was claimant's failure to report to the employer the incident in which claimant hit a street sign pole on April 15, 2020.¹ The employer expected its drivers to timely report all accidents or injuries to a supervisor. Claimant was aware of this policy. The policy was reasonable as a matter of common sense. Thus, the record shows that by hitting the street sign on April 15, 2020 and failing to report the incident, claimant violated the employer's reasonable expectation that claimant would timely report all accidents or injuries. Because claimant was conscious of his failure to report and knew it would violate the employer's policy, claimant's conduct was, at minimum, wantonly negligent.

Applying similar reasoning, Order No. 20-UI-156310 concluded, correctly, that claimant violated the employer's policies with at least wanton negligence. Order No. 20-UI-156310 at 3. The Order went on, however, to conclude that claimant's conduct was disqualifying misconduct because it was not an isolated instance of poor judgment. Order No. 20-UI-156310 at 3. The record fails to support that conclusion.

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).

Here, the employer failed to meet its burden to demonstrate that claimant's failure to report the April 15, 2020 incident was anything more than an isolated instance of poor judgment. Claimant's failure to report

¹ At hearing, the employer conceded that it discharged claimant because he failed to report the April 15, 2020 incident rather than due to the employer's rule against having three or more preventable accidents in a rolling 12-month period. Audio Record at 17:41 to 18:02. The employer did not discharge claimant for having three or more preventable accidents in a rolling 12-month period because the April 3, 2019 incident fell outside the rolling 12-month period. Audio Record at 18:03 to 18:50.

the April 15, 2020 incident was a conscious decision in the context of claimant's employment relationship that violated the employer's reasonable expectation with, at minimum, wanton negligence, and thus was an exercise of poor judgment.

Claimant's failure to report the April 15, 2020 incident was also isolated. Claimant was no serial offender when it came to failing to report incidents – the record shows that the April 15, 2020 incident was the only accident he failed to report. And the weight of the evidence indicates that claimant's conduct of causing the incidents – hitting the street sign pole on April 15, 2020, the mailbox pole on June 17, 2019, and the basketball rim on April 3, 2019 – did not constitute a pattern of wantonly negligent behavior because those incidents were more likely than not the result of mere negligence. Claimant never intended to hit personal property items and “always tr[ie]d to be careful.” Audio Record at 29:22 to 29:31. He hit the street sign pole because he was in a rush to pick up a garbage cart and thought he could do so safely, he struck the mailbox pole because he did not account for the bolt that extended from the mechanical claw, and he made contact with the basketball rim because he accidentally pushed out slightly on the joystick he used to operate the claw. The record suggests that claimant's lack of skill in operating the mechanical claw was a contributing factor in all of the incidents that occurred while he drove an automated truck, and accidents that occur as a result of lack of skill or experience do not constitute wanton negligence. Moreover, although claimant once accidentally hit the right turn signal of a vehicle parked on the street during the nine-year period he did side load work for the employer, that incident was too remote in time to constitute a repeated act or pattern of behavior. In sum, the record does not show that claimant's conduct in causing any of the incidents discussed above was due to a conscious disregard of the employer's expectations such that those incidents constitute a pattern of willful or wantonly negligent behavior. Claimant's exercise of poor judgment during the final incident on April 15, 2020 was no more than an infrequent occurrence.

Finally, claimant's violation of the employer's reasonable expectation to report the April 15, 2020 incident did not exceed mere poor judgment because it was not unlawful, it was not tantamount to unlawful conduct and, viewed objectively, was not so egregious that it created an irreparable breach of trust in the employment relationship or otherwise made a continued employment relationship impossible.

For these reasons, the employer discharged claimant for an isolated instance of poor judgment, which is not misconduct. Claimant is not disqualified from receiving unemployment insurance benefits on the basis of his work separation

DECISION: Order No. 20-UI-156310 is set aside, as outlined above.

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

DATE of Service: December 23, 2020

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 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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