

EMPLOYMENT APPEALS BOARD DECISION
2021-EAB-0097

Reversed
Disqualification

PROCEDURAL HISTORY: On January 7, 2021, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct and claimant was disqualified from receiving unemployment insurance benefits effective October 4, 2020 (decision # 80818). Claimant filed a timely request for hearing. On February 5, 2021, ALJ Snyder conducted a hearing, and on February 9, 2021 issued Order No. 21-UI-160718, concluding the employer discharged claimant, but not for misconduct, and claimant was not disqualified from receiving unemployment insurance benefits on the basis of his work separation. On February 11, 2021, the employer filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) New System Laundry employed claimant as a sales representative from August 22, 2020 to October 8, 2020. Claimant travelled to regional restaurants and bars to sell the employer's product and used an employer-owned fleet vehicle to travel to potential customers for sale calls.

(2) The employer expected claimant to be responsible for the care and operation of the employer vehicle assigned to him and to act in a professional manner when engaging with customers or clients. The employer also expected claimant to be "reliable and punctual" in reporting for work as scheduled and to notify the employer as soon as possible in advance if he was going to be absent or late. Exhibit 1, Attendance Policy. Claimant was aware of and understood the employer's expectations.

(3) On October 6, 2020, claimant travelled to meet with a prospective customer at a regional restaurant and bar to sell the employer's product and used an employer-owned vehicle to get there. Claimant succeeded in making a sale and the establishment's owner invited claimant to stay for a drink. Claimant contacted the employer, reported the successful sale, and asked if he could take the rest of the afternoon off, to which the employer agreed.

(4) Claimant stayed at the bar and had a drink with the business owner. Claimant, who "had a history of alcohol issues," intended to have one drink and then leave. Audio Record at 13:20 to 13:25; 23:50 to

24:05. However, because claimant was “off the clock...was no longer working, and...was enjoying the company [he] had at the time,” he decided to remain at the bar, had multiple drinks and became intoxicated. Audio Record at 24:05 to 24:45. Late on October 6, 2020, the owner’s son found claimant laying on the walkway outside the establishment and the keys to the employer’s vehicle nearby on the ground. The owner’s son assisted claimant and secured the keys to the employer’s vehicle in the establishment. Claimant eventually contacted his wife, who picked claimant up late on October 6, 2020 and drove him home. After calling his wife, claimant broke his phone, which did not operate after that.

(5) On October 7, 2020, claimant did not report for work as scheduled at the morning sales meeting or notify the employer that he would be absent. The employer became concerned about claimant’s whereabouts and attempted to contact claimant by phone without success. The employer decided to locate claimant’s fleet vehicle using the installed Global Positioning System (GPS) tracker and discovered that the vehicle remained at the establishment where claimant had made the sale on October 6, 2020. The employer’s director of operations contacted the establishment’s owner and learned about claimant’s drinking activities on of October 6, 2020 and that the owner’s son found claimant laying on the walkway in front of the establishment with the keys to the employer’s vehicle on the ground nearby. The employer then called claimant’s wife, who explained that she had picked claimant up at the establishment the night before and that he was at home.

(6) During the late afternoon on October 7, 2020, claimant called the employer’s human resources manager using his wife’s phone and offered to resign. He disclosed that he had a “history of alcohol issues,” and that “going in and out of bars in this type of sales position was creating a lot of temptation for him.” Audio Record at 13:00 to 13:35. The manager told claimant to wait until the employer’s management discussed the matter. Claimant later disclosed that he preferred to remain employed if that was an option.

(7) On October 8, 2020, the manager discussed the incident with the employer’s owner, director of operations and sales managers. The group collectively decided to terminate claimant’s employment based on a combination of factors. It concluded that considering claimant’s “history of alcohol issues,” his intoxication and behavior at the customer’s establishment, which included being found outside, intoxicated and laying on a walkway with the keys to the employer’s vehicle nearby and unsecured, and his subsequent failure to report for work or notify the employer he would be absent was “egregious” and justified termination of his employment. Audio Record at 18:10 to 18:45. Later that day, the employer discharged claimant for those reasons.

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 or good faith errors are not misconduct. OAR 471-030-0038(3)(b).

The employer discharged claimant based on his off-duty¹ intoxication and behavior at their customer’s establishment on October 6, 2020, which included being found outside the establishment at night, intoxicated and laying on a walkway with the keys to the employer’s vehicle nearby and unsecured, followed by his subsequent failure to report for work the next day or notify the employer he would be absent.

The record shows that claimant was aware that he “had a history of alcohol issues,” but nonetheless, after planning to have only one drink, decided that because he was “off the clock...no longer working, and . . . enjoying the company [he] had at the time,” decided to remain at the bar and have multiple drinks resulting in his eventual intoxication. Accordingly, the record shows that despite his history of alcohol issues, claimant consciously engaged in conduct, excessive drinking, to an extent that he knew or should have known would probably result in his inability to meet the employer’s expectations regarding professional conduct in front of customers, maintaining responsibility for the employer’s vehicle, and his attendance at work the next day. More likely than not, based on claimant’s poor judgment on October 6, 2020 to consume an excessive amount of alcohol at the customer’s establishment, claimant willfully, or at least consciously, created the circumstances that resulted in his failures to meet those employer expectations on October 6 and October 7, 2020, and his subsequent discharge for those reasons. Claimant’s conduct therefore was, at best, wantonly negligent.

However, Order No. 21-UI-160718 concluded the employer discharged claimant for an isolated instance of poor judgment, which is not misconduct, reasoning,

Claimant was discharged after he became intoxicated at a client’s business after a successful sales meeting, leaving the Employer’s fleet vehicle unsecured in the client’s parking lot, and failing to call out or report to work on October 7, 2020. Although Claimant violated the Employer’s expectations, call out policy, and fleet vehicle policy, Claimant’s conduct amounted to an isolated instance of poor judgment.

Claimant’s conduct was isolated, as the Employer testified that Claimant had only worked for a short period of time, but was a successful employee and had never previously violated the Employer’s expectations or policies. Claimant testified that after

¹ Where, as here, the employer discharged claimant because his off-duty conduct left him unable to comply with the employer’s expectations regarding professional conduct, maintaining responsibility for his employer vehicle, and attendance, the relevant inquiry is whether claimant willfully or consciously engaged in conduct he knew or should have known would probably result in his inability to meet the employer’s expectations. *See, Weyerhaeuser Co. v. Employment Division*, 107 Or App 505, 812 P2d 44 (1991) (where off-duty conduct makes it impossible for an individual to comply with the employer’s attendance requirements, the relevant question is whether claimant willfully created the situation that made it impossible for him to attend work or to comply with the policy); *Dawson v Employment Department*, 251 Or App 379, 283 P3d 434 (2012) (claimant’s wantonly negligent decision to drink and drive resulted in his incarceration and made it impossible for claimant to comply with the employer’s requirement that he remain available for work).

a successful sales meeting at a bar, he was invited to join the business owner and new client for a drink. Claimant testified that he intended to only have one drink and then leave, as he had done at previous sales calls with a supervisor. Claimant ultimately had more than one drink, and continued to drink until he was too intoxicated to drive home. Claimant's conduct involved judgment, because he chose to have a second drink, risking potential intoxication, rather than driving home in the Employer's fleet vehicle. Claimant's conduct involved poor judgment, because Claimant knew or should have known that drinking while responsible for the Employer's fleet vehicle would violate the Employer's expectations. Claimant's conduct was not otherwise tantamount to unlawful conduct, and did not create an irreparable breach of trust with the Employer or make a continued employer-employee relationship impossible. Claimant's conduct in violating the Employer's call-out policy was not conscious, and was therefore not willful or wantonly negligent.

Order No. 21-UI-160718 at 3-4. However, the record does not support the order's conclusion that claimant's off-duty conduct is excusable as an isolated instance or poor judgment under OAR 471-030-0038(3)(b), under which 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).

Even though claimant's exercise of poor judgment on October 6, 2020 to consume an excessive amount of alcohol at the customer's establishment may have been isolated, it exceeded mere poor judgment and was not excusable under OAR 471-030-0038(1)(d)(D). Claimant's poor judgment occurred over several hours, embarrassed the employer in front of a customer and resulted in claimant being passed out in front of the customer's establishment with the keys to the employer's vehicle left on the ground

unsecured. It also resulted in claimant's inability to report for work the next day, notify the employer that he would be absent and the location of its vehicle, all of which the employer considered "egregious." Although claimant may have been a successful employee who had never previously violated the Employer's expectations or policies, he had worked for the employer for less than two months. Claimant also had disclosed that he "had a history of alcohol issues," and that "going in and out of bars was creating a lot of temptation for him." If claimant remained employed, the employer was going to place him in similar situations in the future. Viewed objectively, claimant's October 6, 2020 conduct created an irreparable breach of trust in the employment relationship or otherwise made a continued employment relationship impossible. Claimant's off-duty conduct that day therefore is not excusable as an isolated instance of poor judgment

Claimant's October 6, 2020 conduct is not excusable as the result of a good faith error in his understanding of the employer's expectations under OAR 471-030-0038(3)(b). Claimant anticipated that the employer would discharge him for his conduct and admitted at hearing that he understood the employer's written policies regarding attendance and his responsibility for the care and operation of the employer vehicle assigned to him. Audio Record at 29:50 to 30:30. Viewed objectively, claimant also understood as a matter of common sense the employer's expectation that he engage in professional conduct when in contact with its customers.

The employer discharged claimant for misconduct. Claimant is disqualified from receiving unemployment insurance benefits effective October 4, 2020 and until he has earned at least four times his weekly benefit amount from work in subject employment.

DECISION: Order No. 21-UI-160718 is set aside, as outlined above.

S. Alba and D. P. Hettle.

DATE of Service: March 22, 2021

NOTE: 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.

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

ទោរទៅ – តម្រូវការនេះមិនមានភស្តុតាងគ្រប់គ្រាន់ដើម្បីបញ្ជាក់ការរំលោភបំពាននោះទេ។ បើសិនជាមានភស្តុតាងគ្រប់គ្រាន់ ភ្នាក់ងារនឹងពិនិត្យរឿងក្តីឡើងវិញ។ ប្រសិនបើលោកអ្នកមិនយល់ស្របចំពោះសេចក្តីសម្រេចនេះទេ លោកអ្នកអាចដាក់ពាក្យប្តឹងសុំឲ្យមានការពិនិត្យរឿងក្តីឡើងវិញជាមួយតុលាការឧទ្ធរណ៍រដ្ឋ Oregon ដោយអនុវត្តតាមសេចក្តីណែនាំដែលសរសេរនៅខាងចុងបញ្ចប់នៃសេចក្តីសម្រេចនេះ។

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.

Employment Appeals Board - 875 Union Street NE | Salem, OR 97311
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www.Oregon.gov/Employ/eab

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