

EMPLOYMENT APPEALS BOARD DECISION
2021-EAB-0903

Affirmed
No Disqualification

PROCEDURAL HISTORY: On June 9, 2021, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant was discharged for committing a disqualifying act and therefore was disqualified from receiving unemployment insurance benefits effective May 9, 2021 (decision # 122247). Claimant filed a timely request for hearing. On October 14, 2021, ALJ Scott conducted a hearing, and on October 20, 2021 issued Order No. 21-UI-177586, concluding that the employer discharged claimant, but not for misconduct and claimant was not disqualified from receiving unemployment insurance benefits based on the work separation. On November 1, 2021, the employer filed an application for review with the Employment Appeals Board (EAB).

WRITTEN ARGUMENT: The employer 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 the employer'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) Northwest Grace Inc., a moving company, employed claimant as a mover from October 27, 2020 until May 18, 2021.

(2) The employer did not have a written policy regarding the use, sale, possession, or effects of drugs, cannabis, or alcohol in the workplace, but expected their employees to report for work in a sober state of mind unimpaired by drugs, cannabis, or alcohol. Claimant was aware of the employer's expectation as a matter of common sense.

(3) In 2020, claimant was prescribed medication, including Xanax, to treat depression. Claimant became addicted to Xanax and in early February 2021 entered into a drug treatment program to treat his addiction. Claimant remained in the drug treatment program during the months of February, March and most of April of 2021 and while in the program did not work for the employer. While in the drug

treatment program, claimant was prescribed medications to help treat his addiction. After the formal drug treatment program ended, claimant moved into a “sober living house” where claimant was drug tested three times per week. Audio Record at 19:30 to 19:45.

(4) On April 28, 29 and May 3, 2021, claimant reported for work and to the employer’s owner “seemed fine.” Audio Record at 10:35 to 11:05.

(5) On May 4, 2021, claimant reported for work and after a few hours on a job, a lead worker reported to the owner that claimant almost fell off a truck and appeared to be “impaired.” Audio Record at 11:10 to 11:30. Claimant considered it a regular workday and believed he “was doing fine.” Audio Record at 18:10 to 18:30. The owner did not speak to claimant that day but decided to take claimant off the job. Another employee drove claimant from the work location to the office, from where claimant drove to his sober living house.

(6) On May 4, 2021, claimant had not taken Xanax and was not drug impaired while at work.

(7) After May 4, 2021, the owner took claimant off the schedule to think about whether to return him to work.

(8) On May 9, 2021, claimant texted the employer and inquired about why he was not being scheduled to work, but did not receive a response.

(9) On May 18, 2021, the owner contacted claimant and discharged him from his employment because he believed that claimant was drug impaired at work on May 4, 2021 and on that day and thereafter posed a safety risk to other employees and the employer’s operations. Before discharging claimant, the owner did not ask claimant to take a drug test.

CONCLUSIONS AND REASONS: The employer discharged claimant but not for misconduct.

As a preliminary matter, Order No. 21-UI-177586 concluded that “for unknown reasons, the Department did not adjudicate this decision as a disqualifying act under its drug, cannabis, and alcohol adjudication policy” and for that reason, analyzed the work separation in this case under the standard discharge provisions of ORS 657.176(2)(a) and OAR 471-030-0038(3)(a) (September 22, 2020). Order No. 21-UI-177586 at 3. However, decision # 122247 shows that the Department did, in fact, adjudicate claimant’s work separation as a disqualifying act under its drug, cannabis, and alcohol adjudication policy. Regardless, because the record fails to show that the employer had a written drug, cannabis and alcohol policy, Order No. 21-UI-177586 correctly analyzed the work separation under the standard discharge provisions of ORS 657.176(2)(a) and OAR 471-030-0038(3)(a). *See* OAR 471-030-0125 (11) (January 11, 2018).

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).

The employer discharged claimant because he believed that claimant was drug impaired at work on May 4, 2021 and that on that day and thereafter posed a safety risk to other employees and the employer’s operations. The employer had the right to expect claimant to report for work in a sober state of mind unimpaired by drugs as a matter of common sense. However, the employer failed to meet their burden to show that claimant consciously violated that expectation and was impaired by drugs on May 4, 2021.

The employer’s evidence of claimant’s conduct on May 4, 2021 was based entirely on the hearsay reports of others as the owner testified that he did not speak to claimant that day and the record fails to show that he met with him. Audio Record at 26:05 to 26:30. At hearing, claimant denied that he had taken Xanax that day and that he believed the workday had proceeded normally like a regular workday and that he “was doing fine.” Audio Record at 18:10 to 18:30; 19:30 to 19:45. The individuals who were the source of the owner’s testimony did not testify. Absent a reasonable basis for concluding that claimant was not a credible witness, on matters in dispute, his first-hand testimony was at least as credible as the employer’s hearsay testimony that claimant almost fell off a truck and seemed “impaired.” Moreover, the owner testified that on April 28, April 29 and May 3, 2021, claimant reported for work and to him, claimant “seemed fine.” Audio Record at 10:35 to 11:05. It also was undisputed that claimant was drug tested three times per week at the sober living house where claimant was residing on May 4, 2021. For these reasons, the evidence as to whether claimant engaged in the conduct for which he was discharged in conscious violation of the employer’s expectation that he report for work in a sober state of mind unimpaired by drugs was, at very best, equally balanced. Where the evidence is no more than equally balanced, the party with the burden of persuasion - here, the employer - has failed to satisfy their evidentiary burden.

The employer discharged claimant, but not for misconduct, and claimant is not disqualified from receiving unemployment insurance benefits on the basis of this work separation.

DECISION: Order No. 21-UI-177586 is affirmed.

D. Hettle and A. Steger-Bentz;
S. Alba, not participating.

DATE of Service: December 8, 2021

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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