

EMPLOYMENT APPEALS BOARD DECISION
2022-EAB-0950

Reversed
No Disqualification

PROCEDURAL HISTORY: On July 8, 2022, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that the employer discharged claimant for misconduct, disqualifying claimant from receiving benefits effective May 22, 2022 (decision # 134056). Claimant filed a timely request for hearing. On August 24, 2022, ALJ L. Lee conducted a hearing, and on August 26, 2022 issued Order No. 22-UI-201493, affirming the Department's decision. On September 9, 2022, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Jacksons Food Stores employed claimant as a fuel pump attendant from July 10, 2018 to May 25, 2022.

(2) Putting fuel into a vehicle's engine for which it was not designed causes damage to the vehicle and financial liability for the employer. The employer therefore expected claimant to fuel vehicles with the correct kind of fuel. Claimant understood the employer's expectation and acknowledged the employer's written policy that two instances of pumping the incorrect fuel into a vehicle within a year could result in his discharge.

(3) On July 20, 2021, claimant mistakenly filled a diesel-engine vehicle with gasoline. He correctly identified the vehicle as taking diesel but, through inattention, inserted a gasoline nozzle rather than a diesel nozzle into the vehicle for fueling. The employer warned claimant to follow proper procedures to avoid fueling errors in the future.

(4) On March 28, 2022, claimant mistakenly filled another diesel-engine vehicle with gasoline. The vehicle was a model of passenger car that claimant knew was manufactured with both gasoline and diesel engines. Claimant believed the customer, who was not the owner of the car, requested premium gasoline. He repeated the order back to her and she confirmed she wanted gasoline. The vehicle had no indicators visible to claimant that it had a diesel engine. Claimant was given a final warning regarding fueling errors and he agreed to take greater care in selecting fuels.

(5) On May 24, 2022, claimant fueled a customer's diesel-engine vehicle with gasoline. He correctly identified the vehicle as taking diesel but mistakenly inserted a gasoline nozzle rather than a diesel nozzle into the vehicle for fueling.

(6) On May 25, 2022, the employer discharged claimant for mistakenly pumping the wrong fuel into the customer's vehicle the previous day.

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. OAR 471-030-0038(3)(a) (September 22, 2020) defines misconduct, in relevant part, as a willful or wantonly negligent violation of the standards of behavior which an employer has the right to expect of an employee, or an act or series of actions that amount to a willful or wantonly negligent disregard of an employer's interest. OAR 471-030-0038(1)(c) defines wanton negligence, in relevant part, as 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. The employer has the burden to prove misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

The order under review concluded that claimant's third fueling error in less than a year was misconduct because his failure to follow the employer's procedures to avoid errors was done with wanton negligence. Order No. 22-UI-201493 at 4. On this record, the employer did not establish that claimant acted with indifference to the employer's expectations or that claimant acted consciously in pumping the incorrect fuel during the final incident.

The employer had the right to expect claimant not to put the wrong fuel in customers' vehicles. Claimant understood the expectation and violated it on May 24, 2022 when he put gasoline in a diesel vehicle for the third time in less than a year. For this incident to amount to misconduct, however, the employer must show more than mere negligence. Mere negligence, even repeated negligence, in the performance of work-related duties may be a valid basis for discharge, but it is not sufficient to establish misconduct.

To prove misconduct, the employer must demonstrate by a preponderance of the evidence that claimant acted willfully or with wanton negligence. In this case, there is no evidence suggesting that claimant put gasoline in the diesel vehicle on purpose. Nor is there any evidence suggesting he was conscious that he was putting gasoline into a diesel vehicle at the time of the final incident. For conduct to be considered wantonly negligent, claimant must be "conscious" of the conduct that led to the discharge. *Dennis v. Employment Dept.*, 143 Or App 574, 924 P2d 851 (1996).

To deem a claimant "indifferent" to an employer's expectation or interest, the findings must support the conclusion that claimant does not care about the consequences of his conduct. *See Goin v. Employment Dept.*, 203 Or App 758, 126 P3d 734 (2006). Mistakes and erroneous beliefs generally do not demonstrate indifference. After receiving a final warning in March 2022 for pumping the incorrect fuel into a vehicle, claimant pledged to take extra care in avoiding any more fueling errors. This suggests that

claimant was not acting with indifference to the consequences of his conduct when he selected the wrong nozzle to fuel the vehicle on May 24, 2022. In the absence of evidence showing this final incident occurred because claimant acted willfully or with wanton negligence, the employer has not proven misconduct.

The employer therefore discharged claimant, but not for misconduct. Claimant is not disqualified from receiving unemployment insurance benefits because of this work separation.

DECISION: Order No. 22-UI-201493 is set aside, as outlined above.

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

DATE of Service: November 30, 2022

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 ໄດ້ໂດຍປະຕິບັດຕາມຄຳແນະນຳທີ່ບອກໄວ້ຢູ່ຕອນທ້າຍຂອງຄຳຕັດສິນນີ້.

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.

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