

EMPLOYMENT APPEALS BOARD DECISION
2022-EAB-1019

Affirmed
No Disqualification

PROCEDURAL HISTORY: On May 19, 2022, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that the employer discharged claimant, but not for misconduct, and that claimant was not disqualified from receiving unemployment insurance benefits based on the work separation (decision # 83325). The employer filed a timely request for hearing. On September 21, 2022, ALJ Sachet-Rung conducted a hearing, and on September 30, 2022 issued Order No. 22-UI-203937, affirming the Department's decision. On October 5, 2022, the employer filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Fast Break of Oregon LLC employed claimant as a cashier and fuel pump attendant from September 27, 2017, through April 26, 2022. He had previously worked for the employer in the same capacity.

(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 received training on the employer's fueling procedures at the time of his initial hire, as well as at the time of his rehire in September 2017, and again in November 2021 after a fueling error.

(3) On November 3, 2021, claimant pumped regular gasoline into a diesel-engine vehicle. The customer parked the vehicle at a gasoline pump and failed to specify to claimant which fuel he desired. Claimant mistakenly believed it was a gasoline-engine vehicle. Claimant received a final warning that failure to follow procedures resulting in another fueling error could result in his discharge and was retrained on the employer's procedures.

(4) On April 23, 2022, claimant pumped regular gasoline into a diesel-engine vehicle. The customer parked the vehicle at a gasoline pump and failed to specify to claimant which fuel he desired. Claimant mistakenly believed it was a gasoline-engine vehicle. Claimant did not follow the employer's procedure, on which he had been trained, of verbally confirming the type of fuel desired before pumping it. The

vehicle had a black fuel cap, though diesel fuel caps are typically green. The cap and two other prominent locations on the vehicle were marked that the vehicle had a diesel engine.

(5) On April 26, 2022, the employer discharged claimant for failing to follow fueling procedures resulting in a second fueling error.

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 employer had the right to expect claimant not to put the wrong fuel in customers' vehicles, and to follow their procedures to avoid doing so. Claimant understood the expectation, but it is not clear that he fully understood the employer's procedures. The procedures required a pump attendant to ask the customer what type of fuel they desired, repeat the order back to the customer to confirm it was correct, then repeat the order again just before the pumping began. Transcript at 7-8. Despite being trained on at least three occasions regarding the employer's procedures for avoiding fueling errors, claimant's testimony indicated he understood that when a customer parked at a gasoline pump and said "fill it up," he was sufficiently in compliance with the policy for him to pump gasoline into the vehicle. Transcript at 22-23.

Isolated instances of poor judgment or good faith errors are not misconduct. OAR 471-030-0038(3)(b). In the fueling error of November 3, 2021, claimant failed to employ the procedures on which he had been trained more than four years previously. Claimant's erroneous belief that his actions complied with these procedures in both incidents demonstrates either a misunderstanding of the procedures themselves, or a misunderstanding of the importance of their use. This may constitute a good faith error.

A good faith error analysis must focus on the conduct, not the result; for example, the issue is not whether a claimant believed in good faith that the employer would condone his loss of license, but whether it was good faith error for the claimant to believe he was not under the influence of intoxicants when he drove home. *Freeman v. Employment Dep't.*, 195 Or App 417, 98 P3d 402 (2004). Here, as to the first fueling error, claimant apparently believed, in good faith, that he was following the employer's procedures and fueling the vehicle correctly, even though he was doing neither. Therefore, this incident constitutes a good faith error and was not misconduct.

After November 3, 2021, claimant was retrained in proper fueling procedure. He was also warned of the consequences of failing to follow procedure or committing another fueling error. Nonetheless, on April

23, 2022, claimant failed to follow procedure and fueled a diesel-engine vehicle with gasoline in circumstances nearly identical to the prior incident. Claimant's failure to recognize that the procedures he utilized in the April 2022 incident were incorrect *after* the employer retrained him due to his November 2021 incident, and his failure to implement changes to avoid the same mistake again, showed indifference to the consequences of his actions that he should have known was likely to result in a violation of the standards of behavior the employer had the right to expect of an employee. Claimant therefore acted with wanton negligence on April 23, 2022 when he failed to follow the employer's fueling procedure.

However, isolated instances of poor judgment are not misconduct. OAR 471-030-0038(3)(b). The following standards apply to determine whether an "isolated instance of poor judgment" occurred:

(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).

Conduct is "isolated" if it is a single or infrequent occurrence. OAR 471-030-0038(1)(d)(A). Though the incidents of November 3, 2021 and April 23, 2022 are quite similar, the first incident was not misconduct because it was attributable to a good faith error regarding claimant's understanding of the employer's procedures, which prompted the employer to retrain the claimant. The second incident involved an exercise of poor judgment by the claimant because claimant failed to take reasonable steps to ensure his understanding of the proper procedures during retraining and then implement changes to the way he fueled vehicles to avoid further error. The second fueling error is therefore considered an isolated act, notwithstanding its similarity to the earlier incident.

To be an isolated instance of poor judgment, the conduct must involve a "judgment." A "judgment" is a conscious decision to act or not to act within the context of an employment relationship. OAR 471-030-0038(1)(d)(B). Claimant's failure to fix his fueling procedure and follow the employer's training and

fueling procedures was, more likely than not, a conscious decision not to act. Claimant knew that a failure to follow the procedures could cause him to mistakenly place the wrong type of fuel into a customer's vehicle, was trained on the correct procedure, and had received a final warning from the employer that he would be terminated if he again committed a fueling error by failing to follow proper fueling procedure. Claimant's decision not to follow the employer's procedure resulted in a wantonly negligent violation of the employer's reasonable standard of behavior, as discussed above.

However, an isolated instance of poor judgment that exceeds mere poor judgment cannot be excused. OAR 471-030-0038(1)(d)(D). Acts that violate the law, that are tantamount to unlawful conduct, and that create irreparable breaches of trust in the employment relationship or otherwise make a continued employment relationship impossible exceed mere poor judgment. Here, claimant's actions did not exceed mere poor judgment. The April 23, 2022 incident was not a violation of the law or tantamount to unlawful conduct. While claimant's pumping of an incorrect fuel into a vehicle creates substantial liability for the employer, the final fueling error resulted from claimant's failure to ensure he understood and executed the employer's procedures after his retraining. The employer likely could have repaired the employment relationship to allow it to continue if they had tested and corrected claimant's understanding of the fueling procedures and supervised his work closely for a period to ensure his compliance. Claimant's many years of service to the employer without fueling errors demonstrate that these isolated incidents did not make a continued employment relationship impossible. Therefore, claimant's actions fall within the standards of an isolated instance of poor judgment and are not misconduct.

The employer discharged claimant, but not for misconduct, and claimant is not disqualified from receiving unemployment insurance benefits based on his work separation.

DECISION: Order No. 22-UI-203937 is affirmed.

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

DATE of Service: December 15, 2022

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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