EO: 200
BYE: 202248

State of Oregon
Employment Appeals Board
875 Union St. N.E.
Salem, OR 97311

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DS 005.00

EMPLOYMENT APPEALS BOARD DECISION
2022-EAB-1124

Reversed
No Disqualification

PROCEDURAL HISTORY: On July 8, 2022, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant was discharged for misconduct and was therefore disqualified from receiving unemployment insurance benefits effective June 19, 2022 (decision # 114247). Claimant filed a timely request for hearing. On September 28, 2022, ALJ Ainardi conducted a hearing that was continued on October 17, 2022, and on October 25, 2022 issued Order No. 22-UI-205778, affirming decision # 114247. On November 9, 2022, claimant filed an application for review with the Employment Appeals Board (EAB).

WRITTEN ARGUMENT: Claimant did not declare that he provided a copy of his argument to the opposing party 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 him 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) RLC Industries employed claimant as a forklift operator from June 17, 2019 until June 20, 2022. Claimant had about 20 years of experience as a forklift operator prior to working for the employer.

(2) The employer maintained several workplace policies which were provided to employees at the time of hire and which were also covered in regular safety trainings. These policies included that: employees other than supervisors or managers not use their personal cell phones while on the work floor; employees take breaks in designated areas and not on the work floor; employees wear full-leather work shoes; employees wear armguards while handling wood products; employees ensure that forklifts and other equipment are in good working order before using the equipment, or else report any maintenance problems to the employer; and that forklift operators lower the forks on a forklift before stepping away from the forklift. The employer provided claimant with copies of these policies, and provided him with training on these policies as well.

(3) On January 20, 2022, claimant accidentally hit an office trailer with his forklift. Claimant reported the accident to the employer. Thereafter, the employer suspended claimant for not "freezing the scene and [notifying]… the supervisor on shift." October 17, 2022 Transcript at 27. The employer advised claimant that further violations could lead to him being discharged.

(4) On January 23, 2022, claimant's supervisor sent claimant home because she felt that he was not wearing "appropriate work boots." September 28, 2022 Transcript at 11. The shoes that claimant had been wearing were "soft leather," and read "leather" on the box when he purchased them. October 17, 2022 Transcript at 63. Claimant had been wearing those shoes to work for some time and had not been previously advised that they were not appropriate for work. The following day, claimant purchased another pair of shoes that complied with the employer's footwear policy.

(5) On May 20, 2022, claimant was operating a forklift that had been initially checked out and operated by one of his coworkers. The forklift had a fluid leak. While claimant recognized that one of the employer's forklifts had been leaking, he did not immediately realize that the leak was coming from the forklift he was operating. When claimant realized that his forklift was leaking, he stopped to clean up the leak. Afterwards, the employer coached claimant by telling him that he should have immediately reported the leak. The employer did not take corrective action against claimant because they "wanted to be very clear with him on what our procedures were" and provide claimant an opportunity to make safe choices. October 17, 2022 Transcript at 30.

(6) On June 6, 2022, two supervisory personnel observed claimant working without wearing armguards. Claimant had not previously been aware that he was required to wear armguards, and had observed other forklift drivers not wearing them. The supervisors told claimant that he was required to wear armguards to avoid getting splinters while handling wood. Afterwards, claimant put on armguards.

(7) On June 10, 2022, claimant left the forks on his forklift in an elevated position while he was operating it, then turned it off and left the forklift in place. Claimant's supervisor witnessed the incident and coached claimant not to do that again.

(8) On June 15, 2022, claimant felt that he needed to take a break while he was working. Claimant parked his forklift in an area that was out of the way, turned it off, and sat in it while watching videos on his phone and laughing. The employer's plant scheduler observed claimant doing this for several minutes, then told claimant to stop. The plant scheduler subsequently sent claimant home for violating their cell phone use policy. Thereafter, the employer suspended claimant pending an investigation.

(9) On June 20, 2022, the employer discharged claimant for violating their workplace policies, most recently by taking an unauthorized break and using his cell phone on June 15, 2022.

CONCLUSIONS AND REASONS: Claimant was discharged, 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). 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 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).

The employer discharged claimant for having violated a number of their policies. The final incident that led the employer to discharge claimant occurred on June 15, 2022 when claimant was observed using his cell phone while sitting in his parked forklift. The order under review correctly concluded that this violation constituted a willful or wantonly negligent violation of the employer's standards of behavior. Order No. 22-UI-205778 at 3–4. However, the order under review further concluded that "claimant's repeated violations of the employer's safety policies showed a pattern of willful or wantonly negligent behavior," and that the final incident therefore constituted misconduct. Order No. 22-UI-205778 at 4. The record does not support this conclusion. Rather, the record shows that claimant's violation of the employer's cell phone use policy on June 15, 2022 was an isolated instance of poor judgment.

In order for the final incident to be considered an isolated instance of poor judgment it must, in relevant part, be "isolated." Under OAR 471-030-0038(1)(d)(A), the act must therefore be a single or infrequent occurrence rather than a part of a pattern of willful or wantonly negligent behavior. The record does show that claimant incurred a number of violations of the employer's policies during the last six months

of his employment. However, aside from the final incident, the record shows only one other incident, an incident in which claimant left his forklift's forks in an elevated position and then left the forklift, constituted willful or wantonly negligent behavior.

At hearing, the parties disagreed regarding the elevated-forks incident, which the employer alleged to have taken place on June 10, 2022. Claimant's supervisor, who witnessed the incident, testified that claimant left the forklift's forks "in the air over three feet while not moving anything," and that claimant "just left the forks elevated and then got off and walked away from the forklift." September 28, 2022 Transcript at 13. Claimant expressed doubt that he acted as the supervisor described, but his testimony suggested that he did not actually recall what had occurred. Claimant instead testified that he "never received a coaching for [having his] forks in the air," and that he "would never leave [his] forks" in an elevated position. October 17, 2022 Transcript at 70, 74. Claimant did not explicitly deny that the incident occurred, however. Because claimant's testimony appears to be speculative, while his supervisor's testimony was certain as to what occurred, the supervisor's account is afforded more weight, and the facts have been found accordingly.

The record shows that claimant had about 20 years of experience as a forklift operator. Even aside from the employer's safety policies prohibiting such behavior, leaving a forklift unattended with its forks in an elevated position poses an obvious risk of harm to other employees in the area, as it could lead to injury. An operator with claimant's length of experience would know or have reason to know not to leave their forklift in such a state for that reason. Claimant did not offer any explanation—such as an emergency—that would explain or excuse leaving the forklift in such a state. Without such evidence, it is reasonable to conclude that claimant simply left the forks in an elevated position because he was acting without regard for the consequences of his actions. As such, the incident on June 10, 2022 constituted a willful or wantonly negligent disregard for the employer's standards of behavior.

Aside from the June 10, 2022 incident and the final incident on June 15, 2022, the employer has not met their burden to show that any of the other four described safety violations constituted willful or wantonly negligent violations of their standards of behavior. Importantly, none of the incidents are closely related in regards to the safety policies they implicate, such that claimant would have been on notice not to further violate the same policies.

For instance, the record contains insufficient evidence regarding the incident in which claimant hit an office trailer with his forklift on January 20, 2022 to show that claimant's actions constituted a wantonly negligent violation of the employer's standards of behavior. At hearing, claimant's supervisor testified that she was not personally involved in the incident, but that claimant was disciplined for not "freezing the scene and [notifying]… the supervisor on shift" October 17, 2022 Transcript at 27. The supervisor further testified that while claimant notified the employer that a trailer had been hit, the employer "later found out that [claimant] had been the one to hit it." October 17, 2022 Transcript at 27. Although this suggests that claimant may have failed to follow the employer's policy regarding reporting of on-site accidents, the employer did not provide evidence to show what claimant should have actually done. Without such evidence, the record does not show that claimant violated the employer's policy.

Likewise, claimant's violation of the employer's footwear policy on January 23, 2022 cannot be considered a willful or wantonly negligent violation because claimant had purchased leather shoes believing them to be compliant with the employer's policy, had been wearing the apparently-

noncompliant shoes for some time without comment from his supervisor, and promptly bought new, compliant work shoes when his supervisor notified him of the issue. Further, it is not clear from the record what the employer's precise policy was regarding appropriate footwear. To the extent that claimant's shoes did not comply with that policy, however, his good-faith attempts to both wear compliant shoes and to replace them once he found out they were noncompliant shows that he did not violate the policy willfully or without regard for the consequences of his actions.

Similarly, while claimant apparently did not comply with the employer's policy when he operated a forklift that was leaking fuel on May 20, 2022, the record shows that claimant did not immediately recognize that the forklift was leaking when he took over its operation from a coworker, and that he took steps to address the situation when he became aware of the source of the leak. The employer's human resources representative testified at hearing that claimant violated the employer's policy because claimant was supposed to "ensure that [his] machinery is in good working order upon the start of [his] shift" or report otherwise to the employer. October 17, 2022 Transcript at 12. However, given that claimant took over operation of the forklift from another employee who had been using it, it was reasonable for him to conclude that the other employee had inspected it before operating it. Furthermore, while claimant's supervisor testified that claimant should have reported the leak "immediately," it is not clear from the record when claimant reported it. October 17, 2022 Transcript at 29. Neither is it clear from the record whether claimant personally had the duty to report the leak when it originated from a forklift that another employee had checked out. Given claimant's unclear duty and reporting requirements, as well as claimant's prompt clean-up of the leak once he discovered it, the employer has not met their burden to show that this incident constituted a willful or wantonly negligent violation of their standards of behavior.

Finally, the record does not show that claimant's failure to wear armguards on June 6, 2022 constituted a willful or wantonly negligent violation of the employer's standards of behavior. At hearing, claimant testified that he was not aware that forklift drivers were required to wear armguards, and that "a lot" of forklift drivers did not wear them. October 17, 2022 Transcript at 76. Given that the policy apparently was not stringently enforced by the employer, it was reasonable, if incorrect, for claimant to conclude that he was not required to wear armguards. Further, the record shows that claimant complied with the policy once the employer notified him of it. As such, claimant's initial failure to wear armguards was, at worst, simple negligence, and was not wantonly negligent.

In sum, only two of the six described incidents—the final incident on June 15, 2022 and the incident on June 10, 2022—were willful or wantonly negligent violations of the employer's standards of behavior. In the context of a three-year tenure with the employer, two incidents of willful or wantonly negligent behavior are not sufficient to demonstrate a pattern of behavior. For these reasons, the violations on June 10 and June 15, 2022 were infrequent occurrences rather than a repeated act or pattern of other willful or wantonly negligent behavior. Further, the record does not show that claimant's behavior exceeded mere poor judgment as contemplated by OAR 471-030-0038(1)(d)(D). As such, the final incident on June 15, 2022 was an isolated instance of poor judgment and was not misconduct.

For the above reasons, claimant was discharged, but not for misconduct, and is not disqualified from receiving benefits based on the work separation.

DECISION: Order No. 22-UI-205778 is set aside, as outlined above.

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

DATE of Service: January 19, 2023

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.

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.

Please help us improve our service by completing an online customer service survey. To complete the survey, please go to https://www.surveygizmo.com/s3/5552642/EAB-Customer-Service-Survey. You can access the survey using a computer, tablet, or smartphone. If you are unable to complete the survey online and need a paper copy of the survey, please contact our office.

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 – 本判决会影响您的失业救济金。 如果您不明白本判决， 请立即联系就业上诉委员会。 如果您不同意此判决，您可以按照该判决结尾所写的说明，向俄勒冈州上诉法院提出司法复审申请。

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 فورا، 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 دستورالعمل موجود در پایان آن، از دادگاه تجدید نظر اورگان درخواست تجدید نظر کنید.

Employment Appeals Board - 875 Union Street NE | Salem, OR 97311
Phone: (503) 378-2077 | 1-800-734-6949 | Fax: (503) 378-2129 | TDD: 711
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