

EMPLOYMENT APPEALS BOARD DECISION
2023-EAB-0285

Affirmed
No Disqualification

PROCEDURAL HISTORY: On December 30, 2022, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant was discharged for misconduct and was disqualified from receiving unemployment insurance benefits effective November 20, 2022 (decision # 92423). Claimant filed a timely request for hearing. On February 6, 2023, ALJ Enyinnaya conducted a hearing, and on February 14, 2023 issued Order No. 23-UI-215973, reversing decision # 92423 by concluding that claimant was discharged, but not for misconduct, and was not disqualified from receiving benefits based on the work separation. On March 5, 2023, the employer filed an application for review with the Employment Appeals Board (EAB).

WRITTEN ARGUMENT: The employer's written argument asserted there was a photograph, marked by the employer as exhibit 11, that the ALJ did not have or admit into the record. Employer's Written Argument at 3. A review of the record shows that although the ALJ stated at hearing they did not have this photograph, they did have the photograph marked as exhibit 11 and it was admitted into the record along with the other documents submitted by the employer. Transcript at 10-11, Exhibit 1 at 25. The employer's argument also contained an additional photograph, purporting to be the photograph that was marked as exhibit 11. This photograph is different from the one marked as exhibit 11 and admitted into the record. EAB did not consider this photograph as it was not part of the hearing record, and the employer 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). Additionally, the employer's argument did not include a statement declaring that they provided a copy of their argument to the opposing party as required by OAR 471-041-0080(2)(a) (May 13, 2019). EAB considered only information received into evidence at the hearing, including exhibits, when reaching this decision. *See* ORS 657.275(2).

FINDINGS OF FACT: (1) Schirmer Enterprises, Inc. employed claimant as a plumbing technician from April 23, 2018 until November 23, 2022.

(2) On March 19, 2021, claimant was involved in an automobile accident with a company vehicle. Claimant was the driver of the vehicle and drove into a client's roof gutter.

(3) On June 1, 2021, claimant was involved in an automobile accident with a company vehicle. Claimant was the driver of the vehicle and rear-ended another vehicle. Following this accident, the employer's president had a discussion with claimant where he told him to "pay more attention to his driving habits." Transcripts at 14.

(4) On June 7, 2021, claimant was involved in an automobile accident with a company vehicle. Claimant was driving the vehicle and hit the underside of a train bridge, causing damage to the roof of the company vehicle. Following this accident the president again told claimant "to pay attention to his driving and to drive more safely." Transcript at 15.

(5) On April 28, 2022, claimant was involved in an automobile accident with a company vehicle. Claimant was driving the company vehicle and rear-ended another vehicle.

(6) On May 4, 2022, the employer's president requested that claimant sign a contract that stated, "If you [claimant] are in one more accident, I [the employer] will have to dismiss you." Exhibit 1 at 1. The contract also required claimant to pay the employer \$500 for a deductible for repairs related to the April 28, 2022 automobile accident. Claimant signed this contract.

(7) On November 22, 2022, claimant was involved in an automobile accident with a company vehicle. Claimant was driving the company vehicle down a driveway and began making a left hand turn around a curve. The vehicle veered off the road and crashed into a tree. Claimant called the president and informed him of the accident. Claimant attempted to explain to the president that the engine had died while he was driving the vehicle and, as a result of this, neither the steering nor brakes were responsive. The president did not believe claimant that the truck had died nor that the brakes nor steering were non-responsive. Transcript 23-24. At the time of the accident the vehicle was moving 11 mph. Transcript at 11. Following the accident, claimant was able to start the vehicle and both the steering and brakes appeared to be functioning properly.

(8) On November 23, 2022, the employer discharged claimant because of his involvement in the November 22, 2022 collision.

CONCLUSION 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. "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 for failing to drive cautiously, resulting in the final collision on November 22, 2022. Though the employer did not have a written policy regarding safe driving, it is reasonable to infer that the employer expected all employees to practice safe driving. This is a matter of common sense and is a standard of behavior that an employer has a right to expect from all their employees. Claimant was aware of this expectation through multiple conversations with the employer's president, as well as the written contract that the president had claimant sign on May 4, 2022. At hearing, the parties offered conflicting accounts of what occurred during the final automobile accident, and correspondingly whether claimant's actions constituted a violation of this policy. However, under either description of the final automobile accident, the record does not show that claimant either willfully or with wanton negligence violated this policy.

Claimant testified that the final automobile accident occurred because the company vehicle abruptly died while he was driving around a curve. The vehicle had both power steering and power assisted brakes, and thus, according to claimant, neither the steering wheel or brakes were effective when the car died. Transcript at 21-22. As a result of this confluence, claimant drove the vehicle off of a driveway and crashed into a tree. The employer, on the other hand, argued that even if the truck had died, since it was only moving at 11 mph, the claimant could have used the brakes. Transcript at 11. The employer provided an invoice from brake work performed on the vehicle earlier in the year to demonstrate that the brakes were in working order. Exhibit 1 at 20. Further, the employer's witness testified that following the accident, the employer's president was able to turn the steering wheel, which suggested that the steering wheel had not locked as claimant stated. Transcript at 19. It was the employer's contention that there was nothing mechanically wrong with the truck, but that claimant failed to exercise appropriate caution.

However, even if the employer's theory of how the final accident occurred was accurate, the record does not suggest that the collision was caused by claimant acting either willfully or with wanton negligence. Claimant was driving at a reasonable speed and his failure to brake or turn appropriately was, at worst, merely negligent. At most, the record shows that claimant may have driven negligently in failing to avert the accident by braking in time. Wanton negligence requires a further showing that claimant was aware or should have been aware that his conduct violated the employer's expectation, and the mere occurrence of the collision, even if caused by claimant's driving rather than a mechanical failure, did not establish such awareness. The employer has not established that claimant consciously drove without caution or that claimant intentionally took any action to cause the collision. Therefore, even if claimant violated the employer's expectation by failing to exercise appropriate caution, the record does not show that he did so willfully or with wanton negligence. Accordingly, his actions did not amount to misconduct.

Therefore, the employer discharged claimant, but not for misconduct, and claimant is not disqualified from benefits based on the work separation.

DECISION: Order No. 23-UI-215973 is affirmed.

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

DATE of Service: April 14, 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.

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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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