

EMPLOYMENT APPEALS BOARD DECISION
2023-EAB-1172

Affirmed
Disqualification

PROCEDURAL HISTORY: On September 12, 2023, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant was discharged by the employer for misconduct and disqualified from receiving benefits effective July 9, 2023 (decision # 91618). Claimant filed a timely request for hearing. On October 4, 2023, ALJ Taylor conducted a hearing, and on October 13, 2023, issued Order No. 23-UI-238534, affirming decision # 91618. On October 21, 2023, 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 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 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) We Drive U Leasing Inc. last employed claimant as a shuttle bus driver from November 2021 until July 13, 2023.

(2) Prior to July 13, 2023, claimant held a valid commercial driver's license (CDL). It was necessary to the performance of the shuttle bus driving duties claimant performed for the employer for claimant to maintain his CDL.

(3) In April 2023, claimant drove his personal vehicle while he was intoxicated. Police cited claimant for driving under the influence of an intoxicant (DUII). Upon receiving the DUII citation, claimant received a temporary permit authorizing him to continue driving under his CDL for 30 days.

(4) On May 30, 2023, claimant appeared in criminal court and pleaded no contest to the DUII charge. Claimant's attorney informed claimant that if he contacted the Oregon Driver & Motor Vehicles Services (DMV) and requested an administrative hearing regarding his CDL driving privileges, the suspension of his CDL would be rescinded pending the result of the administrative hearing.

(5) After claimant pleaded no contest to the DUII charge, claimant requested an administrative hearing from DMV regarding his CDL driving privileges. Shortly thereafter, claimant received a letter from DMV advising that the suspension of his CDL was rescinded pending an order on the administrative hearing he had requested.

(6) On June 16, 2023, claimant appeared for the administrative hearing regarding his CDL. The hearing was held by telephone. At the time, claimant was in a location with poor cell phone service and at some point during the hearing, claimant was dropped from the telephone hearing line. Later that day, claimant called back DMV and requested that the hearing be completed or rescheduled.

(7) Claimant believed he had made a request to reschedule the hearing when he called back DMV, although he did not receive a new hearing date during the call back conversation. Shortly after June 16, 2023, claimant received the same letter from DMV that he had received before, advising that the suspension of his CDL was rescinded pending an administrative hearing order. As of late June 2023, claimant checked the status of his CDL on DMV's website and saw that the website indicated his CDL remained valid.

(8) Regardless of the fact that claimant was dropped from the telephone hearing line at some point during the June 16, 2023, hearing, DMV entered an order on the administrative hearing. As of a couple of days before July 13, 2023, DMV suspended claimant's CDL for 90 days. On or about July 13, 2023, the employer learned that claimant's CDL was suspended.

(9) On July 13, 2023, the employer informed claimant that they had learned from DMV that claimant's CDL was no longer valid. On that date, the employer discharged claimant because he did not have a valid CDL.

(10) The fact that his CDL was not valid surprised claimant because of the second letter he received from DMV advising that the suspension of his CDL was rescinded pending an administrative hearing order. After the employer discharged claimant, claimant called DMV for clarification. DMV advised that they sent the second letter to claimant by mistake and confirmed to claimant that his CDL was suspended and no longer valid. Claimant did not have another DMV administrative hearing on the CDL matter.

CONCLUSIONS AND REASONS: The employer discharged claimant 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). Under OAR 471-030-0038(3)(c), “The willful or wantonly negligent failure to maintain a license, certification or other similar authority necessary to the performance of the occupation involved is misconduct, so long as such failure is reasonably attributable to the individual.”

The employer discharged claimant for his failure to maintain a valid CDL, which under OAR 471-030-0038(3)(c) was misconduct. The CDL was necessary to the performance of claimant’s occupation for the employer as a shuttle driver. Claimant’s failure to maintain the CDL was at least wantonly negligent because it was the result of claimant driving his personal vehicle while he was intoxicated, something claimant described at hearing as “a bad decision,” and a crime for which claimant pleaded no contest in criminal court. Audio Record at 18:48. Claimant’s failure to maintain the CDL was reasonably attributable to claimant because the reason claimant’s CDL became suspended was due to claimant’s conduct in driving his personal vehicle while he was intoxicated.

It is correct that for a period of time after claimant was initially cited for DUII in April 2023, his CDL remained valid. This was due to the temporary permit that authorized him to continue driving under his CDL for 30 days from the date of the April 2023 citation, and the fact that the suspension of his CDL was rescinded pending the result of his DMV administrative hearing. Nevertheless, the record shows that as of the date the employer discharged claimant on July 13, 2023, claimant’s CDL was suspended, meaning that the OAR 471-030-0038(3)(c) provision relating to failure to maintain a license was applicable. It is regrettable that DMV mistakenly sent a second letter to claimant which led him to believe that his CDL remained valid as of the date he was discharged. Still, it is evident from the record that on that date claimant’s CDL was suspended and not valid, and so claimant’s discharge was for misconduct pursuant to OAR 471-030-0038(3)(c).

Note that, in the typical case, isolated instances of poor judgment, good faith errors, unavoidable accidents, absences due to illness or other physical or mental disabilities, or mere inefficiency resulting from lack of job skills or experience are not misconduct under OAR 471-030-0038(3)(b). However, since 2004, the Department has consistently interpreted OAR 471-030-0038(3)(c) to define the loss of the legal authority to perform an occupation as a type of misconduct *per se* that is not subject to the general exculpatory provisions of OAR 471-030-0038(3)(b). *See* December 27, 2004, letter to the Employment Appeals Board from Tom Byerley, Assistant Director, Unemployment Insurance Division (exceptions to misconduct under OAR 471-030-0038(3)(b) do not apply to behavior falling under OAR 471-030-0038(3)(c)). Since the exculpatory provisions cannot be applied in this case, claimant’s behavior may not be excused from constituting misconduct as an isolated instance of poor judgment or a good faith error, and it therefore was misconduct.¹

For these reasons, the employer discharged claimant for misconduct. Claimant is disqualified from receiving unemployment insurance benefits effective July 9, 2023.

¹ *See also* Employment Appeals Board, 05-AB-0049, January 4, 2005 (so stating and referring to Byerley letter); Employment Appeals Board, 05-AB-0050, February 7, 2005 (same); Employment Appeals Board, 05-AB-0500, April 11, 2005; Employment Appeals Board, 07-AB-0405, March 8, 2007; Employment Appeals Board, 08-AB-0580, April 10, 2008; Employment Appeals Board, 09-AB-2437, August 11, 2009; Employment Appeals Board, 11-AB-0602, March 10, 2011.

DECISION: Order No. 23-UI-238534 is affirmed.

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

DATE of Service: December 1, 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 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 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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