

EMPLOYMENT APPEALS BOARD DECISION
2024-EAB-0083

Reversed
No Disqualification

PROCEDURAL HISTORY: On November 27, 2023, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant was discharged, but not for misconduct, and therefore was not disqualified from receiving unemployment insurance benefits based on the work separation (decision # 83318). The employer filed a timely request for hearing. On January 9, 2024, ALJ Messecar conducted a hearing, and on January 11, 2024, issued Order No. 24-UI-245323, reversing decision # 83318 by concluding that claimant was discharged for misconduct, and therefore was disqualified from receiving benefits effective August 20, 2023. On January 19, 2024, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Old Dominion Freight Line, Inc. employed claimant as a pickup and delivery driver from June 25, 2021, until August 23, 2023.

(2) The employer maintained a policy which required their drivers to verify that their rear trailer door was pulled down, and that a plastic safety chain was pulled across the dock door, prior to pulling the trailer away from a dock at the employer's facility. This policy was intended to ensure that forklift drivers would not enter the trailer when its driver pulled away from the dock. The policy also dictated that if the safety chain did not work, the driver was required to get a supervisor to stand at the door as the driver pulled out, to ensure that nobody entered. Because of the potential for injury if the policy was not followed, the employer considered violation of the policy to be grounds for immediate discharge. The policy was contained in the employer's handbook, which claimant received shortly after he was hired.

(3) On August 18, 2023, while leaving the dock, claimant pulled away from the dock without closing the rear trailer door or pulling the safety chain across the dock door. Claimant understood the employer's policy to require him to ensure that the trailer door was closed *after* he pulled away from the dock, rather than beforehand, and therefore did not believe that he had violated the employer's policy by pulling away without first checking that the door was closed. Claimant did understand that the policy required him to pull the chain across the dock door, and tried to do so, but did not because it was missing a

component and therefore was not operational. Because the chain was not operational, claimant “wasn’t really concerned about” pulling it across the door. Transcript at 17.

(4) A dock worker witnessed claimant’s actions that day and, after deliberation, decided to report it to the employer a few days later.

(5) Claimant’s supervisor confronted claimant about the August 18, 2023, incident, and claimant confirmed that he had acted as the dock worker described. On August 23, 2023, after consulting with the employer’s human resources department, the supervisor discharged claimant because he had violated the employer’s safety policy on August 18, 2023.

(6) Prior to August 18, 2023, claimant had not violated the employer’s safety policy regarding the rear trailer door or engaged in a pattern of other violations of the employers polices.

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 because he violated the employer's safety policy on August 18, 2023, by failing to ensure that his trailer door was closed, or that the safety chain was pulled across the dock door, prior to pulling his trailer away from the dock. The order under review concluded that this constituted misconduct because claimant's conduct was "at least wantonly negligent," and was not an isolated instance of poor judgment "because the potential injury that could have resulted to others exceeded poor judgment." Order No. 24-UI-245323 at 3. The record does not support the conclusion that claimant's conduct on August 18, 2023, was not an isolated instance of poor judgment.

As a preliminary matter, the record does show that claimant violated the employer's policy with at least wanton negligence. Regarding claimant's failure to close the trailer door itself, the record shows that the employer had provided claimant with a copy of their written policy. Although claimant's testimony indicated that he misunderstood the policy, the fact that the employer had provided claimant with a written copy of the policy shows that claimant had reason to know that failing to close the trailer door prior to leaving the dock would result in a violation of the policy. Regarding claimant's failure to pull the safety chain across the dock door, claimant admitted at hearing that he was aware of the policy requiring him to do so, but that he "wasn't really concerned about" using the safety chain because it was not operational. Transcript at 17. The employer had in place a contingency policy for when a safety chain was not operational, and the record does not show that claimant attempted to use that option. Claimant's stated lack of concern, when viewed with his failure to follow the contingency policy, shows that he acted without regard for the consequences of his action. Claimant's conduct on August 18, 2023, was therefore at least a wantonly negligent violation of the employer's standards of behavior.

However, the record also shows that claimant's conduct was an isolated instance of poor judgment. The record does not show that claimant had ever engaged in any other willful or wantonly negligent conduct.¹ Claimant's conduct on August 18, 2023, was therefore isolated. While the order under review suggested that claimant's conduct exceeded mere poor judgment because of potential injuries to others, this conclusion is a misapplication of OAR 471-030-0038(1)(d)(D). For conduct to exceed mere poor judgment, it must violate the law, be tantamount to unlawful conduct, create an irreparable breach of trust in the employment relationship, or otherwise make a continued employment relationship impossible. The record does not show that claimant's conduct violated the law or was tantamount to unlawful conduct. Although it may have created a safety hazard for other employees, the evidence does not suggest that claimant's behavior breached the employer's trust. Finally, the employer has not shown by a preponderance of the evidence that they could not have continued to employ claimant, such that a continued employment relationship would have been impossible. Therefore, claimant's conduct was an isolated instance of poor judgment, which is not misconduct.

¹ The record lacks evidence showing that claimant had ever violated the employer's standards of behavior. Given this, and the fact that the employer considered claimant's conduct on August 18, 2023 to be grounds for immediate discharge, it is reasonable to infer that claimant had not engaged in similar conduct before, or in a pattern of other willful or wantonly negligent behavior. The facts have been found accordingly.

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

DECISION: Order No. 24-UI-245323 is set aside, as outlined above.

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

DATE of Service: February 22, 2024

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.

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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 الاستئناف 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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