

EMPLOYMENT APPEALS BOARD DECISION
2024-EAB-0157

Reversed
No Disqualification

PROCEDURAL HISTORY: On December 5, 2023, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant was discharged for misconduct, and therefore was disqualified from receiving unemployment insurance benefits effective September 3, 2023 (decision # 114021). Claimant filed a timely request for hearing. On January 16, 2024, ALJ Janzen conducted a hearing, and on January 18, 2024, issued Order No. 24-UI-245667, affirming decision # 114021. On February 7, 2024, claimant filed an application for review with the Employment Appeals Board (EAB).

WRITTEN ARGUMENT: Claimant's argument contained information that was not part of the hearing record and did not show that factors or circumstances beyond claimant's reasonable control prevented her from offering the information during the hearing. Under ORS 657.275(2) and OAR 471-041-0090 (May 13, 2019), EAB considered only information received into evidence at the hearing when reaching this decision. EAB considered claimant's argument to the extent it was based on the record.

FINDINGS OF FACT: (1) The Law Office of Gary G. Norris employed claimant as a legal assistant from May 2023 until September 6, 2023.

(2) In March 2022, claimant underwent gastric sleeve surgery. As a result of that surgery, claimant's body metabolized alcohol more slowly than a typical person, and claimant therefore experienced the effects of alcohol more strongly and for a longer time.

(3) The employer did not maintain a written policy regarding the use of drugs, cannabis, and alcohol. However, the employer expected his employees not to work while under the influence of intoxicants. Claimant knew and understood this expectation.

(4) In late June 2023 and again in late August 2023, claimant incurred charges for driving under the influence of intoxicants (DUII) after having consumed alcohol. In the latter of these two incidents, claimant consumed two alcoholic beverages four hours before driving, but nevertheless was charged with DUII. Claimant had miscalculated how long she needed to wait before driving based on the effect

of her gastric sleeve surgery. Claimant did not notify the employer about these incidents when they occurred. They did not occur during work hours. After the second DUII charge, claimant learned that her driver's license would be suspended or revoked.

(5) Claimant realized that the employer would notice if she stopped driving to work and decided to inform the employer about the DUII charges and her license suspension. On September 5, 2023, claimant asked the employer to meet with her, and claimant told the employer what had occurred. The employer responded by telling claimant that he was concerned that she would drink on the job in the future, and that he would have to consider whether she would remain in his employ.

(6) The employer considered the matter that evening. The following day, on September 6, 2023, the employer discharged claimant.

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).¹ "[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 the day after she disclosed to him that she had been charged with two separate DUIIs and would no longer be driving herself to work. Although the parties agreed on these basic facts, they offered significantly differing accounts of the remaining facts relating to claimant's discharge from work. At hearing, the employer testified that he believed that claimant showed "signs of visible intoxication" during their meeting on September 5, 2023, including "slurring her words," "having difficulty forming sentences," being "unsteady" on her feet, and having an odor of alcohol on her breath. Transcript at 6, 7. The employer also testified that he asked claimant during that meeting whether she "had been drinking at that time," and that claimant responded that, "yes, she had." Transcript at 6. The employer testified that that he discharged claimant because she appeared to be intoxicated and admitted to being intoxicated during the September 5, 2023, meeting. Transcript at 10.

By contrast, claimant denied that she was intoxicated at work, and testified that she told the employer the same during the meeting. Transcript at 23–24. Claimant further testified that the employer told her that he decided to discharge her because, after she notified him of her DUII charges, the employer "was concerned that [claimant] was gonna be drinking on the job moving forward." Transcript at 21. Claimant

¹ The employer discharged claimant due to an alleged instance of her being intoxicated at work. However, OAR 471-030-0038, and not OAR 471-030-0125 (January 1, 2018) controls whether claimant's discharge from work was disqualifying because the employer did not maintain a written policy regarding the "use, sale, or possession of drugs, cannabis, or alcohol in the workplace." OAR 471-030-0125(11).

also testified that the employer “almost looked like he was disgusted” after she informed him about the DUII charges. Transcript at 23–24.

Thus, the parties disagree both as to the exact reason for the discharge and as to whether claimant was intoxicated during their meeting on September 5, 2023. The order under review found that the employer “discharged claimant for reporting to work under the influence of alcohol,” and further found claimant’s testimony that she had not consumed alcohol at work, or admitted to doing so, “not persuasive.” Order No. 24-UI-245667 at 2, 3. The record does not support these conclusions.

The order under review offered the following explanation regarding its conclusion that claimant’s testimony was unpersuasive:

Claimant testified that she would never have asked to meet with [the employer] if she had been drinking because she knew it would violate the employer’s policies. This argument is not persuasive, because claimant also knew it was against the law to drive under the influence of alcohol and lost her license for apparently doing so. Claimant’s self-serving and internally inconsistent testimony is less reliable than [the employer’s] consistent testimony about the events of September 5, 2023.

Order No. 24-UI-245667 at 3. The order under review suggests that because claimant had previously violated the law by driving while under the influence of alcohol, her testimony that she did not violate the employer’s expectation that she refrain from being intoxicated at work lacks credibility. In general, evidence of prior bad acts holds little probative value in determining whether an individual later acted in conformity with those prior acts. Moreover, the record shows that claimant’s second DUII charge occurred after she consumed a modest amount of alcohol, waited four hours to drive, and then mistakenly believed she was able to drive because she underestimated her sensitivity to alcohol that resulted from her surgery. Claimant’s error at the time of the second DUII departs significantly from the lapse in judgment that would lead an individual to be intoxicated during work hours once they were aware of the post-surgical effect of alcohol. Thus, the record fails to show that claimant’s testimony was “internally inconsistent” such that it would lack credibility.

Similarly, the suggestion that claimant’s testimony was “self-serving” does not impugn the credibility of her testimony. Although claimant’s account of events is more favorable to her than the employer’s account, the same can be said of the employer’s account of events in regard to his own interest in this matter. Both parties offered evidence to support their respective positions, such as claimant’s testimony that she had last consumed alcohol on the date of her second DUII,² and the employer’s various observations about claimant’s alleged state during their meeting.

Neither of the parties offered evidence that would conclusively support one party’s testimony over the other. Therefore, the evidence on the question of whether claimant was intoxicated during the September 5, 2023, meeting was equally balanced. The employer bears the burden of proof in a discharge case. Because the employer has not proven by a preponderance of evidence that claimant was intoxicated during the meeting, he has failed to meet that burden.

² Transcript at 25.

Because the preponderance of evidence does not show that claimant was intoxicated during the meeting, the record does not establish that the employer discharged claimant for misconduct. In addition, to the extent that the employer discharged claimant due to concern that she would be intoxicated at work in the future, this would not constitute misconduct because the record does not show that claimant had already engaged in misconduct. Similarly, if the employer discharged claimant due to a mistaken belief that she was intoxicated, this would not constitute misconduct because the preponderance of the evidence does not show that she was intoxicated at work.

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-245667 is set aside, as outlined above.

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

DATE of Service: March 14, 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.

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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