EO: Intrastate
BYE: 08-Feb-2025

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
2024-EAB-0543

Affirmed
Disqualification

PROCEDURAL HISTORY: On May 14, 2024, the Oregon Employment Department (the Department) served notice of two administrative decisions, both concluding that the employer discharged claimant for misconduct, and that claimant therefore was disqualified from receiving benefits effective March 24, 2024 (decisions # L0003999703 and L0004087364).[1] Claimant filed timely requests for hearing on both administrative decisions. On July 1, 2024, ALJ Chiller conducted a consolidated hearing on both administrative decisions, and on July 18, 2024, issued Orders No. 24-UI-259495 and 24-UI-259499, affirming decisions # L0003999703 and L0004087364, respectively. On July 20, 2024, claimant filed applications for review of Orders No. 24-UI-259495 and 24-UI-259499 with the Employment Appeals Board (EAB).

Pursuant to OAR 471-041-0095 (October 29, 2006), EAB consolidated its review of Orders No. 24-UI-259495 and 24-UI-259499. For case-tracking purposes, this decision is being issued in duplicate (EAB Decisions 2024-EAB-0543 and 2024-EAB-0544).

WRITTEN ARGUMENT: Claimant and the employer both submitted written arguments. Both parties' arguments contained information that was not part of the hearing record, and did not show that factors or circumstances beyond their reasonable control prevented them 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 both parties' arguments to the extent they were based on the record.

FINDINGS OF FACT: (1) Sproul Lumber Co., Inc. employed claimant from July 2020 until they laid him off due to a lack of work on February 8, 2024. Claimant returned to work for the employer on March 25, 2024, until March 27, 2024.

(2) Claimant's duties included operating the planer at the employer's lumberyard.

[1] It is not clear from the record why the Department issued both administrative decisions, as both address the same work separation and are identical in substance.

(3) The employer's policies permitted the employer to require employees to submit to drug and alcohol tests prior to returning to work after a period of absence, as well as under other circumstances. Claimant felt that the employer did not consistently enforce their testing policy. However, the employer did not, as a matter of practice, disclose the results of an employee's drug and alcohol test with other employees, unless such disclosure was necessary for business purposes, such as disclosing the results to the tested employee's supervisor.

(4) On or around July 6, 2023, claimant witnessed another employee, "J," vape marijuana on the employer's premises, and notified his supervisor about the issue at that time. Claimant also witnessed J vape marijuana on the employer's premises on other occasions.

(5) The employer required claimant to submit to a drug and alcohol test before his return to work on March 25, 2024. Claimant passed the test and resumed working for the employer.

(6) After claimant returned to work, claimant messaged his supervisor on March 27, 2024, and stated that, because claimant was required to submit to a drug and alcohol test prior to returning to work, he was requesting that any employee who was to work with claimant on the planer "be drug tested as well, due to the inherent… danger of running that job." Transcript at 25–26. Afterwards, claimant's supervisor directed claimant to work with J on the planer. J had recently returned from taking three days off of work for the birth of his child. Claimant refused to work with J on the planer unless the employer first required J to submit to a drug and alcohol test. Claimant had not witnessed J using cannabis that day, did not observe any signs that J was impaired, did not otherwise know whether J was under the influence of any intoxicants at the time, and did not know whether the employer had required J to submit to a drug and alcohol test before his return to work.

(7) Claimant's supervisor reported claimant's refusal to the employer's chief executive officer (CEO), who then came to the worksite to speak to claimant about the matter. Before doing so, the CEO spoke to J to "make sure that he was… not under the influence of anything[.]" Transcript at 9. The CEO did not observe any signs of intoxication in J. The CEO then spoke to claimant, who continued to assert that he would not work on the planer with anyone who had not been tested for drugs and alcohol, as he felt it would be unsafe to do so because of the dangerous nature of the planer. The CEO asked claimant to explain his refusal, and claimant explained only that it was because claimant himself had been required to take a drug and alcohol test. Throughout the conversation, claimant continued to refuse to work with J unless the latter submitted to a drug and alcohol test because he had been required to submit to a drug and alcohol test, and refused to offer any additional explanation for his position.

(8) On March 27, 2024, as a result of claimant's continued refusal to work on the planer with J unless the latter submitted to a drug and alcohol test, the employer discharged claimant.

CONCLUSIONS AND REASONS: Claimant was discharged 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 claimant refused to work with J on the planer, as assigned, unless the employer first required J to submit to a drug and alcohol test. At hearing, claimant explained that his refusal was based on safety concerns, due to the "inherent… danger of running that job." Transcript at 26. Claimant had also observed J using cannabis while at work during the previous year. If claimant had reason to believe that working with J on the planer on March 27, 2024, constituted an unreasonable danger because of the latter's impairment due to cannabis use, the employer's expectation that claimant work with J as directed might have been unreasonable.

However, claimant did not assert that he had witnessed J use cannabis (or any other intoxicants) that day or that he had reason to believe that J was under the influence of intoxicants that day. Additionally, the employer's CEO spoke with J prior to speaking with claimant that day, and found no reason to believe that J was under the influence. Further, claimant admitted at hearing that he did not know whether J had ever been required to submit to a test, and the record is silent as to whether the employer had actually required J to submit to a drug and alcohol test prior to his recent return from his parental leave of three

days. Thus, the totality of the evidence does not show that claimant had a reasonable basis for believing that working with J on the planer that day posed an unreasonable safety risk. As such, the employer's expectation that claimant work with J on the planer, without first requiring J to submit to a drug and alcohol test, was reasonable. Because the employer's expectation was reasonable, claimant's refusal to work with J on the planer as directed was a willful violation of the standards of behavior that the employer had the right to expect.

Further, claimant's conduct cannot be excused as an isolated instance of poor judgment. Per OAR 471-030-0038(1)(d)(A), an isolated instance of poor judgment must be a "single or infrequent occurrence rather than a repeated act or pattern of other willful or wantonly negligent behavior." Although the event which directly led the employer to discharge claimant was the latter's refusal that day to work with J unless J submitted to a drug and alcohol test, claimant had broadly refused to work with *anyone* on the planer unless they submitted to a drug and alcohol test. During his final meeting with the CEO on March 27, 2024, claimant gave no indication that he was willing to back off from this requirement. As such, claimant's ongoing refusal to comply with the employer's expectations that he work on the planer with other employees, as directed, shows that, had the employer not discharged him, his refusal would likely have continued indefinitely. Therefore, his refusal was a repeated act or pattern of behavior, as it amounted to an on-going failure to comply with the employer's reasonable expectation, and was not an isolated instance of poor judgment.

Because the employer discharged claimant for a willful violation of their standards of behavior, and because that conduct was not an isolated instance of poor judgment, the employer discharged claimant for misconduct, and claimant therefore is disqualified from receiving unemployment insurance benefits effective March 24, 2024.

DECISION: Orders No. 24-UI-259495 and 24-UI-259499 are affirmed.

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

DATE of Service: <u>August 7, 2024</u>

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.

<u>Please help us improve our service by completing an online customer service survey</u>. To complete the survey, please go to <u>https://www.surveygizmo.com/s3/5552642/EAB-Customer-Service-Survey</u>. 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.

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