

EMPLOYMENT APPEALS BOARD DECISION
2024-EAB-0710

Affirmed
Disqualification

PROCEDURAL HISTORY: On April 30, 2024, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant was discharged for misconduct and was therefore disqualified from receiving unemployment insurance benefits effective October 1, 2023 (decision # L0003884380).¹ Claimant filed a timely request for hearing. On September 17, 2024, ALJ Wardlow conducted a hearing, and on September 20, 2024, issued Order No. 24-UI-266909, affirming decision # L0003884380. On October 7, 2024, 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 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) Young's Market Company of Oregon, LLC employed claimant as an alcohol distributor from December 20, 2021, through October 5, 2023. Claimant's job involved driving to stores using his personal vehicle and stocking alcohol products.

(2) The employer expected that their alcohol distributors would not drive under the influence of alcohol during or outside of work hours. Claimant understood this expectation.

(3) On September 17, 2023, outside of work hours, claimant was cited for driving under the influence of intoxicants (DUII). During the incident giving rise to that citation, claimant had not been driving a

¹ Decision # L0003884380 stated that claimant was disqualified benefits from October 5, 2023, through October 5, 2024. However, decision # L0003884380 should have stated that claimant was disqualified from receiving benefits beginning Sunday, October 1, 2023, and until he earned four times his weekly benefit amount. *See* ORS 657.176.

vehicle. Immediately after being cited, claimant notified the employer of the situation. The citation was ultimately dismissed after claimant separated from employment.

(4) On September 20, 2023, the employer met with claimant to discuss the citation. During the meeting, the employer directed that as conditions of his continued employment, claimant complete “a training on responsible consumption culture” by the end of September 2023, that he not consume alcohol while working, and that he maintain driving privileges, access to a vehicle, and automobile insurance. Claimant agreed to these terms.

(5) On September 27, 2023, claimant drove a vehicle while under the influence of alcohol and was arrested for that and other offenses arising from the incident. Claimant notified the employer that night that he had been arrested and that he expected to be absent from work the following day due to incarceration. However, claimant was taken to a hospital rather than jail and sought admission to an alcohol rehabilitation facility. The following morning, from the hospital’s emergency department, claimant advised the employer of his plans for medical treatment. Claimant was then admitted to the hospital’s intensive care unit for symptoms of alcohol dependency and severe withdrawal. Claimant was unable to communicate by phone or other means for the next ten days.

(6) Upon being notified of the September 27, 2023, arrest, the employer suspended claimant from work pending investigation of the incident. Claimant could not respond to the employer’s requests for information during the investigation period due to his hospitalization. The employer was therefore unaware of whether claimant desired to request a protected leave of absence, or when he would be able to return to work.

(7) On October 5, 2023, the employer sent claimant an email telling him that he had been discharged. The employer discharged claimant for having been charged with another DUII offense shortly after having been disciplined for the September 17, 2023, DUII citation and lack of communication thereafter.

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) (September 22, 2020). 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 for having driven under the influence of alcohol on September 27, 2023, and his lack of communication thereafter. To the extent the employer's inability to communicate with claimant from September 28, 2023, through his discharge on October 5, 2023, factored into the decision to discharge him, this did not involve a willful or wantonly negligent violation of the employer's reasonable expectations. The record shows that claimant was severely ill and hospitalized without access to a phone or other means of communication during this period, and that claimant had notified the employer on September 28, 2023, that he would be absent for an extended period while he received medical treatment. *See* Transcript at 26. Claimant's failure to communicate with the employer at that time was therefore not willful or wantonly negligent.

The employer reasonably expected that their alcohol distributors would not drive under the influence of intoxicants, whether during or outside of work hours. Claimant was aware of this expectation, which was reiterated through discipline on September 20, 2023, for an alleged DUII offense that occurred outside of work hours on September 17, 2023.² As part of this discipline, the employer required claimant to undergo "a training on responsible consumption culture." It can reasonably be inferred from this requirement that the nature of the business and of claimant's work was such that a distributor's violations of law involving driving and alcohol consumption, even outside of work, would undermine the employer's faith in claimant's ability to safely perform his job, would reflect negatively on the employer and their message that the product should be consumed responsibly, and would subject the

² The September 17, 2023, incident was not shown to be a willful or wantonly negligent violation of the employer's expectations because claimant was not driving during the time he was allegedly under the influence of intoxicants. The discipline resulting from the citation is nevertheless relevant in demonstrating claimant's knowledge of the employer's expectations with regard to DUII offenses.

employer to liability if the conduct was repeated during work hours. Therefore, the September 27, 2023, DUII incident was “connected with work.” *See Levu v. Employment Dept.*, 149 Or App 29, 941 P2d 1056 (1997) (holding that an off-duty criminal act that resulted in the employer’s distrust, where trust is integral to the position, was connected with work.)

Further, this work-connected incident constituted misconduct. Claimant did not rebut the inference that, after consuming alcohol to the extent that he was under its influence, he made a conscious decision to drive a vehicle. Such a decision demonstrated indifference to the consequences of his actions.³ This was therefore a wantonly negligent violation of the standards of behavior which an employer has the right to expect of an employee. And, because such conduct violated the law, it cannot be excused as an isolated instance of poor judgment, per OAR 471-030-0038(3)(b)(D).⁴ Accordingly, claimant was discharged for misconduct connected with work.

For these reasons, claimant was discharged for misconduct and is disqualified from receiving unemployment insurance benefits effective October 1, 2023.

DECISION: Order No. 24-UI-266909 is affirmed.

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

DATE of Service: October 31, 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.

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Understanding Your Employment

³ Claimant described himself as “an alcoholic” during the hearing. Transcript at 27. It is important to note that claimant’s wantonly negligent act was not the consumption of alcohol, but the decision to drive a vehicle while under its influence.

⁴ *See* ORS 813.010(1)(a)-(c), which provide that a person commits the offense of driving while under the influence of intoxicants if the person drives a vehicle while the person: Has 0.08 percent or more by weight of alcohol in the blood of the person as shown by chemical analysis of the breath or blood of the person made under ORS 813.100, 813.140 or 813.150; Is under the influence of an intoxicant or a combination of intoxicants; or Within two hours after driving a vehicle, and without consuming alcohol in the intervening time period, has 0.08 percent or more by weight of alcohol in the blood of the person, as shown by chemical analysis of the breath or blood of the person made under ORS 813.100, 813.140 or 813.150.

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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