EO: Intrastate
BYE: 09-Nov-2024

State of Oregon
Employment Appeals Board
875 Union St. N.E.
Salem, OR 97311

674
DS 005.00

EMPLOYMENT APPEALS BOARD DECISION
2024-EAB-0779

Affirmed
No Disqualification

PROCEDURAL HISTORY: On July 10, 2024, 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 November 5, 2023 (decision # L0005110413).[1] Claimant filed a timely request for hearing. On September 18, 2024, notice was mailed to the parties that a hearing had been scheduled for September 30, 2024. On September 30, 2024, claimant failed to appear for the hearing, and ALJ Nyberg issued Order No. 24-UI-267695, dismissing claimant's request for hearing due to his failure to appear. On October 1, 2024, claimant filed a timely request to reopen the hearing. On October 10, 2024, the Office of Administrative Hearings (OAH) mailed a letter stating that Order No. 24-UI-267695 was vacated and that a hearing would be scheduled on whether to allow claimant's request to reopen and, if so, the merits of decision # L0005110413. On October 28, 2024, ALJ Monroe conducted a hearing, and on October 31, 2024, issued Order No. 24-UI-271637, allowing claimant's request to reopen and reversing decision # L0005110413 by concluding that claimant was discharged, but not for misconduct, and was not disqualified from receiving benefits based on the work separation. On November 4, 2024, the employer filed an application for review of Order No. 24-UI-271637 with the Employment Appeals Board (EAB).

WRITTEN ARGUMENT: The employer's argument contained information that was not part of the hearing record, and did not show that factors or circumstances beyond the employer's 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.

[1] Decision # L0005110413 stated that claimant was denied benefits from November 5, 2023 to November 9, 2024. However, decision # L0005110413 should have stated that claimant was disqualified from receiving benefits beginning Sunday, November 5, 2023 and until he earned four times his weekly benefit amount. *See* ORS 657.176.

EAB considered the entire hearing record. EAB agrees with the part of Order No. 24-UI-271637 allowing claimant's request to reopen the September 30, 2024, hearing. Pursuant to ORS 657.275(2), that part of Order No. 24-UI-271637 is **adopted.**

FINDINGS OF FACT: (1) NSA Trucking, LLC employed claimant as a truck driver from June 25, 2023, until November 9, 2023.

(2) Claimant worked Monday through Friday of each week as work was available. The employer would notify claimant each day by phone or other means whether work would be available the following day. The employer expected that their drivers would report for work when told that work was available for them. Claimant understood this expectation.

(3) The employer also expected that their drivers would accurately report incidents impacting their driving record to the employer. Claimant understood this expectation.

(4) At some point in June 2023, claimant reported to the employer that he had been involved in a collision in February 2023 for which he was not determined to be at fault. Claimant had not been involved in any other collisions and believed that the information he provided about the February 2023 collision was accurate. The employer relied on their insurer to investigate whether their employees or potential hires had information in their driving records that would impact the employer's insurance premium. If informed of such information by the insurer, the employer would question the employee or potential hire as to the accuracy of the information. At the time of claimant's hire, the insurer did not report that any information from claimant's driving record would impact the premium.

(5) On November 3, 2023, the employer's insurance policy was up for renewal. The insurer informed the employer that their premium would increase $18,452 for the next term, "almost tripling in rate," because claimant's driving record showed that claimant was at fault for the February 2023 collision and had "3 points on his record" as a result. Transcript at 27. The employer questioned claimant about this information and claimant maintained that he had not been at fault for the collision and had not been determined to be at fault by either the Department of Motor Vehicles (DMV) or the vehicle's insurer at the time of the collision. Claimant and the employer agreed to investigate further before the current policy expired.

(6) On Monday, November 6, 2023, the employer and claimant agreed that claimant would not work the following day. On November 7, 2023, the employer texted claimant that they had work for him the following day. Claimant did not receive the text due to problems with his phone, and was not aware that he was not receiving messages or calls. Claimant did not reply to the text and did not report for work on November 8, 2023.

(7) On November 8, 2023, the employer attempted to contact claimant about missing work, with no response. The employer attempted to contact claimant's relatives, who also attempted to contact claimant by phone, but claimant similarly did not receive their texts or calls. Late in the day when she returned home from work, claimant's wife alerted claimant that the employer had been trying to contact him, and claimant used her phone to contact the employer. Claimant explained the situation to the employer, but the employer doubted claimant's explanation of phone problems. Claimant and the employer also discussed the insurance issue, and the employer came to believe that claimant had

described a different collision at hire than the one reported by the insurer, and that claimant had concealed the collision and/or his fault in it as reported by the insurer.

(8) On November 10, 2023, the employer emailed claimant a letter stating that they were discharging him, effective November 12, 2023, for having failed to disclose that he was determined to be at fault for the February 2023 collision, and for failing to appear for work on November 8, 2023.

(9) On or about November 14, 2023, claimant visited a DMV office to review his driving record. A DMV employee printed claimant's record and reviewed it with him. It showed only one collision, on February 23, 2023, with no finding of fault made.

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 failed to appear for work on November 8, 2024, and because they believed that claimant failed to report that he was involved in a collision prior to being hired for which he was determined to be at fault. The employer reasonably expected that their employees would appear for work as directed, and claimant was aware of this expectation. However, the parties gave differing accounts regarding the circumstances under which claimant was directed to report for work. The employer testified that claimant worked a "set schedule" and implied that they expected claimant to appear for work Monday through Friday, at a time to be determined the day prior, unless otherwise excused for a particular day. Transcript at 21-22. In contrast, claimant testified that he understood he was expected to appear for work "every time. . . [the employer] had work for [him]," that he "didn't have a set schedule," and that he "had to wait for [the employer] to send [him] a text to know what [he] was doing the next day." Transcript at 38, 45.

Claimant further testified that on Monday of the week of November 6, 2023, the employer told claimant, "I have no work for you tomorrow," and when claimant asked about "the rest of the week," the employer replied that it was "too early to tell" and they agreed that the employer would "[l]et [claimant] know what the rest of the week was going to be like." Transcript at 38. Where the evidence as to the employer's attendance expectation regarding the week of November 6, 2023, conflicts, it is no more than equally balanced, and since the burden is on the employer, the facts have been found according to claimant's account. Therefore, during that week, the employer expected that claimant would appear for work only when directed to do so on a day-to-day basis.

Claimant worked on Monday, November 6, 2023. Both parties agreed that the employer excused claimant from working November 7, 2023, either at claimant's request or due to a lack of work. Transcript at 26, 38. The employer texted claimant on November 7, 2023, that they had work for him on November 8, 2023. Claimant testified that his phone did not receive this message, or follow-up calls from the employer or others about it, until late on November 8, 2023. Transcript at 44-45. Claimant testified that by the morning of November 8, 2023, he was thinking to himself that it was "really unusual" not to have heard from the employer. Transcript at 45. The record does not suggest that claimant attempted to contact the employer or investigate why he had not heard from the employer on November 7, 2023. The employer testified that he "just didn't have any faith in trusting what [claimant] was telling [him] at that time" regarding why he had missed work. Transcript at 20-21. However, the employer did not provide evidence to rebut claimant's account that phone problems caused him to miss work, and the facts have been found accordingly.

Because claimant did not receive the employer's text and therefore did not know that the employer expected him to work on November 8, 2023, his absence that day was not a willful or wantonly negligent violation of the employer's expectations. After not hearing from the employer when expected on November 7, 2023, claimant's failure to realize that his phone was not functioning and his failure to check with the employer regarding the availability of work for the following day amounted to no more than ordinary negligence. Further, even if these failures to act rose to the level of wanton negligence, they constituted an isolated instance of poor judgment because the record does not show other willful or

wantonly negligent violations, the failures to act involved poor judgment, and they did not exceed mere poor judgment by, for example, creating a breach of trust or making a continuing employment relationship impossible. Therefore, claimant's absence from work on November 8, 2023, did not constitute misconduct.

The employer also expected that their employees would provide accurate information about their driving record, and claimant understood this expectation. The employer testified, "[A]t the time of hire my insurance company will pull a motor vehicle report. They'll ask me to verbally ask [the potential hire] if there's anything on their record. It's up to their free will to tell us if there's anything on there before we pull it." Transcript at 29. The employer further testified that no collisions appeared on claimant's record through this process at the time of hire in late June 2023. Transcript at 29. The employer testified that when claimant was hired, he asked claimant about his driving record, and claimant disclosed a "fender bender" involving a left turn on a red light that "wasn't his fault." Transcript at 27. On November 3, 2023, the employer was alerted by their insurance company that claimant's driving record now revealed a February 23, 2023, collision for which claimant was found to be at fault. This caused the employer's premium to increase beyond what they could afford.

In contrast, claimant testified that when he was hired, the employer did not ask him anything about his driving record. Transcript at 48. Claimant testified that he nonetheless spoke with the employer about the collision two or three times during his employment. Transcript at 52, 60. Claimant denied having been involved in any collisions other than the one on February 23, 2023, and denied having been in the "fender bender" involving a left turn on a red light described in the employer's testimony. Transcript at 50-51. Claimant testified that he believed he was not at fault for the February 23, 2023, collision, that he had not been cited by law enforcement because of it, and that the insurance companies involved in the claim for that collision determined that he had not been at fault. Transcript at 50, 66. Claimant also testified that his DMV record, obtained just after his discharge, contained no determination of fault. Transcript at 64-65.

The weight of the evidence shows that claimant was involved in only one collision, that DMV did not determine that claimant was at fault for it, and that the insurer of the vehicle claimant was driving told claimant that they determined he was not at fault. It is unclear from the record why the employer's insurer believed in November 2023 that claimant was at fault for the collision, though it is possible an insurer involved in the collision claim concluded that claimant was at fault without telling claimant, or the information reported to the employer's insurer may simply have been erroneous. Regardless of the reason for this discrepancy, the employer's testimony established that the employer knew at the time they hired claimant that he had been involved in a collision for which claimant believed he had not been found at fault. The employer has not shown by a preponderance of the evidence that this information was inaccurate at the time of hire. Further, even if the information was inaccurate at that time, the employer has not met their burden to show that claimant knew or should have known that an insurer or other entity considered him at fault for the collision. Accordingly, the employer has not shown a willful or wantonly negligent violation of a reasonable expectation concerning disclosure of claimant's driving record, and therefore has not shown misconduct in this regard.

For these reasons, claimant was discharged, but not for misconduct, and is not disqualified from receiving benefits as a result of the work separation.

DECISION: Order No. 24-UI-271637 is affirmed.

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

DATE of Service: December 6, 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 stated above**. *See* ORS 657.282. For forms and information, visit https://www.courts.oregon.gov/courts/appellate/forms/Pages/appeal.aspx and choose the appropriate form under "File a Petition for Judicial Review." You may also contact the Court of Appeals by telephone at (503) 986-5555, by fax at (503) 986-5560, or by mail at 1163 State Street, Salem, Oregon 97301.

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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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