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

EMPLOYMENT APPEALS BOARD DECISION
2025-EAB-0149

Reversed & Remanded

PROCEDURAL HISTORY: On December 20, 2024, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant was discharged by the employer, but not for misconduct, and was not disqualified from receiving benefits based on the work separation (decision # L0007850084). The employer filed a timely request for hearing. On February 18, 2025, ALJ Wardlow conducted a hearing at which claimant failed to appear, and on February 20, 2025, issued Order No. 25-UI-283591, affirming decision # L0007850084. On March 7, 2025, the employer filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Lowe's Home Centers, LLC employed claimant from March 18, 2013, through March 19, 2024.

(2) The employer maintained a safety policy requiring employees to "freeze the scene" when an accident occurs or damaged product is received, and then contact a supervisor to determine how to proceed. Audio Record at 9:58. The employer explained this policy to employees during orientation, and reviewed it with employees periodically during regular safety trainings.

(3) On June 15, 2023, the employer issued claimant a warning relating to poor job performance because of errors he had made that resulted in a "high-dollar" loss for the employer. Exhibit 1 at 11; Audio Record at 19:20.

(4) On June 29, 2023, and July 18, 2023, the employer issued claimant warnings relating to ten "attendance occurrences" that claimant had accrued between August 1, 2022, and May 31, 2023. Exhibit 1 at 11.

(5) On March 18, 2024, claimant was unloading a pallet that had damaged product in it. Instead of immediately "freezing the scene" or contacting his supervisor to determine how to proceed, he attempted to unload the pallet. During the attempt, claimant tried to "piggyback" the damaged pallet onto another pallet, crushing the damaged product and causing it to rupture. Audio Record at 10:35. This

resulted in a liquid substance spraying from the damaged product, which got in claimant's eyes and mouth, as well as on nearby equipment.

(6) After the damaged product ruptured, claimant did not contact a supervisor. Instead, he went to the restroom to clean himself off. Coincidentally, claimant's supervisor was in the restroom at the same time, and asked claimant what happened. After claimant explained what happened, the supervisor found the safety data sheet (SDS) for the substance that claimant had been sprayed with, determined that claimant needed to immediately flush out his eyes at the emergency eye wash station, and directed claimant to do so.

(7) On March 19, 2024, the employer discharged claimant for violating their safety policy the prior day by failing to "freeze the scene" or contact a supervisor after unloading the damaged pallet.

CONCLUSIONS AND REASONS: Order No. 25-UI-283591 is set aside and this matter remanded for further development of the record.

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 of an incident which took place on March 18, 2024. During that incident, claimant unloaded a pallet with damaged product and, instead of "freezing the scene" and contacting a supervisor, took actions that caused further damage and resulted in getting himself and the employer's equipment doused with the product. These actions violated the employer's policy, which specifically required him to "freeze the scene" and contact a supervisor instead of attempting to handle the situation on his own.

The record shows that the employer explained this policy to new employees at orientation, and reviewed it with all employees periodically. As claimant did not appear at the hearing, he did not offer evidence to show that he was unaware, or did not have a reason to be aware, of this policy. Given this, as well as claimant's eleven-year tenure with the employer, it is reasonable to infer that claimant likely was aware of and understood the employer's policy. It also can be inferred that claimant either chose to disregard the policy, or failed to consider that his actions would probably result in a violation of the policy, in acting as he did on March 18, 2024. Claimant's conduct leading to his discharge was at least wantonly negligent. While the order under review concluded the same, it also concluded that claimant's conduct on March 18, 2024, was an isolated instance of poor judgment. Order No. 25-UI-283591 at 3. The record as developed does not support this conclusion.

For the March 18, 2024 incident to be an isolated instance of poor judgment, it must be a single or infrequent occurrence rather than a repeated act or part of a pattern of other willful or wantonly negligent behavior. The record does not indicate that claimant had ever previously violated the employer's safety policy at issue in this matter, and claimant's conduct during the incident therefore was not a repeated act. However, the record does show that claimant received three warnings in June and July 2023 relating to claimant's attendance and job performance. As to the attedance warnings, the record shows that claimant accrued ten "attendance occurrences" between August 1, 2022 and May 31, 2023. Exhibit 1 at 11. As to the job performance warning, the record shows that claimant made errors that cost the employer money, but few details were elicited regarding what claimant actually did or was expected to do in that instance. Thus, while the employer suggested that claimant violated their expectations eleven times prior to the incident that led to claimant's discharge, the record does not show whether claimant's conduct in any of those instances was willful or wantonly negligent. The record therefore does not show whether claimant's conduct on March 18, 2024 was an isolated instance of poor judgment, or part of a pattern of other willful or wantonly negligent behavior.

On remand, the ALJ should develop the record to show, in detail, what specific acts or omissions on claimant's part led to the warnings in June and July 2023, as well as what specific policies or expectations claimant allegedly violated on each of those occasions, in order to determine whether claimant's conduct on March 18, 2024 was an isolated instance of poor judgment, or part of a pattern of other willful or wantonly negligent behavior.

ORS 657.270 requires the ALJ to give all parties a reasonable opportunity for a fair hearing. That obligation necessarily requires the ALJ to ensure that the record developed at the hearing shows a full and fair inquiry into the facts necessary for consideration of all issues properly before the ALJ in a case. ORS 657.270(3); *see accord Dennis v. Employment Division,* 302 Or 160, 728 P2d 12 (1986). Because further development of the record is necessary for a determination of whether claimant was discharged for misconduct, or an isolated instance of poor judgment, Order No. 25-UI-283591 is reversed, and this matter is remanded.

DECISION: Order No. 25-UI-283591 is set aside, and this matter remanded for further proceedings consistent with this order.

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

DATE of Service: April 8, 2025

NOTE: The failure of any party to appear at the hearing on remand will not reinstate Order No. 25-UI-283591 or return this matter to EAB. Only a timely application for review of the subsequent order will cause this matter to return to EAB.

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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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