

EMPLOYMENT APPEALS BOARD DECISION
2019-EAB-0317

Affirmed
No Disqualification

PROCEDURAL HISTORY: On February 15, 2019, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 115632). Claimant filed a timely request for hearing. On March 14, 2019, ALJ Snyder conducted a hearing, and on March 22, 2019, issued Order No. 19-UI-126914, concluding the employer discharged claimant, but not for misconduct. On March 28, 2019, the employer filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Townsend Farms Inc. employed claimant as a controller from January 2015 to January 23, 2019.

(2) The employer prohibited employees from watching videos during work time but permitted it during breaks and lunch periods. The office environment in which claimant worked often was loud with disruptive background noise. The employer's chief financial officer (CFO) discussed the issue with claimant and told him to use headphones to listen to media to block out the noise, which claimant often did.

(3) Prior to 2019, the employer had concerns about performance issues that involved claimant. Claimant reportedly walked out on the president of the company during meetings on two occasions, although the president subsequently apologized to claimant for his behavior during those meetings. In October of 2018, claimant reportedly had unauthorized access to payroll information in the employer's computer system and was subsequently told that such access was not permitted. Claimant also had occasional disagreements with office personnel over work issues and sometimes engaged in heated discussions with them. By 2019, the employer had "lost confidence in [claimant's] ability to work across the organization...in terms of having peoples' trust." Transcript at 11. Although the employer had these concerns, it never issued a warning to claimant or suggested to him that his job was in jeopardy.

(4) On January 22, 2019, a consultant who shared a workplace with claimant told the employer's CFO that claimant "spent five hours...watching videos on his phone" on January 21, 2019. Transcript at 7-8.

On January 23, 2019, without questioning claimant about the report, the CFO discharged claimant for that reason.

CONCLUSIONS AND REASONS: The employer discharged claimant, 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. OAR 471-030-0038(3)(a) (December 23, 2018) defines misconduct, in relevant part, as a willful or wantonly negligent violation of the standards of behavior which an employer has the right to expect of an employee, or an act or series of actions that amount to a willful or wantonly negligent disregard of an employer's interest. OAR 471-030-0038(1)(c) defines wanton negligence, in relevant part, as 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. In a discharge case, the employer bears the burden to show misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976). Good faith errors are not misconduct. OAR 471-030-0038(3)(b)

At hearing, although the employer's witness asserted that claimant "wasn't fired for a single issue" but that the "tipping point" that caused the employer to discharge claimant when it did was the report it received from an unnamed consultant that claimant had watched five hours of video on his phone on January 21, 2019. Transcript at 7. In a discharge case, the proximate cause of the discharge is the initial focus for purposes of determining whether misconduct occurred. *See e.g. Appeals Board Decision*, 12-AB-0434, March 16, 2012 (discharge analysis focuses on proximate cause of the discharge, generally the last incident of misconduct before the discharge). Therefore, here, the report the employer received from the consultant is the initial focus of the misconduct analysis.

The employer discharged claimant for allegedly watching five hours of video on his phone on a work day. However, the employer's description of the incident was based on a hearsay report from an unidentified consultant who was not offered as a witness and, for that reason, could not be cross-examined concerning the accuracy of her observations, description of claimant's conduct, or her possible bias in making the report. Moreover, the employer admitted that it did not confront or attempt to verify the report with claimant before discharging him. Transcript at 8. Although claimant conceded at hearing that it was "possible" he could have streamed some video on his phone on January 21, 2019, that concession was insufficient to establish that such conduct occurred, or that even if it did, it lasted for five hours or occurred outside of his breaks or lunch period that day. And, even if the consultant's account was partially accurate, that claimant's conduct occurred within plain sight of another suggests that he did not consider such conduct a violation of a known employer expectation. Accordingly, the employer failed to establish that claimant's conduct was not the result of a good faith error in his understanding of the employer's expectations, which is not misconduct.

The employer discharged claimant, but not for misconduct under ORS 657.176(2)(a). Claimant is not disqualified from receiving unemployment insurance benefits on the basis of his work separation.

DECISION: Order No. 19-UI-126914 is affirmed.

D. P. Hettle and S. Alba;
J. S. Cromwell, not participating.

DATE of Service: April 29, 2019

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 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 desisyong ito.

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 Asuntos Laborales. Si no está de acuerdo con esta decisión, puede presentar una Petición 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

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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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