

EMPLOYMENT APPEALS BOARD DECISION
2021-EAB-0066

Modified
No Disqualification

PROCEDURAL HISTORY: On October 22, 2020, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant was discharged for misconduct and disqualified from receiving unemployment insurance benefits effective July 26, 2020 (decision # 94747). Claimant filed a timely request for hearing. On November 13, 2020, the Office of Administrative Hearings (OAH) served notice of a hearing scheduled for November 25, 2020 at 8:15 a.m. On November 25, 2020, claimant failed to appear at the hearing, and ALJ M. Davis issued Order No. 20-UI-156908, dismissing claimant's request for hearing for failing to appear. On December 8, 2020, claimant filed a timely request to reopen the hearing. On January 20, 2021, ALJ Murdock conducted a hearing, and on January 22, 2021 issued Order No. 21-UI-159666, allowing claimant's request to reopen the November 25, 2020 hearing, cancelling Order No. 20-UI-156908, and affirming decision # 94747. On January 28, 2021, claimant filed an application for review of Order No. 21-UI-159666 with the Employment Appeals Board (EAB).

WRITTEN ARGUMENT: Claimant's argument 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. 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 claimant's written argument to the extent it was based on the record.

Based on a *de novo* review of the entire record in this case, and pursuant to ORS 657.275(2), the portion of the order under review concluding that claimant showed good cause for reopening the November 25, 2020 hearing, allowing his request to reopen, and cancelling Order No. 20-UI-156908 is **adopted**. The remainder of this decision addresses whether the employer discharged claimant for misconduct.

FINDINGS OF FACT: (1) The Oregon Department of Transportation employed claimant from January 2006 until July 28, 2020.

(2) Claimant worked as part of a bridge crew until August 2014, when he was promoted to the position of procurement and contract specialist 1/fleet inspector. Exhibit 4 at 5.

(3) The employer expected claimant to be accountable and transparent with public funds and to hold himself to the highest ethical standards, which included refraining from using or attempting to use his position to obtain financial gain for himself. Exhibit 4 at 6. Claimant understood this expectation.

(4) On March 9, 2020, claimant had the day off from work. Claimant attended a medical appointment in the morning. After his appointment, claimant stopped at a supply company to purchase four bags of sand for use at his home. While at the supply company, claimant was “not paying attention” because he felt distracted by the information he received during the medical appointment that morning. To purchase the sand, claimant offered his debit card to the vendor. The vendor handed claimant what claimant assumed was a receipt for the sand, and told claimant the sand would be at the loading dock. Claimant put the paper in his wallet, went to the vendor’s loading area, put the sand in his vehicle, and went home.

(5) The paper claimant received from the vendor was an invoice that showed the purchase would be billed to the employer. The invoice contained an electronic signature from a bridge crew employee.

(6) On March 10, 2020, while working, claimant had to make a purchase for work. While engaged in the work purchase, claimant looked at the paper in his wallet that he had received from the vendor on March 9, 2020, and realized that it was not a receipt. Claimant saw that the paper was an invoice to the employer’s bridge crew, which would result in a bill to the employer for the sand. Claimant felt “panicked” because the vendor would bill the employer for the sand claimant purchased for himself, and immediately went to the vendor. Audio Record at 26:31. At the vendor, claimant corrected the error, and paid for the sand with his own funds. Claimant called the “crew person” who did the billing for the employer’s crew that had been charged, and told them about the error. Audio Record at 23:42. Claimant put the corrected receipt in the bridge crew coordinator’s inbox at work. Claimant did not report the incident to a manager.

(7) On March 10, 2020, the bridge crew coordinator received the March 9, 2020 invoice from the vendor for the sand. The coordinator investigated the sale and determined that none of the bridge crew employees had made the purchase. Exhibit 4 at 7.

(8) On May 1, 2020, the employer conducted a fact-finding meeting to discuss the allegations against claimant. During the fact-finding, claimant denied that he intentionally purchased the sand using the employer’s account. Claimant also denied having signed the invoice electronically with another employee’s name.

(9) On July 28, 2020, the employer discharged claimant because he allegedly intentionally purchased items for personal use with the employer’s funds, and was not honest or “forthcoming” in a fact-finding meeting with the employer. Exhibit 4 at 6.

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. “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).

Order No. 21-UI-159666 concluded that the employer discharged claimant for misconduct, reasoning that the record showed that claimant’s purchase of sand for personal use with the employer’s account was at least a wantonly negligent violation of the employer’s standards, and “not merely inadvertent error caused by a moment of distraction.”¹ The order found that the record showed that claimant knew at the time of the March 9, 2020 transaction that the vendor had prepared an invoice for the employer because of the detailed information gathered by the vendor from claimant’s answers to the vendor's specific questions, and because claimant signed another employee’s name to the invoice by way of the electronic signature pad.² The order also found that claimant’s assertion that he did not sign the invoice electronically was “merely self-serving” and implausible because the vendor must have obtained the incorrect name from claimant.³ The weight of the evidence does not, however, support the order’s conclusion or reasoning.

The employer’s witness testified that the employer discharged claimant in part because he was not honest or “forthcoming” in the May 1, 2020 fact-finding meeting with the employer. Audio Record 14:18 to 14:41. The witness’ testimony did not show that claimant failed to answer the employer’s questions or otherwise participate in the fact-finding regarding the March 9, 2020 purchase, or that claimant was evasive, untruthful, or otherwise less than “forthcoming.” Nor does the employer’s hearsay evidence presented by way of the July 27, 2020 dismissal letter show by a preponderance of the evidence that claimant failed to participate in good faith in the investigation. Exhibit 4 at 5-9. Claimant’s denial of certain allegations during the fact-finding meeting did not amount to dishonesty or evasiveness. Nor does the record provide more than hearsay assertions that claimant’s responses to the employer throughout the investigation were inconsistent. Exhibit 4 at 5-9. Moreover, even if there were inconsistencies in claimant’s responses, the record does not show that they were due to dishonesty or intentional, impermissible evasiveness. Exhibit 4 at 5-9. To the extent the employer discharged claimant because he was dishonest or evasive during the fact-finding meeting on May 1, 2020, the employer discharged claimant not for misconduct.

The employer also discharged claimant, in part, because it concluded that claimant intentionally purchased items for personal use using the employer’s funds. Claimant’s explanation, that he was “not paying attention” and did not notice that the vendor gave him an invoice charging the employer for the

¹ Order No. 21-UI-159666 at 5.

² Order No. 21-UI-159666 at 5.

³ Order No. 21-UI-159666 at 5.

sand, was plausible. As evidence of claimant's intent, the employer relied upon the fact that the invoice was signed using another employee's name. Exhibit 4 at 5-9, Audio Record at 14:01 to 14:12.

Claimant denied having signed the invoice electronically with another employee's name. Audio Record at 24:38 to 24:58. The employer's human resources business partner provided hearsay testimony that the vendor stated that it did not sign the invoice for claimant. Audio Record at 29:04 to 29:22. Claimant provided equally persuasive hearsay testimony that the vendor "told us" that they sign for people when they are "in a hurry" or if they are already leaving the store. Audio Record at 27:12 to 27:30. It is plausible that the vendor chose the name on the invoice because that employee was from the bridge crew, and claimant had worked for the bridge crew in the past. On this record, it is therefore just as likely as not that the vendor, not claimant, put the other employee's name on the invoice.

The employer also relied on the fact that claimant did not inform a member of management about the March 9, 2020 transaction as evidence that claimant intended to use employer funds for personal use. Exhibit 4 at 7; Audio Record at 29:22 to 29:51. However, the record does not show that claimant tried to conceal the March 9, 2020 transaction. On March 10, 2020, claimant called the "crew person" who did the billing for the employer's crew that had been charged, and told them about the error. Claimant also put the corrected receipt in the bridge crew coordinator's inbox at work. The record does not show that claimant knew or should have known that the employer expected him to do more than correct his error and inform the crew that would receive the invoice.

Claimant was the only witness at the hearing who was present at the vendor on March 9, 2020. By contrast, all of the employer's evidence regarding that transaction is contained in the dismissal letter. Other than the information regarding claimant's statements during the fact-finding hearing, the dismissal letter is primarily "double hearsay," meaning that it is a statement written by a manager who did not testify at hearing, citing statements from others, such as the vendor and bridge crew coordinator, who also did not testify at the hearing. Absent a reason to discount the reliability of claimant's testimony at hearing, claimant's testimony is afforded more weight than the employer's hearsay evidence regarding what occurred during the March 9, 2020 transaction.

In sum, the employer has not met its burden to show that claimant intended to purchase the sand for himself using the employer's funds or was even conscious that he had done so. Wanton negligence requires that an individual be conscious of their conduct. Because the record does not show that claimant was conscious of the fact that the sand was charged to the employer's account, claimant's conduct was not willful or wantonly negligent. The employer discharged claimant, but not for misconduct. Claimant is not disqualified from receiving unemployment insurance benefits on the basis of his work separation.

DECISION: Order No. 21-UI-159666 is modified, as outlined above.

S. Alba and D. P. Hettle.

DATE of Service: March 5, 2021

NOTE: This decision modifies an order that denied benefits. Please note that payment of benefits, if any are owed, may take approximately a week for the Department to complete.

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.

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

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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