

EMPLOYMENT APPEALS BOARD DECISION
2021-EAB-0075

Affirmed
No Disqualification

PROCEDURAL HISTORY: On October 15, 2020, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct, disqualifying claimant from receiving benefits effective May 17, 2020 (decision # 110238). Claimant filed a timely request for hearing. On December 1, 2020, ALJ M. Davis conducted a hearing, and on December 3, 2020 issued Order No. 20-UI-157188, concluding that claimant's discharge was not for misconduct, and claimant therefore was not disqualified from receiving benefits. On December 23, 2020, the employer filed an application for review with the Employment Appeals Board (EAB).

WRITTEN ARGUMENT: The employer did not declare that they provided a copy of their argument to the opposing party or parties 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 the employer's reasonable control prevented them 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).

EVIDENTIARY MATTER: The ALJ admitted Exhibits 1 and 2 into evidence, but failed to mark them as such. As a clerical matter, EAB has identified the exhibits based on the ALJ's description of them and marked them as Exhibit 1 and Exhibit 2. Audio Record at 3:30 to 6:45.

FINDINGS OF FACT: (1) Klamath Bird Observatory employed claimant as a biological technician and its banding project leader from April 19, 2018 until May 20, 2020. Claimant's job duties included contributing to project specific goals, assisting in the development of science projects, and participating in field station operations.

(2) The employer expected claimant to perform her job duties and avoid being disruptive to the employer's operations. Claimant was aware of the employer's expectations either because they were included in her job description or as a matter of common sense. Exhibit 1 (Banding Project Lead job description).

(3) In April 2020, in response to the COVID-19 pandemic, the employer asked claimant to create a new protocol for bird banding projects using a single employee, such as claimant, rather than two or more employees as was done previously to complete banding work at the employer's field stations. The employer also asked claimant to create a rodent management plan for the employer's field stations that would potentially include lethal rodent trapping performed by employees working at the field stations, as was done previously. After the 2019 field season, claimant had become ethically opposed to lethal rodent trapping and instead preferred live rodent trapping combined with tracking the trapped rodents to ensure that method's effectiveness, which she was willing to perform. Claimant had previously received authorization from a prior field station supervisor who left the job in early 2020 to perform live rodent trapping instead of lethal rodent trapping.

(4) On or about April 22, 2020, claimant's supervisor and the employer's executive director informed claimant that she would need to perform lethal rodent trapping at the field stations. After claimant informed them that she was ethically opposed to personally using lethal traps and preferred live rodent trapping, they agreed that claimant should draft a new field office protocol for their review. Claimant agreed to pursue professional rodent exclusion appraisals as an option for the protocol, although her direct supervisor cautioned that the option might not be feasible depending on cost.

(5) On May 18, 2020, claimant presented her single person bird banding plan and rodent management plan to her supervisor and the executive director. Claimant was opposed to opening all the employer's nests using a single bander because it posed safety issues for the birds being banded. Claimant was not willing to personally perform lethal rodent trapping but provided alternatives, including live rodent trapping, marking and tracking, in conjunction with using professional rodent exclusion contractors. Claimant, her supervisor and the executive director agreed to think about claimant's plan for a couple of days before discussing it again. On May 19, 2020, claimant submitted an email to her supervisor, which she later converted to a statement, in which she clarified that with regard to the bird banding plan she understood "it is ultimately [the executive director's] call on what data we collect" and that she was willing to "live trap rodents as a management technique in concert with professional rodent exclusion" Exhibit 1 (May 19, 2020 claimant statement). Claimant did not refuse to perform any of her job duties.

(6) On May 20, 2020, when claimant returned to the office, she expected a discussion about moving forward with both protocols. Claimant was willing to continue to work on modifying them to satisfy the employer's concerns, and believed the employer also was willing to do so. However, when she arrived, a brief meeting was held during which claimant was thanked for her work and was told, "We've decided that we won't be able to move forward," that Oregon was an "at-will" employer, and that she was being terminated from her employment. Transcript at 39-40. The employer did not give claimant a reason for her termination. Transcript at 39.

(7) On May 20, 2020, the employer discharged claimant based on its belief that she was "being disruptive" and "refusing to do aspects of her job." Transcript at 6.

(8) The employer had not previously issued any formal written or verbal warnings to claimant during her employment.

CONCLUSIONS AND REASONS: Claimant's discharge was 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).

The employer expected claimant to perform her job duties and avoid being disruptive to the employer’s operations. Claimant understood those expectations. The employer discharged claimant because they believed, based on claimant’s May 19, 2020 email, that she had violated those expectations. Although the executive director asserted at hearing that the employer did not discharge claimant because of the May 19, 2020 email, the employer indicated on a Department form that the date of the final incident was “5/19/2020.” Transcript at 13; Exhibit 2 (Form 220). They also indicated on that form that although they had concluded that “claimant became disruptive to a level that could not be tolerated,” they denied that claimant had violated any company policy. Exhibit 2 (Form 220).

The record shows that as of the day of her discharge, claimant remained willing to satisfy the employer’s expectations that she create acceptable protocols for bird banding and rodent control, and that she had not refused to perform any of her job duties. Claimant had expressed to the employer in her May 19, 2020 email her belief that limiting the number of nests that were opened for bird banding was necessary for bird safety if a single employee was to perform the banding of birds at field stations. However, claimant also indicated that she was willing to compromise on that issue if results showed that opening all nests did not compromise bird safety. She also had expressed to the employer that although the lethal trapping of rodents was something she was unwilling to do personally, she was open to “live trap rodents as a management technique in concert with professional rodent exclusion.” Claimant had also expressed to the employer that she was willing to collaborate with the employer, particularly the executive director, in reaching a mutually agreeable resolution of any outstanding issues. Exhibit 1 (May 19, 2020 email).

The record as a whole shows that rather than refusing to perform her job duties, claimant was attempting to comply with the employer's expectations while also addressing her own concerns. It also shows that on May 20, 2020, claimant believed that she and the employer were still negotiating on how to best do that, but that the employer discharged her before that occurred. It also fails to show that claimant intentionally or even consciously was being disruptive to the employer’s operations. Rather, claimant was attempting to collaborate with the employer on reaching mutually agreeable protocols. Viewed objectively, the employer failed to meet their burden to show that claimant knew or should have known her conduct probably violated the employer's expectations, or that she was indifferent to the consequences of her actions. Accordingly, the employer discharged claimant but not for misconduct under ORS 657.176(2)(a), and claimant is not disqualified from receiving unemployment insurance benefits on the basis of her work separation.

DECISION: Order No. 20-UI-157188 is affirmed.

S. Alba and D. P. Hettle.

DATE of Service: February 16, 2021

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 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 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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