

EMPLOYMENT APPEALS BOARD DECISION
2021-EAB-0376

Affirmed
No Disqualification

PROCEDURAL HISTORY: On March 2, 2021, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that the employer discharged claimant for misconduct, disqualifying claimant from receiving unemployment insurance benefits effective January 24, 2021 (decision # 84249). Claimant filed a timely request for hearing. On April 5, 2021, ALJ Schmidt conducted a hearing, and on April 7, 2021 issued Order No. 21-UI-164291, reversing decision # 84249 by concluding that claimant's discharge was not for misconduct and did not disqualify claimant from receiving benefits. On April 27, 2021, the employer filed an application for review with the Employment Appeals Board (EAB).

WRITTEN ARGUMENT: EAB considered the employer's argument when reaching this decision.

FINDINGS OF FACT: (1) Coca Cola Bottling Co. employed claimant as a merchandiser from September 24, 2019 to January 28, 2021.

(2) The employer paid their merchandisers for their business mileage, which the employer considered the miles traveled between merchandising stops, but not the miles traveled between a merchandiser's home to their day's first merchandising stop or between their day's last merchandising stop back to their home. The employer used a GPS application installed on the merchandisers' cellphones to track their business mileage between stops. At the end of each month, the employer gave each merchandiser the opportunity to review and revise their tracked business mileage for the month before certifying that the tracked business mileage submitted for payment was accurate. The employer expected each merchandiser to be honest when submitting their monthly business mileage for payment. Claimant was aware of and understood the employer's expectations.

(3) The GPS application the employer installed on merchandiser's cellphones had two operating modes, a "manual mode" and a "safe track mode." Transcript at 7. When the application was in the manual mode, it tracked the miles only between the time the merchandiser pressed "start," when they left a merchandising stop, and the time they pressed "stop," when they reached their next merchandising stop.

Transcript at 7. When the application was in the safe track mode, it tracked the miles between a certain timeframe of business hours, such as from the time the merchandiser's day started when they left home until the time the merchandiser's day ended when they arrived back home after leaving their last merchandising stop.

(4) Around mid-December, 2020, claimant noticed that he was having problems with the GPS application. He had set the application to manual mode and although it initially appeared to function as expected, claimant noticed that on some days it had tracked the mileage from his home to his first merchandising stop rather than only the mileage from when he pressed "start" to when he pressed "stop." Claimant erased the mileage the application tracked between his home and his first merchandising stop on those days. However, claimant was not aware that on those days, the application had also tracked the mileage from his last merchandising stop at the end of the day to his home, and so claimant did not erase that tracked mileage. At the end of the month of December 2020, claimant reviewed his tracked business mileage for the month, and believing that all of the miles tracked were business miles, he certified that the tracked business mileage submitted for payment was accurate.

(5) When the same issue with the application reoccurred in early January 2021, claimant notified his merchandising supervisor that the application sometimes tracked the mileage between his home to his first merchandising stop. On or about January 12, 2021, the supervisor met with claimant, examined his phone, adjusted the application on the phone, handed it back to claimant, and told him that he "should be good to go," without telling claimant what adjustments he had made. Transcript at 15.

(6) On January 26, 2021, the merchandising supervisor and others met with claimant and asked him questions about his usage of the phone application to track his mileage. At that time, the merchandising supervisor informed claimant that the application on his phone also was tracking as business mileage the mileage between his last merchandising stop at the end of the day and his home. After that meeting, claimant erased all the miles the application tracked between his last stop and his home in January 2021 to correct his business mileage for that month.

(7) On January 28, 2021, the employer discharged claimant for "theft of mileage" because claimant certified that miles the application tracked between claimant's last merchandising stop and his home at the end of the day during December of 2020 were business miles and received payment for those miles. Transcript at 5.

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).

The employer discharged claimant for “theft of mileage” based on claimant’s certification and acceptance of payment for miles his phone application tracked between his last stop of the day and his home during December 2020. The employer reasonably expected claimant to be honest when submitting his monthly business mileage for payment, and claimant understood that expectation. However, the employer failed to establish that claimant violated that expectation willfully or with wanton negligence.

Claimant testified that prior to December 2020, he had set the tracking application on his phone to manual mode and believed it was recording his business miles accurately until mid-December of 2020, when he noticed that “every so often” the application “started tracking me from my home to my first store,” and at those times, he would erase the inaccurate mileage. Transcript at 14-15. He explained that when he certified his December 2020 business mileage as accurate, he “thought [he] had already caught everything.” Transcript at 17. When the same issue with the application occurred in early January 2021, claimant sought help from his merchandising supervisor to correct the problem. He also explained that it was not until the January 26, 2021 meeting with his supervisors that he first realized that the application had also tracked the miles from his last merchandising stop to his home. Transcript at 16.

The record shows that claimant took steps to correct the mileage tracking errors he was aware of, and that the employer discharged him for unknowingly tracking and certifying business miles at the end of his workdays in December 2020. The record fails to show that claimant consciously violated the employer’s expectations, or that he acted with indifference to the consequences of his actions by consciously engaging in conduct he knew or should have known would probably result in him violating those expectations. Accordingly, the employer failed to meet its burden to show that claimant willfully certified or accepted payment for mileage that was not compensable, or did so with wanton negligence.

The employer discharged claimant, but not for misconduct, and claimant is not disqualified from receiving unemployment insurance benefits on the basis of this work separation.

DECISION: Order No. 21-UI-164291 is affirmed.

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

DATE of Service: June 7, 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.

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 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 الاستئناف 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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