

EMPLOYMENT APPEALS BOARD DECISION
2021-EAB-0493

Affirmed
No Disqualification

PROCEDURAL HISTORY: On December 4, 2020, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct, disqualifying claimant from receiving unemployment insurance benefits effective December 15, 2019 (decision # 84013). Claimant filed a timely request for hearing. On June 8, 2021, ALJ Amesbury conducted a hearing, and on June 9, 2021 issued Order No. 21-UI-168433, reversing decision # 84013 by concluding that claimant was discharged, but not for misconduct, and was not disqualified from receiving benefits based on the work separation. On June 18, 2021, the employer filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) High Ridge Roofing and Construction employed claimant as a journeyman roofer from June 2019 until November 18, 2019.

(2) On November 18, 2019, claimant was working alone on a jobsite. The employer had previously provided other workers to help claimant with the job. Claimant traveled to the jobsite using the employer's vehicle, in which a GPS system was installed. By monitoring the GPS system, the employer determined that claimant left the jobsite at 11:00 a.m. that day, drove to a nearby rest stop, and stayed there until 4:33 p.m. that day. Afterwards, the employer visited the jobsite and determined that claimant had not made sufficient progress on the job.

(3) The employer confronted claimant about having allegedly left the jobsite. Claimant denied that he had left, and stated that he had been there working the entire time the employer believed him to have been gone. On November 18, 2019, based on his belief that claimant had left the jobsite for several hours and had failed to perform his work as a result, the employer discharged claimant.

CONCLUSIONS AND REASONS: Claimant was discharged, 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).

As a preliminary matter, claimant testified at hearing that the employer did not discharge him on November 18, 2019, but that he was instead sent home with a warning, and that he continued to work for the employer until he was laid off due to a lack of work in January 2020. Transcript at 16. The employer disputed this, asserting that after he discharged claimant the first time, he rehired claimant shortly thereafter, discharged him on January 2, 2020 due to attendance issues, rehired him for a third time on January 11, 2020, and that claimant never showed up for work after the final rehire. Transcript at 25-26. The employer also testified that he rehired claimant after the initial discharge because claimant sent him a text message “begging and pleading” to be rehired because claimant would otherwise have been unable to support his family. Transcript at 23. Claimant did not dispute this assertion. Given the specificity of the testimony the employer offered, the balance of the evidence shows that, more likely than not, the employer discharged claimant on November 18, 2019. Because the ALJ did not accept jurisdiction¹ over the other separations which the employer alleged to have occurred, the questions of whether and when those separations may have occurred, and whether they were disqualifying, are not before EAB and therefore not addressed further in this decision.

The employer discharged claimant because of his belief that claimant had, on November 18, 2019, abandoned the site at which he was working and had instead spent several hours at a nearby rest stop. The employer based this belief on both data from the GPS system in the vehicle claimant used at the jobsite and the employer’s subsequent determination, based on an inspection of the jobsite, that claimant had not completed enough work that day. After claimant denied having left the jobsite, the employer discharged him. At hearing, the employer did not offer evidence to substantiate the accuracy of the data he had taken from the GPS.

At hearing, claimant again denied having left the jobsite as the employer had alleged. Transcript at 16. Claimant also testified that while he did not believe he was behind on the job he had been performing on November 18, 2019, the employer had pulled claimant’s helpers from the job, “there was quite a lot to do there” for a single worker, and it was a “two-week job.” Transcript at 18. The employer did not offer specific evidence regarding how much work he had expected claimant to complete compared to how much claimant actually got done. While both the GPS data and the employer’s assessment of the work claimant had completed both support the employer’s allegation that claimant had left the jobsite that day, the evidence is too circumstantial and, in the latter instance, too subjective to outweigh claimant’s firsthand account that he did not leave the jobsite that day. The employer has therefore not met its burden to prove that claimant committed the alleged actions for which he was discharged.

¹ See OAR 471-040-0025(8) (August 1, 2004).

For the above reasons, claimant was discharged, but not for misconduct, and is not disqualified from receiving benefits based on the work separation.

DECISION: Order No. 21-UI-168433 is affirmed.

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

DATE of Service: July 23, 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 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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