

EMPLOYMENT APPEALS BOARD DECISION
2021-EAB-0576

Affirmed
No Disqualification

PROCEDURAL HISTORY: On December 23, 2020, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant was discharged for misconduct and was disqualified from receiving unemployment insurance benefits effective July 26, 2020 (decision # 143109). Claimant filed a timely request for hearing. On July 9, 2021, ALJ Janzen conducted a hearing, and on July 13, 2021 issued Order No. 21-UI-170228, reversing decision # 143109 by concluding that claimant was discharged not for misconduct and was not disqualified from receiving benefits. On July 16, 2021, the employer filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Javelin Utility Services Inc. employed claimant as a flagger from May 12, 2020 until July 27, 2020.

(2) The employer expected their flaggers to refrain from leaving their traffic control station until they obtained a replacement in order to avoid leaving a traffic control station unattended. Claimant was aware of the employer's expectation.

(3) On July 27, 2020, claimant and her lead coworker reported for work at an employer jobsite. The employer had been hired to control traffic for a construction crew that was installing cable lines along a road. Claimant was flagging traffic at one station along the road while her lead worker was flagging traffic at another station along the road. After several hours without a break on a hot day, claimant asked the construction crew supervisor for permission to leave her station and walk over to the employer's truck to get some water. The supervisor told claimant that their crew was going to be "off the road," not working, for approximately 20 minutes and that claimant had time to get water. Transcript at 16-19. Claimant then told her lead worker over her communication device what she had just been told by the construction crew supervisor, and received permission from the lead worker to leave her station to get water. Several minutes later, an employer manager arrived at the work site. The manager observed that claimant's traffic control station was unattended and discharged claimant because she left her flagging station without obtaining a replacement and "without permission." Transcript at 17-18.

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). Good faith errors are not misconduct. OAR 471-030-0038(3)(b). 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, the parties offered conflicting testimony about what occurred on July 27, 2020. Claimant testified that she received permission from the construction crew supervisor to leave her flagging station to walk over to employer’s truck for water because the construction crew was going to be “off the road” and not working for about 20 minutes. Transcript at 16-19. She further testified that after she received that permission, she contacted her lead worker and relayed that information to her. Transcript at 16-19. Claimant’s witness, the lead worker in question, also testified that claimant contacted her before leaving her flagging station, explained that she had received permission from the construction crew foreman to leave her station because the crew was going to be “off the road,” and that she gave claimant permission to leave her station to get water. Transcript at 26-27. The employer’s human resources manager, who was not present at the work site on July 27, 2020, and who had never spoken to claimant, presented hearsay evidence that claimant had left her station that day “for no reason” and without obtaining a replacement. Transcript at 5. Absent a basis for concluding that claimant and her witness were not credible witnesses, their firsthand testimony under oath was afforded more weight than the human resources manager’s hearsay evidence, and EAB therefore found facts in accordance with the testimony from claimant and her witness about the incident on July 27, 2020.

The employer discharged claimant for leaving her flagging station unattended on July 27, 2020 without first obtaining a replacement. Claimant did not contest that she left her flagging station unattended without obtaining a replacement. However, the record shows that claimant believed that she was allowed to leave her flagging station when she did that day because both the construction crew supervisor and her lead worker had given her permission to leave her station to get water while the construction crew was not working. Based on the permission granted by the construction crew supervisor and her lead, claimant sincerely believed, and had a rational basis for believing, that her conduct on July 27, 2020 complied with the employer’s expectation regarding leaving her flagging station. Claimant’s conduct on July 27, 2020 resulted from a good faith, though apparently erroneous, understanding of the employer’s expectation and not from a conscious or knowing disregard of that expectation. Good faith errors are not misconduct. OAR 471-030-0038(3)(b).

The employer discharged claimant, but not for misconduct. Claimant is not disqualified from the receipt of unemployment benefits based on this work separation.

DECISION: Order No. 21-UI-170228 is affirmed.

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

DATE of Service: August 24, 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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