

EMPLOYMENT APPEALS BOARD DECISION
2021-EAB-0994

Affirmed
No Disqualification

PROCEDURAL HISTORY: On February 3, 2021, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant was discharged for misconduct and therefore disqualified from receiving unemployment insurance benefits effective December 20, 2020 (decision # 111635). Claimant filed a timely request for hearing. On November 3, 2021, ALJ Lease conducted a hearing, and on November 10, 2021 issued Order No. 21-UI-179472, reversing decision # 111635 by concluding that claimant was discharged, but not for misconduct and was not disqualified from receiving unemployment insurance benefits. On November 23, 2021, the employer filed an application for review with the Employment Appeals Board (EAB).

WRITTEN ARGUMENT: On December 17, 2021, the employer submitted written argument in which they offered new information, including a video, for EAB's consideration that they did not offer into evidence at the hearing. OAR 471-041-0090(2) (October 29, 2006) allows EAB to consider new information only if the party offering the information demonstrates that circumstances beyond the party's reasonable control prevented the party from offering that information at the hearing. In their written argument, the employer stated:

I would respectfully request that the documents that were originally sent to the Oregon State Employment Department in February 2021 as well as my written argument be used in determining the final outcome of this case regarding Ms. Thompson . . . I was unaware that these documents . . . were not available for the hearing on November 3, 2021.

Employer's Written Argument at 1. However, the Notice of Hearing, mailed to the employer on October 22, 2021, stated that the ALJ would make a decision based only on the evidence presented during the hearing, and also stated in two separate places that the only documents that the ALJ would consider when reaching their decision were those documents, if any, that were enclosed with the Notice of Hearing or were provided to the ALJ and the other parties in advance of the hearing. Notice of Hearing at 1, 7. It was within the employer's reasonable control to have carefully read the Notice of Hearing and, based on its language, the employer should have understood that the ALJ would not consider documents simply because the employer had provided them to the Department. For this reason, the employer did

not show that their failure to present the new information submitted with their written argument was caused by a circumstance beyond their reasonable control. The employer's request for EAB to consider their new information therefore is denied. However, EAB considered the employer's written argument to the extent it was based on the record.

FINDINGS OF FACT: (1) Heart Haven Ranch, a horse boarding facility, employed claimant as a ranch hand and stall mucker from June 2017 to December 22, 2020.

(2) The employer expected claimant to perform her work tasks in a professional manner and to work as scheduled. Claimant was aware of the employer's expectations as a matter of common sense.

(3) Prior to December 2020, the employer received several complaints from the ranch manager regarding claimant's work performance. The complaints included that claimant used her personal cell phone during work hours, that she often was disrespectful when communicating with others and that she sometimes was insubordinate when directed to perform a work task.

(4) On December 17, 2020, the employer received a complaint from a client that claimant had not placed enough wood shavings in their horse's stall for bedding purposes. When questioned by the employer, claimant explained that she had made a "judgment" that she had placed sufficient shavings in the stall and apologized if she had been wrong. Transcript at 45-46.

(5) On December 18, 2020, the employer received a report from the ranch manager that claimant had left work early without permission, which claimant did not do.

(6) On December 22, 2020, the employer discharged claimant from her employment based on the two December complaints regarding her conduct and because the employer concluded that claimant "wasn't . . . a good fit" anymore. Transcript at 13.

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).

In a discharge case, the proximate cause of the discharge is the initial focus for purposes of determining whether misconduct occurred. The "proximate cause" of a discharge is the incident or incidents without which a discharge would not have occurred when it did and is usually the last incident of alleged misconduct preceding the discharge. *See e.g. Appeals Board Decision 12-AB-0434*, March 16, 2012

(discharge analysis focuses on proximate cause of the discharge, which is generally the last incident of misconduct before the discharge); *Appeals Board Decision* 09-AB-1767, June 29, 2009 (discharge analysis focuses on proximate cause of discharge, which is the incident without which the discharge would not have occurred when it did). At hearing, although the employer's ranch manager testified that claimant was discharged on December 22, 2020 because she "wasn't . . . a good fit" and the employer's owner testified that claimant was discharged for "a multitude of things," the owner also explained that the employer had made the decision shortly after the two December complaints about claimant's work conduct. Transcript at 13, 20, 42. Therefore, those incidents were the proximate cause of claimant's discharge and the incidents without which claimant's discharge would not have occurred when it did.

The record fails to show that on December 17, 2020, claimant knew or should have known that her failure to place enough wood shavings in the horse's stall for bedding purposes would probably violate the employer's expectation that she perform the work task in a professional manner. Claimant testified that she had owned horses during most of her life and considered herself an "expert" regarding their care. Transcript at 45. She also testified that on December 17, 2020 she made "a judgment" that the horse had enough shavings in the horse's stall and that when the employer discussed the client's complaint about insufficient shavings with her, she explained that to the employer and then apologized if her judgment had been wrong. Transcript 45-46. Absent evidence of a willful or wantonly negligent violation of the employer's expectation in that regard, the employer failed to meet their burden to show that claimant engaged in misconduct on December 17, 2020.

The record also fails to show that on December 18, 2020, claimant left work early without permission. The ranch manager testified that on that day, "claimant left early without authorization." Transcript at 16-17. Claimant testified that she "never left without permission" and specifically denied that she had done so on that day. Transcript at 37, 45-46. Absent evidence from an independent witness corroborating the ranch manager's testimony, the evidence on that issue is no more than equally balanced, and when the evidence on an issue is equally balanced, the party with the burden of persuasion – here the employer – has failed to meet their burden to establish the fact in dispute. Accordingly, the employer failed to meet their burden to show that claimant willfully, or with wanton negligence, violated their expectation that claimant work as scheduled on December 18, 2020 and thereby engaged in misconduct.

For these reasons, the employer discharged claimant, but not for misconduct under ORS 657.176(2)(a). Claimant is not disqualified from receiving unemployment insurance benefits based on the work separation.

DECISION: Order No. 21-UI-179472 is affirmed.

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

DATE of Service: December 30, 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 desisyon.

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 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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