

EMPLOYMENT APPEALS BOARD DECISION
2022-EAB-0232

Affirmed
No Disqualification

PROCEDURAL HISTORY: On November 19, 2021, 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 October 17, 2021 (decision # 72029). Claimant filed a timely request for hearing. On January 26, 2022, ALJ Blam-Linville conducted a hearing, and on February 2, 2022 issued Order No. 22-UI-185416, reversing decision # 72029 by concluding that claimant was discharged, but not for misconduct, and was not disqualified from receiving benefits based on the work separation. On February 14, 2022, the employer filed an application for review with the Employment Appeals Board (EAB).

WRITTEN ARGUMENT: The employer's argument 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. Under ORS 657.275(2) and OAR 471-041-0090 (May 13, 2019), EAB considered only information received into evidence at the hearing when reaching this decision. EAB considered the employer's argument to the extent it was based on the record.

FINDINGS OF FACT: (1) First Response Restoration Service Inc. employed claimant as a general manager from July 1, 2019 to October 6, 2021.

(2) The employer maintained a misconduct policy which prohibited dishonesty and required employees to communicate accurately with the employer regarding job status and time off. The employer also maintained a separate "code of conduct" policy, which prohibited the employer from employing any individual with a felony conviction. Transcript at 17. Claimant was aware of and understood these policies.

(3) In September 2019, claimant was arrested on multiple theft-related charges, at least one of which was a felony. When claimant returned to work after his arrest, he informed the employer of the charges he was facing and believed he would lose his job. The employer "stuck with [claimant]" because "just like everything else, you're innocent until proven guilty." Transcript at 37, 39.

(4) In September 2021, claimant was scheduled for a hearing related to his pending criminal charges. Claimant notified the employer of the hearing; however, the hearing was later postponed.

(5) On October 4, 2021, claimant informed the employer's owner that he had contracted COVID-19. The employer did not ask claimant to provide a copy of his test results. The employer and claimant agreed that claimant should take leave until October 25, 2021. Later that day, claimant's attorney in claimant's pending criminal case told claimant that a hearing had been scheduled in claimant's case for October 5, 2021. Claimant did not tell the employer about this hearing because they had "already put [him] on leave . . . for COVID." Transcript at 27.

(6) On October 5, 2021, claimant appeared at the hearing and pleaded guilty to one count of aggravated theft and one count of theft. Claimant was sentenced to 20 days in jail.

(7) On October 6, 2021, the employer discovered that claimant had been incarcerated as the result of his plea in the criminal case. The employer discharged claimant on October 6, 2021 because they believed he had been dishonest on October 4, 2021 when he told them that the reason he needed time off from work was because he had contracted COVID-19 and said nothing to the employer about his pending criminal hearing.

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 being dishonest on October 4, 2021, about the reason he needed time off from work. The employer determined that claimant had lied by indicating that his contraction of COVID-19 was the basis for his need for time off, when the employer believed that the actual reason was so that claimant could attend the hearing in his criminal case and serve any jail time imposed following sentencing. However, the record shows that claimant told the employer on October 4, 2021 of his COVID-19 condition, and that the employer never asked him to provide a copy of his COVID-19 test results prior to approving his leave. Under these circumstances, claimant's first-hand testimony that he had contracted COVID-19 and that it formed the basis for his leave request is entitled to greater weight than the employer's suspicion to the contrary. Furthermore, because the employer had approved claimant's sick leave prior to him learning about his October 5, 2021 hearing, and because there was no reason to believe that any aspect of his criminal matter would extend beyond the October 25 2021 date when his sick leave would end, the employer did not establish that claimant acted dishonestly by not

informing the employer of the October 6, 2021 hearing. Under these circumstances, the employer failed to show that claimant lied about the reason he needed to take leave on October 4, 2021, or that he otherwise violated a standard of behavior that the employer had a right to expect.

The employer's office manager also suggested in her testimony that claimant's discharge on October 6, 2021 may have been due to his alleged dishonesty about the fact that he was facing felony charges. However, assuming for argument's sake that the employer discharged claimant based in part on this reason, the record shows that claimant was not dishonest about the fact that he was facing a felony charge(s). Claimant testified that after his arrest in September 2019 he told the employer about the charges he was facing and the record shows that, at least through the month of September 2021, he kept the employer informed about hearings he was required to attend in the criminal matter. Transcript at 35, 39. Furthermore, the office manager testified that the employer was aware of claimant's arrest and believed that claimant was "innocent until proven guilty." Transcript at 37. Under these circumstances, the record evidence shows that the employer, more likely than not, was aware as early as September 2019 that claimant was facing a felony charge(s) and that he was therefore not dishonest at any point with respect to the felony nature of the offense(s) he was facing. As such, the employer failed to show that claimant was discharged for misconduct and claimant is therefore not disqualified from receiving benefits based upon the work separation.

DECISION: Order No. 22-UI-185416 is affirmed.

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

DATE of Service: April 19, 2022

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 ໂດຍປະຕິບັດຕາມຄໍາແນະນໍາທີ່ບອກໄວ້ຢູ່ຕອນທ້າຍຂອງຄໍາຕັດສິນນີ້.

Arabic

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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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