

EMPLOYMENT APPEALS BOARD DECISION
2022-EAB-0233

Affirmed
No Disqualification

PROCEDURAL HISTORY: On December 17, 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 November 28, 2021 (decision # 81110). Claimant filed a timely request for hearing. On January 19, 2022, ALJ Roberts conducted a hearing, and on January 21, 2022 issued Order No. 22-UI-184523, reversing decision # 81110 by concluding that claimant was discharged, but not for misconduct, and was not disqualified from receiving benefits based on the work separation. On February 10, 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.

FINDINGS OF FACT: (1) Vanity Art employed claimant as a warehouse manager from August 30, 2021 to November 30, 2021. Claimant's job duties included management of between four and six warehouse employees.

(2) On every Friday during claimant's period of employment, the employer's chief executive officer (CEO), who was claimant's immediate supervisor, would meet with claimant to discuss the employer's expectations for how claimant should manage the warehouse. These weekly meetings were not intended to be disciplinary in nature. Towards the end of claimant's employment, the employer's human resources (HR) manager also began to attend the meetings.

(3) The employer maintained an attendance policy and during one or more of these meetings the CEO emphasized the need for claimant to "set a good example" for the warehouse employees by being on time for work and not missing work when he was scheduled. Transcript at 12. Also during one or more

of the meetings, the CEO told claimant “about how much money in this particular warehouse . . . [the employer] was losing.” Transcript at 24.

(4) On September 20, 2021, September 30, 2021, October 19, 2021, October 28, 2021, and November 1, 2021, claimant either was late for work or absent from work. In each instance, claimant informed the employer prior to his shift that he would either be late for work, or absent for work, and provided a reason for his tardiness or absence. The employer did not issue any disciplinary warnings to claimant based on a violation of the employer’s attendance policy for any of these instances.

(5) On November 26, 2021, the employer’s warehouse employees had limited work to perform because the shipping carriers that usually picked up orders from the employer’s warehouse were closed because it was the day after Thanksgiving. As a result, the warehouse employees were “sitting around doing nothing.” Transcript at 24. Based on his prior discussions with the CEO about the warehouse losing money, and in an effort to be “proactive” and save the employer unnecessary labor costs, claimant decided to have a chat discussion with the HR manager via “Teams” about sending the warehouse employees home early. Transcript at 17, 24. The CEO was away that day and not part of the discussion. During the discussion, the HR manager neither told claimant to send the warehouse employees home, nor told him that he should not send the warehouse employees home. At the conclusion of this portion of the discussion, claimant decided to send the warehouse employees, and himself, home for the day. After learning of claimant’s decision, the HR manager also decided to leave work early. Upon leaving work for the day, the HR manager stated to claimant, “[W]ho works the day after Thanksgiving?” Transcript at 20.

(6) On November 30, 2021, the employer discharged claimant for sending the warehouse employees home from work early on November 26, 2021.

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). Good faith errors are not misconduct. OAR 471-030-0038(3)(b).

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 without which a discharge would not have occurred 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). The HR manager provided testimony indicating that claimant's several instances of reporting late to work and being absent from work contributed to the employer's decision to discharge claimant. However, the record shows that claimant provided prior notice to the employer with respect to each of the instances and that the employer did not discipline claimant for any of these purported attendance policy violations. As such, the preponderance of the evidence shows that but for his decision to allow the warehouse employees to leave work early on November 26, 2021, claimant would not have been discharged. Therefore, the proximate cause of the employer's decision to discharge claimant was claimant's decision to release the warehouse employees early from work on November 26, 2021.

The employer discharged claimant, but not for misconduct. Here, the employer had a right to expect, as a matter of common sense, that on November 26, 2021, claimant would not prematurely release the warehouse employees he supervised from their respective shifts without the prior authorization of the employer. However, although claimant did not have the prior authorization of his employer before he released these employees, the record shows that claimant was not indifferent to the consequences of his actions in releasing them, but was instead motivated by the best interests of the employer. Specifically, the record shows that because claimant's supervisor – the employer's CEO – was unavailable, claimant communicated with the HR manager to address his concerns over the financial impact to the employer of having the warehouse employees "sitting around doing nothing," and his plan to remedy the situation by releasing the employees early. Based on that communication – which included the HR manager never telling claimant not to release the employees and stating, "Who works the day after Thanksgiving?" – claimant reasonably believed that she supported his plan. Moreover, because the record shows that it was reasonable for claimant to believe that the HR manager supported his plan, it was also reasonable for claimant to believe that the employer would also support his decision to release the employees early. Furthermore, the record supports the reasonableness of claimant's concerns over the potential financial impact to the employer of unproductive employees working a full shift given that the CEO had previously told claimant that the warehouse had been losing money. Under these circumstances, the employer failed to show that claimant knew or should have known that his decision to release the warehouse employees early on November 26, 2021 probably violated the employer's expectations.

In other words, the employer failed to show that claimant's actions on November 26, 2021 amounted to anything more than a good faith error. Claimant testified to his belief that the employer would condone his actions because they were motivated by his desire to cut the employer's labor costs in light of the warehouse losing money. Transcript at 24. The record supports the reasonableness of claimant's decision-making in this regard, as well as the conclusion that claimant was attempting to be proactive to help the employer financially. Under these circumstances, the employer failed to show that claimant's conduct was anything more than a good faith error and, as a result, failed to show that claimant was discharged for misconduct. Claimant therefore is not disqualified from receiving benefits based on the work separation.

DECISION: Order No. 22-UI-184523 is affirmed.

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

DATE of Service: April 14, 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

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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