

EMPLOYMENT APPEALS BOARD DECISION
2022-EAB-0321

Affirmed
No Disqualification

PROCEDURAL HISTORY: On December 22, 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 December 5, 2021 (decision # 143744). Claimant filed a timely request for hearing. On February 16, 2022, ALJ Kaneshiro conducted a hearing, and on February 17, 2022 issued Order No. 22-UI-186716, reversing decision # 143744 by concluding that claimant was discharged, but not for misconduct, and was not disqualified from receiving benefits based on the work separation. On March 8, 2022, the employer filed an application for review with the Employment Appeals Board (EAB).

WRITTEN ARGUMENT: EAB did not consider the employer's March 8, 2022 written argument when reaching this decision because they did not include a statement declaring that they provided a copy of their argument to the opposing party or parties as required by OAR 471-041-0080(2)(a) (May 13, 2019). The employer's March 12, 2022 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) VROPCO LLC employed claimant as a project manager from June 2020 until December 8, 2021.

(2) The employer expected their employees to document the work they performed on assigned projects to ensure that work performed by others on the project would flow smoothly. As part of this policy, the employer also expected employees to track the amount of time they performed on a project to the minute and without rounding the time.

(3) Prior to November 7, 2021, the employer had allowed claimant to define the parameters of his work on any assigned projects, the documentation he prepared to track the work he had completed on any project, and the time he had spent working on assigned projects. Claimant's autonomy included the

ability to decide whether to “launch” certain projects, either in a “testing state” or a “go live state.” Transcript at 19, 23-24. The employer subsequently began to experience difficulty tracking the work claimant had completed on his assigned projects and the time he spent working on the projects due to claimant’s failure to adequately document these areas.

(4) On November 7, 2021, claimant met with the employer’s owner and the employer’s maintenance supervisor to address claimant’s documentation issues. During the meeting, the employer provided claimant strict parameters defining the work he was to perform on assigned projects and addressing the documentation requirements he was expected to meet with respect to that work. Between November 7, 2021 and November 21, 2021, claimant continued to have difficulty meeting the employer’s expectations for how he documented his work and time keeping on assigned projects.

(5) On November 21, 2021, the owner and maintenance supervisor had a second meeting with claimant to address his documentation issues. During that meeting, the employer told claimant that he should place “more of a priority” on completing a financial model project he had been working on, but that claimant was allowed to work on other projects as well. Transcript at 19, 27. The employer also told claimant that he was not authorized to “launch” any projects without the prior approval of the owner. Claimant understood this latter instruction as only requiring pre-approval for project launches in a “go live” state, but not a testing state. During that meeting, the day-to-day supervision of claimant’s work activities was transferred from the owner to the maintenance supervisor.

(6) From November 21, 2021 through December 7, 2021, claimant’s documentation preparation was “much better” under the supervision of the maintenance supervisor. Transcript at 15. Claimant also continued to emphasize his work on the financial model project by ensuring that he spent a minimum of eight hours per week on the project.

(7) On December 7, 2021, claimant decided to prioritize working on a project involving the usefulness of products and devices, instead of working on the financial model project. As part of that work, claimant anticipated that he would be launching the project in a testing state. Prior to beginning his work, claimant spoke with the operations manager about the project he was prioritizing and was told that although it was okay to evaluate the products and devices in a testing state, he should not go live with the project without the owner’s permission. Claimant launched the products and devices project in a testing state.

(8) On December 8, 2021, the employer terminated claimant because he had prioritized the products and devices project over the financial model project on December 7, 2021, and because he violated the owner’s instruction that he not launch any project without the owner’s prior approval.

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 record shows that the employer discharged claimant on December 8, 2021 for two reasons. First, the employer discharged claimant because he prioritized his work December 7, 2021 on a project involving the usefulness of certain products and devices, instead of the financial model project the employer believed should have been claimant’s priority. However, although the record shows that the employer placed a high priority on the financial model project, and although this prioritization was addressed by the parties during the November 21, 2021 meeting, the record shows that the employer did not tell claimant that the project should be prioritized to the exclusion of the other projects claimant was responsible for. Instead, claimant was instructed that the financial model project was “more of a priority” than the other projects he was working on, but that he was allowed to continue working on the other projects as well.

The record shows that after the November 21, 2021 meeting, claimant’s work performance improved generally, and that claimant believed that he was meeting the employer’s prioritization intent with respect to the financial model project by spending at least eight hours per week addressing it. Given that claimant remained responsible for other assigned projects (including the products and devices project), and the financial model project was only “more of a priority” (but not the only priority), the employer failed to show that claimant knew or should have known that working on the products and devices project probably violated the employer’s expectations.

Likewise, the employer failed to meet their burden to show that claimant committed misconduct to the extent that he allegedly launched a project on December 7, 2021 without the prior permission of the owner. As an initial matter, the record shows that it was undisputed that claimant had permission to work on the products and devices project. However, there is a dispute as to whether claimant’s work on the project required claimant to obtain permission from the owner to “launch” the project in any state – whether it was in the testing state or the “go live” state – or whether claimant had the authority to launch the project in the testing state without the need for prior approval.

As to this latter issue, the maintenance supervisor testified that the launching issue was discussed at both the November 7 and November 21, 2021 meetings (at which the maintenance supervisor was present), and that claimant was told that he could not launch any projects “in any state” without approval. Transcript at 24. However, claimant testified that he did not recall the issue being addressed at all during the meetings and, to the extent it was addressed, the matter was not “clearly articulated [or] understood by me at all.” Transcript at 37. While claimant understood he needed the owner’s permission before going live, he believed he had the owner’s approval to launch products and devices project in a testing state to determine whether they would be worthwhile to the employer. Furthermore, claimant’s understanding in this regard was supported by his December 7, 2021 discussion with the employer’s operations manager who told claimant that while he could not conduct a live launch of the project without the owner’s permission, he had permission to launch the project in a testing state. In light of this corroborating evidence, the record shows that claimant’s belief that he was authorized to launch the products and devices project in a testing state, and without the prior permission of the owner, was

reasonable. As such, the employer failed to show that claimant knew or should have known that launching the project in the test state probably violated the employer's expectations.

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

DECISION: Order No. 22-UI-186716 is affirmed.

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

DATE of Service: May 13, 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 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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