

EMPLOYMENT APPEALS BOARD DECISION
2022-EAB-0426

Affirmed
No Disqualification

PROCEDURAL HISTORY: On January 24, 2022, the Oregon Employment Department (the Department) served notice of an administrative decision concluding employer discharged claimant, but not for misconduct, and claimant was not disqualified from unemployment insurance benefits based on the work separation (decision # 103335). The employer filed a timely request for hearing. On March 22, 2022, ALJ Blam-Linville conducted a hearing, and on March 28, 2022, issued Order No. 22-UI-189840, affirming decision # 103335. On March 30, 2022, the employer filed an application for review with the Employment Appeals Board (EAB).

WRITTEN ARGUMENT: EAB considered claimant's written argument to the extent it was based on the record.

FINDINGS OF FACT: (1) Claimant was employed by the City of Pendleton as a patrol officer from February 2018 until November 2, 2021.

(2) The employer has a conduct policy regarding insubordination that states "Members will obey any lawful order of the supervisor, including orders relayed from a supervisor by a member of the Department. Refusal demonstrated by failure of any member to obey a lawful order, or directive, or other intentional noncompliance constitutes insubordination." Transcript at 14.

(3) The employer also has a conduct policy regarding competent performance that states, in part, "Members will perform their assigned duties in a competent manner, Incompetence may be

demonstrated by: a) A lack of knowledge of the laws to be enforced; b) A lack of knowledge or an unwillingness to perform assigned task; c) The failure to conform to work standards; d) The failure to take appropriate action in response to a crime, incident or disorder; e) A written record of repeated infractions of policies, procedures, regulations, and rules or orders of the Department; or f) Repeated work evaluations which indicate substandard performance. Transcript at 15- 16.

(4) Claimant acknowledged the employer's policy and procedure manual at the time of hire on February 15, 2018 and after training on October 23, 2018. Transcript at 18.

(5) On June 28, 2021, claimant was placed on a work plan for failure to meet the standards set by the department, including a failure to submit timely reports. The work plan was set to be reevaluated after six months. The work plan was divided into three categories designed to improve claimant's understanding of: 1) the supervisor/subordinate dynamic; 2) following a logical course of investigation to reach a sound conclusion based on available evidence; and 3) keeping up with the pace of work and submit acceptable reports on time. The plan contained three phases in a stepping-stone process intended to help claimant achieve an acceptable work performance. Transcript at 10-11, 23-24.

(6) On July 26, 2021, claimant's supervisor advised her that when he had court he told someone, usually a supervisor. Claimant understood from this conversation that if she was summoned to court and was going to miss a shift briefing she should inform a supervisor. Transcript at 9 and 31.

(7) On July 27, 2021, claimant's workday was scheduled to begin at 8:00 a.m. Claimant was subpoenaed to appear in court at 8:00 a.m. Claimant arrived at work and was unable to find a supervisor. Claimant did not see the Corporal who was going off duty, and the Sergeant's office was dark with the lights off. Corporal Freeman, the supervisor claimant reported to, was not on duty or in the building. Claimant asked a K-9 lieutenant to inform the supervisor when he arrived that she had gone to court. Transcript at 31-32, 35.

(8) Claimant did not think to radio a supervisor or inform the Chief before she left for court. Claimant believed she was complying with the supervisor's June 26, 2021 instructions by informing the K-9 lieutenant. Transcript at 38-39. The employer believed claimant defied a direct order from a supervisor because she failed to notify a supervisor before she went to court and missed the shift briefing. Transcript at 9.

(9) Claimant's last day worked was August 1, 2021. On November 2, 2021, employer discharged claimant for insubordination for failing to follow an officer's direct order to inform a supervisor before going to court, failing to perform duties in a competent manner, and failing to improve her work performance in accordance with the June 2021 work plan. Transcript at 5, 26.

CONCLUSIONS AND REASONS: Claimant was discharged by the employer, 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) (September 22, 2020). 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 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).

At hearing, the employer testified that claimant had a number of performance issues at work, which included failing to understand and follow the instructions of her supervisor and failing to keep up with the pace of work and submit acceptable reports on time, for which claimant had been on a work improvement plan for about a month. However, the final incident leading to claimant’s dismissal occurred on July 27th when claimant failed to inform a supervisor that she was going to court and was going to miss a shift briefing. Therefore, this incident is the proximate cause of claimant’s discharge, and the incident without which claimant’s discharge would not have occurred when it did.

The employer expected that claimant would generally follow the instructions of her supervisors and that she would inform a supervisor when she had court. These were reasonable expectations. Claimant’s supervisor testified that claimant was on a work improvement plan because she “didn’t quite understand that when she was given an order, she needed to follow that order, if it wasn’t illegal, violated the law, violated our policies and procedures, or was immoral.” Transcript 20-21. However, claimant’s supervisor was not in the building at the time she needed to leave for court. Claimant was under an 8:00 a.m. subpoena to appear at court and did not have an unlimited amount of time to search for a supervisor. As a result, claimant informed the K-9 lieutenant that she had court and asked him to notify her supervisor when he arrived. Claimant proceeded to court in order to comply with the subpoena, Claimant believed she was in compliance with her employer’s expectations when she informed the K-9 lieutenant she was going to court. A “good faith error” usually involves a mistaken, but honest belief, that one is in compliance with the employer’s expectations, and has some factual basis for believing that to be the case. *See accord Goin v. Employment Dep’t.*, 203 Or App 758, 126 P3d 734 (2006). As such, claimant’s conduct was a good faith error, and not misconduct.

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-189840 is affirmed.

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

DATE of Service: June 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 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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