

EMPLOYMENT APPEALS BOARD DECISION
2022-EAB-0567

Affirmed
No Disqualification

PROCEDURAL HISTORY: On March 8, 2022, 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 February 20, 2022 (decision # 115544). Claimant filed a timely request for hearing. On April 25, 2022, ALJ Roberts conducted a hearing, and on April 27, 2022 issued Order No. 22-UI-192354, reversing decision # 115544 by concluding that claimant was discharged, but not for misconduct, and was not disqualified from receiving benefits based on the work separation. On May 14, 2022, the employer filed an application for review with the Employment Appeals Board (EAB).

WRITTEN ARGUMENT: The employer did not declare 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 argument also 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 as required by OAR 471-041-0090 (May 13, 2019). EAB considered only information received into evidence at the hearing when reaching this decision. *See* ORS 657.275(2).

FINDINGS OF FACT: (1) NJ Reynolds Co. employed claimant as a delivery driver from January 23, 2019 until February 22, 2022. The employer was a contractor whose only customer was FedEx Ground. Claimant's job required him to operate one of the employer's trucks within the FedEx Ground facility. Although the facility did not have posted signs stating the speed limit in the facility, the FedEx facility manager had told the employer's president that the speed limit inside the facility was five miles per hour (MPH).

(2) The employer maintained a policy that required delivery drivers to drive safely and maintain safe speeds while operating within the FedEx facility. The employer's policy did not specify what speed constituted a safe speed, but the employer's president believed that an employee travelling at seven or eight MPH within the facility was "probably not gonna raise any red flags[.]" Transcript at 8. Claimant understood that he was required to drive safely within the facility, and he never drove faster than six MPH in the facility.

(3) The employer also maintained a policy that informed employees that a condition of their employment was FedEx approval of the employee and that if they were banned from the FedEx facility for any reason, they would be immediately terminated from employment. Claimant understood that policy.

(4) On February 17, 2022, claimant was driving the employer's truck within the FedEx facility, while a coworker rode along in the passenger's seat. The truck contained a satellite-tracked "G-pad," which was facing the coworker and displayed the vehicle speed. The coworker never observed the G-pad exceed five MPH. Later that day, the employer's president was informed by the FedEx facility manager that claimant had exceeded the five MPH facility speed limit during work that day. The president called claimant and warned him that he needed to drive slower within the facility and keep a safe speed. The president did not tell claimant that he needed to stay under five MPH.

(5) On February 18, 2022, the employer's president received a written notification from the FedEx manager that indicated that claimant had been speeding at work that day and that, as a result, "[claimant was] no longer allowed inside my building." Transcript at 6. Although there were "some other things" identified in the written notification, the FedEx manager identified "primarily speeding" as the basis for banning claimant from the facility. Transcript at 5, 6.

(6) On February 22, 2022, the employer's president terminated claimant's employment because the FedEx manager had banned claimant from the FedEx facility. Claimant did not believe he had been speeding on February 17, 2022 or February 18, 2022.

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 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 record shows that the employer discharged claimant after claimant violated the employer's policy forbidding their employees from being banned from working in the FedEx facility, and that claimant was banned from the facility because the FedEx manager believed he had been speeding in the facility on February 18, 2022. At hearing, the FedEx manager testified that on February 18, 2022, claimant had also displayed his middle finger to the FedEx manager and other FedEx employees while driving in the facility, and his testimony suggested that this obscene gesture might have also formed part of the basis for claimant being banned. Transcript at 28. However, in addition to testifying that the decision to ban claimant was "primarily" based on claimant's excessive speeding, the employer's president quoted from the written notification he had received from the FedEx manager banning claimant from the FedEx facility. Transcript at 5-6. Although the written notification referenced "some other things" claimant had purportedly done within the facility, the only misconduct expressly referenced in the written notification was claimant's alleged speeding. As such, the preponderance of the evidence shows that the alleged February 18, 2022 speeding incident in the FedEx facility was the proximate cause of his discharge.

Claimant did not speed on February 18, 2022 within the FedEx facility and, therefore, claimant's conduct that day did not amount to misconduct. As an initial matter, the record shows that although claimant was aware that he was required to drive safely within the facility, the record fails to show that he ever had notice that he was required to keep his speed within the facility under five MPH. Although claimant would often drive six MPH within the facility, without prior notice of the five MPH speed limit, there is no evidence in the record that shows that claimant knew or should have known that his conduct in exceeding the five MPH limit would probably result in a violation of the employer's expectations.

Moreover, although the FedEx facility manager testified that claimant was driving ten MPH within the facility on February 18, 2022, claimant testified that he did not speed on that day but was driving safely. *Compare* Transcript at 27, Transcript at 16-17, 19. As such, the evidence on this issue is no more than equally balanced and therefore the employer, as the party with the burden of persuasion, has failed to meet their burden to show that claimant committed misconduct.

For these reasons, the employer failed to establish that claimant's discharge was for misconduct. Claimant therefore is not disqualified from receiving benefits based on the work separation.

DECISION: Order No. 22-UI-192354 is affirmed.

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

DATE of Service: August 1, 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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