

EMPLOYMENT APPEALS BOARD DECISION
2022-EAB-0792

Reversed
No Disqualification

PROCEDURAL HISTORY: On May 17, 2022, 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 January 2, 2022 (decision # 80936). Claimant filed a timely request for hearing. On July 7, 2022, ALJ Lucas conducted a hearing at which the employer failed to appear, and on July 12, 2022 issued Amended Order No. 22-UI-198070¹ affirming decision # 80936. On July 14, 2022, claimant filed an application for review with the Employment Appeals Board (EAB).

WRITTEN ARGUMENT: Claimant's argument contained information that was not part of the hearing record, and did not show that factors or circumstances beyond claimant's reasonable control prevented him 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 claimant's argument to the extent it was based on the record.

FINDINGS OF FACT: (1) TDS Telecom Inc. employed claimant as a network operations center technician from August 6, 2018 until January 3, 2022. Claimant worked remotely during all relevant times herein.

(2) The employer expected all employees to provide documentation of their COVID-19 vaccination status to the employer. Claimant understood the employer expected him to submit his vaccination status to them.

(3) The initial due date for employees to submit their vaccination status was December 10, 2021. Claimant objected to giving the employer his vaccination status and did not submit it to the employer by the December 10, 2021 deadline.

¹ Amended Order No. 22-UI-198070 amended Order No. 22-UI-197881, which was issued on July 11, 2022. The order was amended to address a scrivener's error. Amended Order No. 22-UI-198070 at 1.

(4) On December 15, 2021, the employer suspended claimant because he failed to provide the employer with his vaccination status. Because of this suspension, the employer “had taken away [claimant’s] permissions for [his] computer” and claimant no longer had access to his work email. Audio Record at 23:37 to 23:40. The employer gave claimant a new deadline, December 31, 2021, by which to submit his vaccination status and informed claimant that he would face “further disciplinary action” if he did not comply. Audio Record at 21:40.

(5) At the beginning of his suspension, claimant changed his mind and decided to submit his vaccination status to the employer. He attempted to call his manager twice and his manager’s supervisor once. Claimant left them voicemails when he called. He also sent an email to human resources asking the employer to allow him to return to work and stating that he would submit his vaccination status.

(6) Claimant did not submit his vaccination status to his employer before the December 31, 2021 deadline.

(7) Claimant did not receive a return call, email response or other communication from the employer until January 3, 2022, when the employer sent claimant an email stating that claimant was discharged for failing to submit his vaccination status to the employer.

CONCLUSIONS AND REASONS: Claimant was discharged 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 order under review concluded that claimant was discharged for misconduct because he did not submit his vaccination status to the employer by December 31, 2021. Amended Order No. 22-UI-198070 at 3-4. The record does not support this conclusion because the record does not show that claimant’s failure to submit his vaccination status amounted to a willful or wantonly negligent disregard of the employer’s expectation.

Claimant’s failure to submit his vaccination status by December 31, 2021 was a breach of a reasonable employer policy. Claimant understood the employer required him to submit his vaccination status to the employer by December 31, 2021, but claimant did not do so. When he failed to submit the vaccination status by this deadline, he breached a reasonable employer policy. However, the record fails to show that claimant violated the employer’s expectation willfully. During his suspension, claimant decided he was willing to submit his vaccination status to the employer and attempted to communicate that willingness to the employer, yet the employer did not enable claimant to comply with their policy.

Likewise, the record does not show by a preponderance of the evidence that claimant's breach of the employer's policy was wantonly negligent because claimant's failure to provide his vaccination status on time was not due to an indifference to the consequences of his failure to act. After the employer suspended claimant, claimant decided to submit his vaccination status to the employer because it "wasn't worth the fight." Audio Record at 18:18. However, the employer removed claimant's "permissions" and email access when they suspended claimant. The record shows that because of this lack of access, claimant did not know how to comply with the policy until he returned to work or the employer communicated further compliance information to him. Claimant's attempts to contact his manager, his manager's supervisor, and human resources show claimant was not indifferent to the consequences of failing to comply with the employer's policy. To the contrary, his attempts to communicate by telephone and email show his desire to comply with the employer's expectation. Further, claimant's email to human resources specifically stated that he was willing to submit his vaccination status. Thus, the record shows that claimant wanted to follow the policy and was concerned about the consequences of not following the policy. Because claimant was not indifferent to the consequences of a failure to comply with the employer's policy, his breach of the employer's policy was not wantonly negligent.

The order under review found that claimant could have submitted his vaccination status to the same human resources email address that he used to send the message stating his willingness to submit his vaccination status. Amended Order No. 22-UI-198070 at 3. However, the record does not show that an email to human resources was a private or otherwise appropriate manner for claimant to submit his vaccination status to the employer. Nor does the record show that claimant knew or should have known that an email to the human resources email address he had previously used, without a response, was an acceptable way to submit his vaccination status. As such, the preponderance of the evidence does not support the inference that claimant's failure to send his vaccination status to the human resources email he had used before showed an indifference to the consequences of not submitting his vaccination status.

For these reasons, claimant's breach of the employer's policy was not willful or wantonly negligent. Therefore, claimant was discharged, but not for misconduct, and is not disqualified from receiving unemployment insurance benefits based on the work separation.

DECISION: Order No. 22-UI-198070 is set aside, as outlined above.

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

DATE of Service: October 14, 2022

NOTE: This decision reverses an order that denied benefits. Please note that payment of benefits, if any are owed, may take approximately a week for the Department to complete.

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 ໄດ້ໂດຍປະຕິບັດຕາມຄຳແນະນຳທີ່ບອກໄວ້ຢູ່ຕອນທ້າຍຂອງຄຳຕັດສິນນີ້.

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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