

EMPLOYMENT APPEALS BOARD DECISION
2022-EAB-1167

Reversed
No Disqualification

PROCEDURAL HISTORY: On October 11, 2022, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct, disqualifying claimant from receiving benefits effective September 4, 2022 (decision # 142849). Claimant filed a timely request for hearing. On November 18, 2022, ALJ Krause conducted a hearing, and on November 23, 2022 issued Order No. 22-UI-208173, affirming decision # 142849. On November 25, 2022, claimant filed an application for review with the Employment Appeals Board (EAB).

WRITTEN ARGUMENT: Claimant submitted written arguments on November 25, 2022 and December 2, 2022. EAB did not consider claimant's November 25, 2022 written argument when reaching this decision because he did not include a statement declaring that he provided a copy of his argument to the opposing party or parties as required by OAR 471-041-0080(2)(a) (May 13, 2019).

Claimant's December 2, 2022 written argument contained information that was not part of the hearing record. Some of this information consisted of documents that were forwarded to the Office of Administrative Hearings (OAH) and received before the November 18, 2022 hearing in this case, but for unknown reasons were not available to the ALJ and so their admissibility was not ruled upon. EAB did not consider these documents because they were not material to EAB's determination. As for the remaining information in the December 2, 2022 argument that was not part of the hearing record but which claimant had not previously tried to submit, claimant 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 December 2, 2022 argument to the extent it was based on the record.¹

¹ Claimant also asserted in his December 2, 2022 argument that he also attempted to mail a video to OAH for consideration by the ALJ at hearing. December 2, 2022 Written Argument at 1. Unlike certain of the documents claimant attached to his December 2, 2022 argument, there is no indication that OAH received any video in advance of the November 18, 2022 hearing. For this reason, the video is presumed to have either not been mailed to OAH or to be missing from the record and EAB therefore did not consider it.

FINDINGS OF FACT: (1) Electrical Distributing Co. employed claimant as a warehouse manager from March 7, 2022 until September 8, 2022.

(2) Prior to the end of July 2022, claimant reported to the employer's owner and routinely worked well past 5:00 p.m. each day or went home at 5:00 p.m. and then returned to the warehouse to work alone during the evening. At the end of July 2022, the employer hired a company president and assigned claimant to report to the president. Thereafter, in several meetings in August and early September 2022, the president believed he conveyed to claimant that the employer expected claimant to work from 7:00 a.m. to no later than 6:00 p.m., and not to be alone in the warehouse at night. The expectation conveyed by the president was not in writing.

(3) As of August 31, 2022, claimant understood that the employer expected him to work from 7:00 a.m. to 5:00 p.m. each day and to get all his warehouse orders prepared for the next day in a timely manner.

(4) On the evening of September 7, 2022, claimant went to the employer's warehouse with his son. The purpose of claimant's trip to the warehouse was to show his workplace to his son before dropping his son off at the airport. Claimant did not work while visiting the warehouse with his son. Claimant armed the warehouse alarm and departed the warehouse that night at about 8:50 p.m.

(5) That evening, the president received an alert on his cell phone that claimant had armed the warehouse alarm at 8:50 p.m. On the morning of September 8, 2022, the president reviewed the warehouse's camera footage and saw claimant was in the warehouse the previous evening with his son.

(6) Later on the morning of September 8, 2022, the president held a six-month performance review meeting with claimant. At the meeting, the president discharged claimant because claimant had been present in the warehouse at night on the evening of September 7, 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).

The order under review concluded that the employer discharged claimant for misconduct because claimant understood that the employer expected him not to visit the warehouse or bring his son to the warehouse at night and that claimant violated the employer's expectations when he brought his son to the warehouse after hours on the evening of September 7, 2022. Order No. 22-UI-208173 at 3. The record does not support this conclusion.

At hearing, the employer's president testified that he had multiple conversations with claimant in August and early September 2022 advising that claimant was to finish his work by 6:00 p.m. at the latest and that claimant was "no[t] [to be] there by himself late in the night, and into the evening hours." Transcript at 7. In contrast, claimant testified that as of August 31, 2022 he understood that the president expected him to work 7:00 a.m. to 5:00 p.m. and to get his work done in a timely manner, but that the president had not expressed concerns about claimant being in the warehouse alone after 5:30 p.m. Transcript at 33-34, 31. These accounts are no more than equally balanced. Given that the burden of proof is on the employer in a discharge case, the record fails to show that claimant understood that the employer expected him not to visit the warehouse or to bring his son to the warehouse on the evening of September 7, 2022.

The record shows that as of August 31, 2022, claimant understood only that the employer expected him to work from 7:00 a.m. to 5:00 p.m. each day and to get all the orders prepared for the next day in a timely manner. Claimant's conduct on the evening of September 7, 2022 did not breach this expectation. That evening, claimant visited the warehouse not to work but to show his workplace to his son. Claimant did not actually work while he was present at the warehouse with his son. Although the warehouse camera footage, which the employer's president viewed, showed claimant and his son were present at the warehouse, at hearing, the president candidly testified that based on his review of the footage he "d[id not] know exactly what [claimant] was doing in – in the warehouse at – at that late at night." Transcript at 9. Accordingly, the employer failed to meet their burden to prove that claimant violated the employer's expectations willfully or with wanton negligence by visiting the warehouse at night on September 7, 2022 to show the warehouse to his son.

The record therefore fails to show the employer discharged claimant for engaging in a willful or wantonly negligent violation of the standards of behavior the employer had the right to expect of him or a disregard of the employer's interests. The employer therefore did not discharge claimant for misconduct under ORS 657.176(2)(a). Claimant is not disqualified from receiving benefits based on this work separation.

DECISION: Order No. 22-UI-208173 is set aside, as outlined above.

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

DATE of Service: January 26, 2023

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.

Please help us improve our service by completing an online customer service survey. To complete the survey, please go to <https://www.surveygizmo.com/s3/5552642/EAB-Customer-Service-Survey>. You can access the survey using a computer, tablet, or smartphone. If you are unable to complete the survey online and need a paper copy of the survey, please contact our office.



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.

Employment Appeals Board - 875 Union Street NE | Salem, OR 97311
 Phone: (503) 378-2077 | 1-800-734-6949 | Fax: (503) 378-2129 | TDD: 711
www.Oregon.gov/Employ/eab

The Oregon Employment Department is an equal opportunity employer/program. Auxiliary aids and services are available upon request to individuals with disabilities. Language assistance is available to persons with limited English proficiency at no cost.

El Departamento de Empleo de Oregon es un programa que respeta la igualdad de oportunidades. Disponemos de servicios o ayudas auxiliares, formatos alternos y asistencia de idiomas para personas con discapacidades o conocimiento limitado del inglés, a pedido y sin costo.