

EMPLOYMENT APPEALS BOARD DECISION
2023-EAB-0032

Reversed
No Disqualification

PROCEDURAL HISTORY: On October 21, 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 September 4, 2022 (decision # 85057). Claimant filed a timely request for hearing. On December 6, 2022, ALJ Clemons conducted a hearing, and on December 9, 2022 issued Order No. 22-UI-209519, affirming decision # 85057. On December 29, 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) Custom Window Cleaning employed claimant as a crew lead from about October 2015 until September 7, 2022.

(2) The employer reasonably expected that an employee would not leave work if denied permission to do so, or if an employee knew there was additional work at the jobsite they needed to perform. Claimant was aware of this expectation.

(3) On September 5, 2022, claimant was working as a lead at a jobsite. Claimant believed that there was no more work for him to do because there were only "a couple" of windows left to clean and two cleaners were working on them. It was the last day of work at the jobsite. Transcript at 13. Members of management were present at the time. Claimant therefore decided to leave work for the day with another lead that was leaving the jobsite at that time. Claimant historically left the jobsite at the completion of a job and would make the decision about when to do so.

(4) The employer's general manager observed claimant preparing to leave in the passenger seat of a truck driven by a coworker, and approached the driver's side window to speak with them. At some point during the conversation, claimant's coworker started the truck's ignition, and claimant was no longer able to hear the manager over the noise of the idling truck. The manager felt that there was additional work for claimant to do at the site and told claimant, "I'm not stopping you from leaving, but there's going to be a consequence if you leave[.]" Transcript at 8. Claimant did not hear this statement, and the coworker drove away. Claimant did not return to work that day and was not scheduled to work on September 6, 2022.

(5) On September 7, 2022, the employer notified claimant at home that he was discharged for leaving the jobsite early on September 5, 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. OAR 471-030-0038(3)(a) (September 22, 2020) defines misconduct, in relevant part, as a willful or wantonly negligent violation of the standards of behavior which an employer has the right to expect of an employee, or an act or series of actions that amount to a willful or wantonly negligent disregard of an employer's interest. OAR 471-030-0038(1)(c) defines wanton negligence, in relevant part, as 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. The employer has the burden to prove misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

The employer discharged claimant because claimant left a jobsite when the employer felt there was still work for claimant to do and claimant had been denied permission to leave. The order under review concluded that the employer discharged claimant for misconduct because claimant was at least wantonly negligent when he left the jobsite without authorization. Order No. 22-UI-209519 at 3. The record does not support this conclusion.

The employer reasonably expected that an employee would not leave work if denied permission to do so, or if an employee knew there was additional work at the jobsite they needed to perform. Claimant was aware of this expectation because he served as a crew lead supervising others, and frequently made the determination as to when it was appropriate to leave the worksite. The parties offered differing accounts of the events leading to claimant's discharge. The manager testified that while claimant left the jobsite at 11:54 a.m. on September 5, 2022, work at the jobsite was not completed until 5:28 p.m. because of a need for additional pressure washing after window cleaning was completed. Transcript at 34-35. Further, the manager testified that he carried on a conversation with claimant from outside an idling truck in which he asked claimant "three or four times" why he was leaving, to which claimant initially replied by shrugging his shoulders, before finally saying he "had family things to do." Transcript at 40. The manager also testified that he told claimant during this interaction that, "[T]he job's not done." Transcript at 37. In contrast, claimant maintained that he could not hear most of what the manager was saying once the truck was turned on, and he thought the manager was speaking to the coworker in the driver's seat of the truck. Transcript at 16-17. Claimant said he did not know the

manager felt there was additional work for claimant to do or that he threatened a “consequence” if claimant left work at that time. Transcript at 17. Because the employer bears the burden of showing claimant was discharged for misconduct by a preponderance of the evidence, and these first-hand accounts are no more than equally balanced, the employer has not met their burden. Therefore, the record shows that, more likely than not, claimant did not hear the manager denying him permission to leave or telling him that there was more work at the site to be done, and claimant reasonably believed there was no more work for him to do there. Under these circumstances, claimant did not willfully violate the employer’s expectation by leaving.

Before leaving, claimant took time to assess what work he believed remained to be done and what staff remained to perform the work before concluding there was nothing left for him to do. This demonstrates that claimant was not indifferent to the consequences of his actions in leaving the worksite. Claimant testified he thought it was appropriate to leave because he did not “want to stay and waste money,” referring to being paid to remain onsite without having any work to do. Transcript at 14. Claimant therefore believed that he was acting in the employer’s best interests in leaving when he did. If the facts were as claimant believed them to be, he had no reason to know that his leaving work at that time would likely have violated the employer’s expectations. To the extent claimant did not affirmatively seek guidance on whether the manager was in agreement with claimant’s assessment that there was no further work for him to do and that he should leave, or determine what the manager was saying through the truck window before leaving if he could not hear, these failures to act amounted to no more than mere negligence. Because the employer has not shown that claimant violated the employer’s expectation willfully or with wanton negligence, they have not proven that they discharged claimant for misconduct.

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

DECISION: Order No. 22-UI-209519 is set aside, as outlined above.

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

DATE of Service: March 1, 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.

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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
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