

EMPLOYMENT APPEALS BOARD DECISION
2023-EAB-0503

Reversed
No Disqualification

PROCEDURAL HISTORY: On February 10, 2023, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant was discharged by the employer for misconduct and was disqualified from receiving benefits effective January 22, 2023 (decision # 125123). Claimant filed a timely request for hearing. On April 6 and 14, 2023, ALJ Monroe conducted a hearing, and on April 24, 2023 issued Order No. 23-UI-222944, affirming decision # 125123. On May 1, 2023, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Portland Patrol, Inc. employed claimant, most recently as a security officer, from October 31, 2022 until January 23, 2023. As a security officer, claimant was stationed at a parking lot connected to a University of Oregon building, with whom the employer was contracted.

(2) At all times relevant to this decision, claimant's hearing was "a little deficient." April 14, 2023 Transcript at 32.

(3) As part of claimant's duties while working at the parking lot, the employer expected him to maintain situational awareness throughout his shift, open and close the security gate for any vehicles entering or exiting the parking lot, and verify the identification of any drivers entering the connected building from the parking lot entrance. Claimant understood these expectations.

(4) On two separate occasions on January 23, 2023, claimant failed to open the gate for vehicles awaiting entry to the parking lot. On the first occasion, after observing a vehicle waiting to enter the parking lot area without claimant watching or opening the gate, claimant's supervisor called to alert claimant, but claimant did not hear her call. The supervisor then walked down to the parking lot to open the gate herself. When claimant saw the supervisor exiting the building, claimant walked over to the gate and grabbed it himself after the supervisor had already started opening it. Afterwards, the supervisor directed claimant to remain vigilant and pay more attention to the gated area, and reiterated the employer's expectations for him to open and close the gate for all approaching vehicles. The supervisor

also asked claimant to hand her his work phone, which he did. The supervisor confirmed that the phone's ringer volume was at a sufficient level.

(5) Approximately 15 minutes after the first incident, the supervisor, watching the gate on security camera footage, noticed another vehicle waiting at the gate for entry. The supervisor again tried unsuccessfully to call claimant about the vehicle waiting for entry. Thereafter, the driver exited her vehicle and opened the gate herself. Afterwards, when the supervisor asked claimant about this incident, claimant told her that he had opened and closed the gate for the driver.

(6) Prior to these two incidents, claimant had opened and closed the gate for several other drivers that day.

(7) On January 23, 2023, the employer discharged claimant in connection with the incidents that had occurred that day.

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 found that the employer discharged claimant for "failing to complete his assigned duties" on January 23, 2023, and concluded that claimant's failure to do so constituted a willful or wantonly negligent violation of the employer's standards of behavior. Order No. 23-UI-222944 at 3–4. However, the record does not support that conclusion.

As a preliminary matter, while the fact that claimant did not open the gate as required during the two incidents on January 23, 2023 is not in dispute, the record shows that the employer discharged claimant, at least in part, because of his alleged untruthfulness regarding the latter of the two incidents. At hearing, in response to the ALJ's request to summarize the reason why they discharged claimant, the employer's human resources manager testified that the employer discharged claimant because he was "untruthful regarding performing his job duties[.]" April 6, 2023 Transcript at 6. The witness further explained that this related to the second of the two incidents on January 23, 2023, during which claimant told his supervisor that he had let the driver into the gate despite not having actually done so. April 6, 2023 Transcript at 20. This shows that the proximate cause for discharging claimant was, more likely than not, the employer's belief that claimant had been untruthful about that the fact that he had failed to perform his duties that day.

To the extent that the employer discharged claimant due to his alleged untruthfulness, the employer has not met their burden to show that claimant’s verbal report regarding the second incident constituted misconduct. At hearing, claimant explained that he told the supervisor that he was “sure” that he opened the gate because he “did, many times on that day.” April 14, 2023 Transcript at 18. Claimant also denied “intentionally or knowingly” giving incorrect information to his supervisor regarding the second incident. April 14, 2023 Transcript at 19. This testimony suggests that claimant unintentionally gave incorrect information to his supervisor because he was not certain of the incident to which the supervisor was referring. Given that claimant opened the gate for several other cars that day, the record does not show that the supervisor identified the incident or driver at issue with such specificity that claimant could not have reasonably misunderstood the supervisor’s inquiry. Therefore, the employer has not met their burden to show that claimant’s misstatement was deliberate. Because the misstatement was not the result of claimant’s willful or wantonly negligent behavior, it was not misconduct.

To the extent that the employer discharged claimant for the act of failing to open the gate for the second driver, the employer has also not met their burden to show that claimant’s failure to do so was misconduct. In both of the incidents that occurred on January 23, 2023, claimant did not answer a call from his supervisor as she attempted to alert him of a driver who was waiting for entry. As the supervisor confirmed that the ringer volume on claimant’s phone was up, but claimant did not answer her calls in either of the two incidents, it is reasonable to conclude that claimant simply did not hear the calls because of his hearing deficit. Aside from his failure to hear his supervisor’s call, the record does not show why claimant apparently did not see the driver waiting at the gate. Therefore, the employer has not met their burden to show that claimant’s failure to open the gate in the second incident rose above the level of ordinary negligence. Because the failure to open the gate was not the result of claimant’s willful or wantonly negligent behavior, it was not misconduct.

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

DECISION: Order No. 23-UI-222944 is set aside, as outlined above.

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

DATE of Service: June 6, 2023

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.

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.

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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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