

EMPLOYMENT APPEALS BOARD DECISION
2023-EAB-0541

Affirmed
No Disqualification

PROCEDURAL HISTORY: On January 30, 2023, 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 1, 2023 (decision # 72223). Claimant filed a timely request for hearing. On April 18, 2023, ALJ Lucas conducted a hearing, and on April 25, 2023 issued Order No. 23-UI-223058, reversing decision # 72223 by concluding that claimant was discharged but not for misconduct, and was not disqualified from receiving unemployment insurance benefits based on the work separation. On May 9, 2023, the employer filed an application for review with the Employment Appeals Board (EAB).

WRITTEN ARGUMENT: The employer's argument 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. 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 the employer's argument to the extent it was based on the record.

FINDINGS OF FACT: (1) Direct Marketing Solutions, Inc. employed claimant as a bindery supervisor from August 14, 2006 until January 4, 2023.

(2) As a part of claimant's job duties, he was expected to approve timesheets for the employees that he supervised. This expectation was detailed in claimant's job description. The employer also expected that their employees would not engage in conversations about non-work related topics during work hours. Claimant was aware of and understood each of these expectations.

(3) On July 19, 2022, claimant received a performance review. At this review, the employer raised a concern about claimant speaking with other employees about non-work related topics. Claimant did not speak to other employees about non-work topics during work hours.

(4) On November 15, 2022, claimant lost access to the computer program that he used to approve his subordinates' timesheets. Upon realizing that he lost access to this program, claimant sent an email to the employer's payroll office requesting assistance with this computer program. Claimant also informed his direct supervisor that he had lost access to this program. Claimant never received a reply from payroll regarding his request.

(5) On November 25, 2022, claimant missed a deadline to submit his subordinates' timesheets to his employer. When claimant missed this deadline, claimant was presented with a performance improvement plan. Claimant refused to sign the performance improvement plan.

(6) On December 20, 2022, the employer presented claimant with a performance improvement plan. This plan cited claimant's failure to approve the timesheets by November 25, 2022, and engaging in personal conversations during work hours as the reasons for its issuance. Claimant refused to sign this plan.

(7) On January 3, 2023, the employer presented claimant with a performance improvement plan citing the same deficiencies as the previous plan. Claimant again refused to sign the performance improvement plan.

(8) On January 4, 2023, the employer discharged the claimant.

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 employer asserted at hearing and in their written argument that claimant was discharged for refusing to sign performance improvement plans and failing to improve his performance in accordance with those plans. Transcript at 6; Employer's Written Argument at 1. However, at hearing, the employer's witness gave conflicting testimony in this regard. Initially, the witness testified that on January 3, 2023, claimant's supervisor attempted to talk to claimant about his performance, but that claimant "did not respond well and walked away from the conversation. . . that's when [] the termination was decided." Transcript at 7-8. The witness later testified that "[claimant's discharge] had already been decided" before claimant was presented with the January 3, 2023 performance improvement plan. Transcript at 17. The record does not show that claimant was discharged for failing to sign previous performance improvement plans, as the employer continued to employ claimant while issuing subsequent performance improvement plans. The employer has therefore failed to establish by a preponderance of

evidence that claimant's refusal to sign any of the performance improvement plans was a proximate cause of his 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). Instead, the record shows that the proximate causes of claimant's discharge were the performance issues underlying the final performance improvement plan. The two performance issues cited in this plan were claimant's failure to approve his subordinates' timesheets and claimant's engagement in personal conversations with other employees during work hours.¹ The employer has failed to carry their burden of proof to show that either of these issues constituted misconduct.

On November 25, 2022, claimant failed to approve and submit timesheets for the employees that he supervised. This was one of claimant's job duties, claimant understood that this was one of his duties, and the employer had a right to expect that claimant would complete this task in a timely manner. However, the record shows that claimant failed to complete this task by the deadline only because he lost access to a computer program that was necessary to complete it. Further, the record shows that upon recognizing that he lost access to this program, claimant sent an email to the payroll department to notify them of the issue and request assistance. He also informed his supervisor of the access issue. Given claimant's inability to perform the task due the lack of access and his attempts to timely address the problem, the record shows that claimant's failure to approve the timesheets by the deadline was not willful or the result of wanton negligence.

Further, the employer has not shown by a preponderance of evidence that claimant engaged in personal conversations with co-workers during work hours. The employer had a policy against engaging in personal conversations during work hours and claimant was aware of this policy. The employer's witness testified that she was not present for and did not personally observe any conversation involving claimant that violated the employer's policy. Transcript at 29. Her testimony that claimant engaged in such conversations was based on reports from others that were documented in the employer's files. Transcript at 31. Claimant denied ever speaking with other employees about "non-work related topics." Transcript at 25. As claimant's first-hand account of the conversations is entitled to greater weight than the hearsay accounts contained in the employer's files, the employer has failed to prove that, more likely than not, claimant engaged in personal conversations with co-workers during work hours. Accordingly, the employer has not carried their burden to show that claimant engaged in this behavior willfully or with wanton negligence.

For these reasons, the employer discharged claimant, but not for misconduct, and he is not disqualified from unemployment based on the work separation.

DECISION: Order No. 23-UI-223058 is affirmed.

¹ The employer's witness also testified that the "last incident" leading to claimant's discharge occurred when claimant allegedly left work before the end of his shift on December 14, 2022, and did not inform his supervisor that he was leaving. Transcript at 7. However, the record does not show whether this incident was a basis for any of the performance improvement plans, and given the amount of time that elapsed between the incident and claimant's January 4, 2023 discharge, the employer has not shown by a preponderance of evidence that the incident was a proximate cause of his discharge.

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

DATE of Service: June 15, 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.

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.