

EMPLOYMENT APPEALS BOARD DECISION
2023-EAB-0661

Affirmed
No Disqualification

PROCEDURAL HISTORY: On April 14, 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 March 19, 2023 (decision # 143320). Claimant filed a timely request for hearing. On June 2, 2023, ALJ Sachet-Rung conducted a hearing, and on June 9, 2023 issued Order No. 23-UI-227447, reversing decision # 143320 by concluding that the employer discharged claimant, but not for misconduct, and claimant was not disqualified based on the work separation. On June 12, 2023, the employer filed an application for review with the Employment Appeals Board (EAB).

WRITTEN ARGUMENT: Both the employer's argument and claimant's argument contained information that was not part of the hearing record, and neither party showed that factors or circumstances beyond their 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 and claimant's argument to the extent the arguments were based on the record.

FINDINGS OF FACT: (1) Skyline Sales Inc., a car dealership, employed claimant, most recently as a body shop foreman, from February 1, 2000 until March 21, 2023.

(2) The employer prohibited their body shop employees from being dishonest and from working on their own cars in the shop during work time. These expectations were contained in the employer's employee handbook, which claimant signed an acknowledgement of having read and received on December 18, 2019. The expectations had also been in place during the whole of claimant's more than 23-year tenure with the employer.

(3) On March 16, 2023, claimant asked the body shop manager for permission to bring a car he owned into the employer's body shop to work on it during nonworking time. The manager agreed to allow claimant to do so. On Friday March 17, 2023 claimant brought his car into the shop. He worked on it over the weekend of March 18 and 19, 2023.

(4) On the morning of March 20, 2023, claimant worked on his car after his shift began and believed the body shop manager told him that he “could go ahead and continue working on [his] car until [they] got some vehicles checked in[.]” Transcript at 22. The body shop manager believed claimant spent time that morning on his car instead of customer vehicles. The manager reminded claimant that day that he could work on his car only during personal time, not during work time.

(5) Also on March 20, 2023, the body shop manager noticed that claimant had prepared his car to be repainted. The manager asked claimant how claimant would cover the cost for the paint to repaint his car and claimant stated that the employer’s paint supplier, with whom claimant had a longstanding relationship, had agreed to give claimant the paint free of charge. Later that day, the body shop manager called the supplier about the paint. The supplier told the body shop manager that the supplier had told claimant he would bill the employer for the paint at cost.

(6) On March 21, 2023, claimant was scheduled to start his shift at 8:00 a.m. The employer’s parts and service director observed claimant working on his car that morning at a time the parts and service director thought was 8:06 a.m. Claimant believed it was actually 7:06 a.m. and that the parts and service director was mistaken about the time because the clock on the body shop wall was one hour slow.

(7) Later on March 21, 2023, the employer’s co-owner asked the body shop manager about the status of a wrecked truck in the employer’s inventory that had sat on the employer’s lot unmoved for years. The body shop manager looked the truck up in the employer’s database and found multiple repair orders opened and closed by claimant, with charges for parts and labor.

(8) Thereafter, on March 21, 2023, the employer discharged claimant. The employer did so due to claimant allegedly working on his car during company time on March 21, 2023, and because claimant had allegedly been dishonest by opening repair orders on the wrecked truck and about whether claimant would receive the supplier’s paint for free or whether the supplier would bill the employer for the paint at cost.

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).

At hearing, the parties offered conflicting accounts regarding the events leading up to claimant’s discharge. The employer presented evidence from their human resources manager, who offered testimony based on claimant’s termination paperwork, and the employer’s body shop manager, who

offered testimony that was based mostly (but not entirely) on personal knowledge. Transcript at 5, 14-18. The body shop manager testified that on March 20, 2023, claimant spent most of the morning working on his car instead of customer vehicles, and the manager informed claimant that he could work on his car only during personal time, not on company time. Transcript at 16. The manager further testified that when he asked claimant that morning how claimant would cover the cost of the paint to repaint his car, claimant stated that the employer's paint supplier would give claimant the paint free of charge. Transcript at 15. The manager stated that he thereafter called the supplier to confirm and the supplier told him that the supplier had told claimant he would bill the employer for the paint at cost.¹ Transcript at 16-17.

The body shop manager stated that the next morning, March 21, 2023, before he arrived at the shop, the employer's parts and service director observed claimant working on his car at 8:06 a.m., six minutes after the start of claimant's shift. Transcript at 17. The body shop manager also testified that on the morning of March 21, 2023, the employer's co-owner asked the body shop manager about the status of a wrecked truck in the employer's inventory that had sat on the employer's lot unmoved for years. Transcript at 18. The manager stated he looked the truck up in the employer's database and found multiple repair orders opened and closed by claimant, with charges for parts and labor, despite the truck having "not moved or been touched since 2019." Transcript at 18.

Claimant, in contrast, provided his firsthand account at hearing. Claimant testified that, with the body shop manager's permission, claimant brought his car into the shop on Friday March 17, 2023 and then worked on it during his days off on Saturday and Sunday, March 18 and 19, 2023. Transcript at 22. Claimant testified that on the morning of Monday, March 20, 2023, he continued working on his car with permission from the body shop manager, who advised that claimant could work on his car until they "got some vehicles checked in, and start[ed] [their] work week." Transcript at 22. Claimant stated that on the morning of March 21, 2022, he was working on his car, but that his shift start time was 8:00 a.m. and the parts and service director who observed him working on his car believed it was 8:06 a.m., when it was actually 7:06 a.m., because the clock in the body shop was slow one hour. Transcript at 23-24.

Claimant further testified that his agreement with the paint supplier was that the supplier would "just give [claimant] what [he] needed to do" the repainting at no charge to the employer because claimant did not want the employer "to be involved in it in any way." Transcript at 29-31. Transcript at 23. Regarding opening repair orders on the wrecked truck, claimant testified that he did so at the direction of the employer's general manager because a customer bought a new truck that came in damaged and the general manager did not want there to be a record of the new truck being repaired at the employer's dealership. Transcript at 23.

Given the conflicting evidence, the employer did not meet their burden to establish that claimant violated their expectations willfully or with wanton negligence. With respect to claimant working on his personal vehicle after his shift began on March 21, 2023, claimant offered firsthand testimony that disputed the time the parts and service director, who did not testify at hearing, was said to have observed

¹ The body shop manager also testified that at the time employer's owners and general manager met with claimant to discharge him on March 21, 2023, claimant insisted that the supplier agreed to give him the paint for free. Transcript at 19. The body shop manager testified that the employer's general manager called the supplier and confirmed the body shop manager's understanding that the supplier would bill the employer for claimant's paint at cost. Transcript at 19.

claimant working on his car. Claimant's assertion that, because the clock in the body shop was an hour slow, the time he was seen working on his car was actually 7:06 a.m. was somewhat implausible. Nevertheless, claimant's firsthand testimony is accorded more weight than the hearsay evidence of what the parts and service director was said to have observed. In any case, even if claimant's assertion about the time was incorrect, and in fact it was 8:06 a.m., the employer did not prove that claimant was conscious of his conduct of working on his own car after the start of his shift, which is necessary to establish a willful or wantonly negligent breach of the employer's expectations, given that 8:06 a.m. is near in time to the 8:00 a.m. beginning of claimant's shift, and the likelihood exists that claimant may simply have lost track of time.

The employer also did not meet their burden with respect to claimant's alleged dishonesty relating to opening repair orders on the wrecked truck. Claimant denied any wrongdoing with respect to the repair order on the wrecked truck, testifying that he opened the orders at the direction of the employer's general manager. At hearing, the employer did not offer testimony from the general manager or otherwise rebut claimant's account on this point. Transcript at 23. Likewise, the employer did not meet their burden to prove that claimant was dishonest with respect to whether the supplier would bill the employer for the paint. Although the body shop manager testified that he called the paint supplier and the supplier stated that the supplier had told claimant he would bill the employer for the paint at cost, claimant offered a different account. Transcript at 16-17. Claimant testified that his agreement with the paint supplier was that the supplier would "just give [claimant] what [he] needed to do" the repainting at no charge to the employer because claimant did not want the employer "to be involved in it in any way." Transcript at 29-31. The employer also offered evidence that the employer's general manager called the supplier as well and was also told that the supplier would bill the employer for claimant's paint at cost. Transcript at 19. While the body shop manager's account and the hearsay account support that the supplier's understanding, when he spoke to the employer's managers, was that the employer would be charged for the paint, that is not sufficient to establish that claimant was dishonest to the employer in describing his arrangement with the supplier. Despite the account of the body shop manager and the hearsay attributed to the general manager, it remains possible that the details of the claimant and the supplier's arrangement were unclear and claimant was simply incorrect that the employer would not be charged, rather than dishonest. Thus, the employer did not prove by a preponderance of evidence that claimant was dishonest in conveying his understanding that the repainting would be at no charge to the employer, and therefore did not prove that claimant willfully or with wanton negligence violated their expectations on this point.

For these reasons, the employer discharged claimant, but not for misconduct. Claimant is not disqualified from receiving unemployment insurance benefits based on the work separation.

DECISION: Order No. 23-UI-227447 is affirmed.

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

DATE of Service: July 21, 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.