

EMPLOYMENT APPEALS BOARD DECISION
2023-EAB-0841

Affirmed
No Disqualification

PROCEDURAL HISTORY: On March 15, 2023, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant was discharged for misconduct and was therefore disqualified from receiving unemployment insurance benefits effective February 26, 2023 (decision # 74845). Claimant filed a timely request for hearing. On July 25, 2023, ALJ Scott conducted a hearing, and on July 27, 2023 issued Order No. 23-UI-231710, reversing decision # 74845 by concluding that claimant was discharged, but not for misconduct, and was not disqualified from receiving benefits. On August 1, 2023, the employer filed an application for review with the Employment Appeals Board (EAB).

WRITTEN ARGUMENT: EAB considered the employer's written argument in reaching this decision.

FINDINGS OF FACT: (1) Kaady Car Washes employed claimant from September 4, 2020 through February 28, 2023, initially at a car wash, and beginning in January 2023, as a receptionist at company headquarters. In February 2023, claimant ordinarily worked Tuesday through Friday, 7:30 a.m. to 4:30 p.m.

(2) The employer expected that their employees would not engage in personal pursuits during work hours and that they would promptly complete assigned tasks.

(3) On the morning of Wednesday, February 22, 2023, the employer's assistant human resources manager observed claimant at her desk writing in a personal notebook. He reported this to the human resources manager, who called claimant into her office that morning to discuss the matter. Claimant stated that she had been writing a book because there was no other work to do between answering calls and other sporadic receptionist duties. The manager warned claimant not to engage in such personal pursuits during working hours and to seek additional work from others if she felt she had nothing else to do. Claimant understood this warning. The human resources manager believed that claimant had been warned multiple times previously about not engaging in personal pursuits during working hours, while claimant believed that this discussion was the first and only warning she received regarding this expectation.

(4) Later that morning or early afternoon, claimant was given a task of stapling and organizing pamphlets. This task was assigned to her largely in response to her claim that she did not have work to do. Claimant completed this task before leaving work that day. Due to an unexpected snow storm, claimant and other employees were permitted to leave early, and claimant clocked out at 4:08 p.m.

(5) As part of claimant's usual work responsibilities, twice weekly she had to get "wash cards" ready to deliver to car washes. Transcript at 18. Claimant was to have the cards ready for the second time of the week by each Friday.

(6) On Thursday, February 23, 2023, and Friday, February 24, 2023, the employer closed their headquarters due to inclement weather and claimant therefore was instructed not report to work those days. Claimant was notified via text of the closures. Claimant responded to the Thursday text by saying that she would "come in extra early tomorrow" so that she could finish a project she had not started. Transcript at 6. Claimant was referring to preparing the wash cards, which she had planned to do at some point between Wednesday morning and Friday morning. The employer believed that claimant was referring to the stapling and organizing pamphlet task, and assumed that if she had not started that task as directed, she had spent the rest of February 22, 2023 engaging in personal pursuits. The employer therefore decided to discharge claimant when she next returned to work.

(7) On Tuesday, February 28, 2023, the employer discharged claimant as planned when she reported for work.

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).

A discharge analysis focuses on the proximate cause of the discharge, which is generally the last incident of misconduct before the discharge. *See e.g. Appeals Board Decision 12-AB-0434*, March 16, 2012. The proximate cause of a discharge is the incident without which the discharge would not have occurred when it did. *Appeals Board Decision 09-AB-1767*, June 29, 2009. The employer asserted that on the morning of February 22, 2023, claimant engaged in misconduct when she was observed working on writing a book at her desk during a time that she was supposed to be performing receptionist duties. Transcript at 5-6. Claimant admitted that she was writing in a personal notebook at her desk during this time. Transcript at 13-14. However, upon discovering this, the employer chose not to discharge claimant for her actions. Instead, the employer imposed a lesser discipline of issuing a formal warning to

claimant. Therefore, claimant's work on her book that day was not the proximate cause of her discharge. Immediately following the warning, the employer had a coworker assign claimant a task of stapling and organizing pamphlets. Based on a text message from claimant the following day, February 23, 2023, the employer's human resources managers believed that claimant had not begun the pamphlet task as directed and therefore assumed that she had continued to engage in personal pursuits while neglecting her assigned duties. It was only then that the employer decided to discharge claimant. *See* Transcript at 6-7. Therefore, the February 23, 2023 text from claimant and the employer's resulting belief that claimant had not performed the assigned task were the proximate cause of her discharge, and the record shows that claimant would not have been discharged on February 28, 2023 had these actions of the parties following the warning not occurred. Accordingly, the discharge analysis must focus only on claimant's conduct *following* the warning she received on the morning of February 22, 2023.

The employer expected that their employees would not engage in personal pursuits, such as writing a book, during work hours, and that they would promptly complete assigned tasks. Immediately following the warning she received on the morning of February 22, 2023, claimant was assigned a task of stapling and organizing pamphlets. The following day, February 23, 2023, the human resources managers texted claimant that the office would be closed due to weather. Claimant responded that she would therefore have to come in early on Friday, February 24, 2023, to work on a project that she "didn't get started on." Transcript at 6. The managers assumed that claimant was referring to the pamphlet task that she had been assigned following the warning and believed that claimant had violated their expectations by not promptly completing the task and, presumably, engaging in personal pursuits or otherwise neglecting her work for the rest of the day. The employer discharged claimant due to this perceived violation of their expectations when she next reported for work on February 28, 2023.

The employer did not meet their burden of showing that claimant violated a reasonable expectation following the February 22, 2023 warning. Claimant testified that she completed the pamphlet task prior to the end of the workday on February 22, 2023. Transcript at 20. The employer did not offer evidence that they attempted to verify whether this task was completed, and therefore failed to rebut claimant's first-hand account that she completed this task as instructed. Claimant further testified that she did not work on her book again that day after she was warned not to do so. Transcript at 20. Similarly, the employer did not rebut this first-hand account. Claimant explained that in the text message at issue, she was referring to having not begun a different task, which involved wash cards, that she was typically expected to complete each week prior to Friday morning. Transcript at 19. It can be inferred from the record that claimant had not yet started the wash cards task that week because she was working on the pamphlet task Wednesday, left 22 minutes early that day due to inclement weather, and did not work Thursday due to the employer's unexpected weather-related closure. Claimant's explanation of which project she was referring to in the text message was not rebutted by the employer. Therefore, the employer has not met their burden of proving by a preponderance of evidence that, after the February 22, 2023 warning, claimant failed to promptly perform assigned tasks or engaged in personal pursuits during work hours. While claimant may have violated the employer's expectations in this regard prior to the February 22, 2023 warning, for which the employer chose not to discharge her, the record shows that the proximate cause of claimant's discharge was the employer's misinterpretation of her February 23, 2023 text message and their unproven assumption that claimant neglected her work duties following that warning. The employer has therefore not shown that claimant was discharged for misconduct.

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

DECISION: Order No. 23-UI-231710 is affirmed.

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

DATE of Service: September 18, 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.

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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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