

EMPLOYMENT APPEALS BOARD DECISION
2023-EAB-1137

Reversed
No Disqualification

PROCEDURAL HISTORY: On September 7, 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 July 30, 2023 (decision # 102226). Claimant filed a timely request for hearing. On September 28, 2023, ALJ Adamson conducted a hearing, and on September 29, 2023, issued Order No. 23-UI-237304, affirming decision # 102226. On October 10, 2023, claimant filed an application for review with the Employment Appeals Board (EAB).

WRITTEN ARGUMENT: Claimant did not declare that he provided a copy of his argument to the opposing party as required by OAR 471-041-0080(2)(a) (May 13, 2019). The argument also 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 as required by OAR 471-041-0090 (May 13, 2019). EAB considered only information received into evidence at the hearing when reaching this decision. *See* ORS 657.275(2).

FINDINGS OF FACT: (1) USA Custom Trucks employed claimant as a technician from March 1, 2021, until August 4, 2023.

(2) The employer did not have a written lunch break policy, and the specifics of the employer's expectations regarding lunch breaks were "never really clarified" to claimant. Audio Record at 27:31. Claimant typically took a one-hour lunch break from 11:00 a.m. to 12:00 p.m., although when precisely claimant took the lunch break could vary, such as if he was working on a time sensitive project. Claimant knew that if he was going to be late returning from lunch, he should communicate that fact to the employer if it was safe and possible to do so.

(3) On August 1, 2023, claimant left for lunch at about 11:15 a.m. Claimant spent a portion of his lunch break at a store buying epoxy and looking for parts for an air compressor. The epoxy claimant bought was for a work project. The air compressor parts claimant was looking for were not related to work.

(4) As claimant was returning to the employer's shop from his lunch break, he encountered road construction which led to traffic delays. Claimant did not send a text message to the employer informing them that he would be late returning from lunch. Claimant returned to the employer's shop at about 12:30 p.m., approximately an hour and fifteen minutes after he left for lunch.

(5) On August 4, 2023, the employer discharged claimant. A factor in the employer's decision to discharge claimant was the fact that claimant was late coming back from lunch on August 1, 2023, but the deciding factor was the fact that claimant failed to communicate he would be returning late from lunch that day.

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 order under review concluded that the employer discharged claimant for misconduct. Order No. 23-UI-237304 at 3. The record does not support this conclusion.

The focus of a discharge analysis is the proximate cause of the discharge because the proximate cause is the incident without which the discharge would not have occurred when it did. *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).

At hearing, the employer testified that for the most part during claimant's employment if claimant was going to be late "he always texted he would be late." The ALJ asked the employer, "Okay, so if he had communicated with you that he was going to be late coming back from lunch on August 1st, would he still have been discharged?" to which the employer responded, simply, "No." Audio Record at 22:28. In contrast, when the employer was asked whether they still would have discharged claimant had he not come back late from lunch, the employer responded, more indefinitely, "probably not." Audio Record at 19:07. Based on this evidence, more likely than not, the proximate cause of claimant's discharge was the fact that claimant did not communicate that he would be late returning from lunch on August 1, 2023, rather than the fact that claimant was late coming back from lunch that day.

The employer did not meet their burden to prove that claimant's failure to communicate that he would be late returning from lunch on August 1, 2023, was a willful or wantonly negligent violation of the

employer's expectations. The employer did not have a written lunch break policy, and the specifics of the employer's expectations regarding lunch breaks were "never really clarified" to claimant. Audio Record at 27:31. Despite this lack of clarity, claimant testified he knew that if he was going to be late returning from lunch, he should communicate that fact to the employer if it was safe and possible to do so. Audio Record at 26:04. On August 1, 2023, as claimant was returning from his lunch break, he encountered road construction. The record therefore fails to show that the conditions claimant faced on the road were such that it was safe or possible to send a text message to the employer communicating that he would be late. Accordingly, the employer did not establish that claimant's failure to communicate his lateness on August 1, 2023, was a willful or wantonly negligent breach of a known reasonable employer expectation because it is possible that it was unsafe or impossible for claimant to text the employer while driving due to road construction.

To the extent the employer discharged claimant because of the fact he returned from lunch late on August 1, 2023, the employer failed to show that claimant's conduct was a willful or wantonly negligent violation of the employer's expectations. The employer did not have a written lunch break policy and the specifics of the employer's expectations regarding lunch breaks were "never really clarified" to claimant. Audio Record at 27:31. At hearing, claimant acknowledged returning from lunch 15 minutes late on August 1, 2023. Audio Record at 26:50. However, road construction caused claimant to return late. Also, claimant testified that he spent a portion of his lunch break at a store partly to buy epoxy for a work project, which could have contributed to claimant's lateness.¹ Audio Record at 29:15. The record fails to show that claimant violated the employer's expectations willfully or with wanton negligence by being late from lunch, given first that the employer's lunch break expectations were unclear and not in writing, and that a factor claimant could not control, road construction, was responsible for claimant's lateness, and that performing a task for the employer, buying epoxy, may have also contributed to claimant's lateness.

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-237304 is set aside, as outlined above.

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

DATE of Service: November 17, 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.

¹ Note that the employer testified that claimant was 30 minutes late in returning from lunch on August 1, 2023 and further testified that claimant bought epoxy for the shop on a different day. Audio Record at 32:20. As the employer is the party with the burden of proof in a discharge case and since the evidence on these matters was no more than equally balanced, on these issues, this decision adopts claimant's account.

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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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