

EMPLOYMENT APPEALS BOARD DECISION
2024-EAB-0102

Affirmed
No Disqualification

PROCEDURAL HISTORY: On December 18, 2023, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant was discharged, but not for misconduct, and was not disqualified from receiving unemployment insurance benefits based on the work separation (decision # 70312). The employer filed a timely request for hearing. On January 19, 2024, ALJ Buckley conducted a hearing and issued Order No. 24-UI-246031, affirming decision # 70312. On January 23, 2024, the employer filed an application for review with the Employment Appeals Board (EAB).

WRITTEN ARGUMENT: EAB did not consider the employer's January 26, 2024, written argument when reaching this decision because they did not include a statement declaring that they provided a copy of their argument to the opposing party as required by OAR 471-041-0080(2)(a) (May 13, 2019). The employer's February 21, 2024, argument, while served on the opposing party, 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. Specifically, it was within the employer's reasonable control to provide copies of the documents attached to their written argument to claimant prior to hearing, in which case they would have been admitted as evidence at the hearing. The requirement to provide copies of proposed exhibits to the opposing party prior to the hearing was stated in the notice of hearing, and therefore it was within the employer's reasonable control to read and comply with that requirement. 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. The employer's February 21, 2024, argument was considered to the extent it was based on the hearing record.

The essence of the employer's argument was that claimant's failure to complete tasks in accordance with the employer's expectations exceeded ordinary negligence. The evidence at hearing was no more than equally balanced in this regard. The employer suggested that claimant was not meeting their expectations, at least in part, because he was spending too much time on some tasks, such as photographs and posters, and not enough on others. Transcript at 9-10. The employer specifically cited that "marketing wasn't moving fast enough" when, on four occasions, claimant did not begin marketing

until a month after a show was booked, though the record does not show whether marketing delays persisted after the issue was brought to claimant's attention in a performance improvement plan. Transcript at 25. Additionally, the employer cited that claimant had been tasked with creating a video to be played at a September 16, 2023, event, but as of September 1, 2023, it was unfinished and the employer concluded that claimant was unlikely to finish it before the event and reassigned it. At some time between September 23, 2023, and October 11, 2023, the employer concluded that claimant completed "[a]most nothing on that final set of tasks" set forth in his performance improvement plan, prompting the decision to discharge him. Transcript at 6-7.

In contrast, while claimant acknowledged "concerns that [his] performance lagged" following the death of his mother in June 2023, he testified he changed his behavior when the performance improvement plan was instituted and "was performing the tasks . . . that were requested" including "[s]ome of the tasks [that] were new to the position." Transcript at 17. Claimant testified that he "[did] not remember a hard and fast date" regarding deadlines for progress on the video and that he told his supervisor prior to September 1, 2023, that it would be ready for the September 16, 2023, event. Transcript at 19. That the person to whom responsibility for the video was reassigned on September 1, 2023 was able to finish it before the event suggests that claimant's belief that he could have finished it by September 16, 2023 was not unfounded. Claimant maintained that he was reporting his progress on the issues identified in the performance improvement plan to the employer and that the primary concerns the employer expressed to him following implementation of the plan were about the employer's overall financial condition rather than deficiencies in his performance. Claimant believed that he was "accomplishing what was expected" from the plan and was "surprise[d]" by his discharge. Transcript at 18. Claimant described his efforts to complete the terms of the plan as "me doing my best." Transcript at 22.

The employer bears the burden of showing by a preponderance of evidence that claimant made conscious decisions not to timely complete his work, with indifference to the consequences of those decisions, in order to show that claimant violated their expectations with wanton negligence.¹ The evidence tending to show that claimant may have consciously neglected some work duties is no more than equally balanced with evidence tending to show that claimant's failure to complete those duties to the employer's standards was unintentional and occurred despite his best efforts. Accordingly, the employer has not satisfied their burden of showing a willful or wantonly negligent violation of their expectations, and therefore that claimant was discharged for misconduct.

EAB reviewed the entire hearing record. On *de novo* review and pursuant to ORS 657.275(2), the order under review is **adopted**.

DECISION: Order No. 24-UI-246031 is affirmed.

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

DATE of Service: February 27, 2024

¹ "[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) (September 22, 2020).

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 الاستئناف 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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