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BYE: 202344

State of Oregon
Employment Appeals Board
875 Union St. N.E.
Salem, OR 97311

624
DS 005.00

EMPLOYMENT APPEALS BOARD DECISION
2024-EAB-0188

Affirmed
No Disqualification

PROCEDURAL HISTORY: On December 12, 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 # 71223). The employer filed a timely request for hearing. On January 30, 2024, ALJ Goodrich conducted a hearing, and on February 2, 2024, issued Order No. 24-UI-247167, affirming decision # 71223. On February 21, 2024, the employer filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) School District 549C employed claimant as a building painter from May 9, 2023, until September 19, 2023.

(2) Claimant ordinarily worked from 6:30 a.m. to 3:00 p.m. Monday through Friday. Claimant was permitted an unpaid 30-minute lunch break and two paid 15-minute breaks throughout the workday at times of claimant's choosing. The employer expected that their employees would not combine two or more breaks at one time, or take a break at the beginning or end of a shift, and claimant was informed of this expectation in writing when hired.

(3) The employer also expected that their employees would not use the employer's vehicles for personal business, even on breaks, without prior authorization. The employer authorized claimant generally to use the employer's vehicle to "grab lunch" at any place he passed "right on the way" while driving for work purposes. Transcript at 12. Additionally, the employer expected that their employees would not report having worked time that they did not actually work. Claimant was informed of these expectations in writing when hired.

(4) On September 13, 2023, claimant reported working from 6:34 a.m. to 3:00 p.m., including his lunch break, and was paid for 7.93 hours. Exhibit 1 at 9. At 12:15 p.m., claimant used the employer's vehicle to drive from his primary work location to a store to purchase paint as part of his work duties. Claimant waited for the paint to be mixed and loaded into the vehicle, then drove to one of the employer's schools

to deliver some of the paint. Claimant's next work-related task was to drive the vehicle back to the employer's workshop. However, claimant instead used the vehicle to go to a nearby supermarket, where he purchased flowers for his wife. Claimant then drove "about three miles" to his wife's workplace, which was in an adjacent city and not on the route to the employer's workshop. Transcript at 18. Claimant delivered the flowers to his wife for her birthday, then drove the vehicle to the employer's workshop. On the way to the workshop, claimant stopped at a fast-food restaurant, purchased food, and ate it in the vehicle. Claimant returned to the workshop by 3:00 p.m. The employer did not know where claimant was from 12:15 p.m. to 3:00 p.m.

(5) On September 15, 2023, the employer scheduled a meeting with claimant wherein he was asked to account for his time on the afternoon of September 13, 2023. Claimant accurately described his activities to the employer during this period. The employer believed that claimant violated their policies regarding personal use of the employer's vehicle, taking breaks, and falsely reporting time worked on this occasion and decided to discharge him for that reason.

(6) Between September 13, 2023, and September 15, 2023, the employer had investigated whether claimant falsely reported time worked on other occasions. Surveillance footage was obtained by the employer for the previous two weeks which showed claimant entering the employer's workshop and exiting it 45 to 60 minutes later at the start of each workday. The employer did not consider the workshop to be claimant's "worksite" at that point in his shift and therefore believed claimant was not performing work during these periods. Transcript at 8. Claimant was "gathering materials and talking to the guys in the shop" and performing cleanup duties from the previous shift, which claimant believed he was supposed to do, during these periods. Transcript at 9. Until the matter was brought up at the September 15, 2023, meeting, claimant was unaware that the employer questioned how he spent these time periods.

(7) On September 19, 2023, the employer discharged claimant for violations of their vehicle use, break, and worktime reporting policies. The employer would have discharged claimant for his activities during the afternoon of September 13, 2023, alone, even if concerns about whether claimant was working the first 45 to 60 minutes of each shift during the prior two weeks had not arisen.

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).

Isolated instances of poor judgment are not misconduct. OAR 471-030-0038(3)(b). The following standards apply to determine whether an "isolated instance of poor judgment" occurred:

> (A) The act must be isolated. The exercise of poor judgment must be a single or infrequent occurrence rather than a repeated act or pattern of other willful or wantonly negligent behavior.
>
> (B) The act must involve judgment. A judgment is an evaluation resulting from discernment and comparison. Every conscious decision to take an action (to act or not to act) in the context of an employment relationship is a judgment for purposes of OAR 471-030-0038(3).
>
> (C) The act must involve poor judgment. A decision to willfully violate an employer's reasonable standard of behavior is poor judgment. A conscious decision to take action that results in a wantonly negligent violation of an employer's reasonable standard of behavior is poor judgment. A conscious decision not to comply with an unreasonable employer policy is not misconduct.
>
> (D) Acts that violate the law, acts that are tantamount to unlawful conduct, acts that create irreparable breaches of trust in the employment relationship or otherwise make a continued employment relationship impossible exceed mere poor judgment and do not fall within the exculpatory provisions of OAR 471-030-0038(3).

OAR 471-030-0038(1)(d).

The employer discharged claimant because they believed that on September 13, 2023, he used the employer's vehicle for personal business, and did so during time he reported he was working. The employer also cited as a reason for claimant's discharge their belief that claimant was not performing work duties during the first 45 to 60 minutes of his shifts for the two weeks prior to September 13, 2023. The employer expected that claimant would take each of his allotted breaks, without combining two or more breaks or taking a break at the start or end of his shift. Claimant was expected to perform work at all other times he reported to be working. The employer also expected that claimant would not use the employer's vehicle for personal business, other than to stop for food along his work-related driving route, without verbal permission from the employer. Claimant was presented with these expectations in writing upon hire, and claimant understood these expectations. A discharge analysis focuses on proximate cause of the discharge, which is the incident without which the discharge would not have occurred when it did. *Appeals Board Decision* 09-AB-1767, June 29, 2009. As the employer's witness testified that claimant would have been discharged for the September 13, 2023, incident alone, that incident was the proximate cause of claimant's discharge, and is therefore the subject of the misconduct analysis. Transcript at 16.

The employer was initially unaware of claimant's location and activities from 12:15 p.m. to 3:00 p.m. on September 13, 2023, and ultimately discovered, through claimant's own admission, that he had engaged in both work and personal activities during this time. As the record suggests claimant had not taken breaks earlier in the day, it is reasonable to infer that claimant was entitled under the employer's break policy to a lunch break of 30 minutes and a rest break of 15 minutes during this period of 2 hours and 45

minutes. The record shows that claimant spent this period engaged in work duties (purchasing paint, delivering some of it to a school, and returning to the employer's workshop), but also engaged in personal business (buying and delivering flowers and visiting a fast-food restaurant). However, the record does not show how much time was devoted to each of these activities. Claimant bought flowers, drove three miles to his wife's place of employment, delivered the flowers, and drove three miles back to where he left his work-related route. It is no more likely that these activities took more than 30 minutes to complete than it is that they were completed within 30 minutes. Similarly, it is no more likely that claimant's stop at the fast-food restaurant lasted more than 15 minutes than it is that it lasted 15 minutes or less. Accordingly, the employer has not met their burden to show, by a preponderance of evidence, that claimant's deviation from his work duties to purchase and deliver flowers and return to his work-related driving route exceeded the 30 minutes allowed for his lunch break, or that his later stop to purchase and eat food exceeded the 15 minutes allowed for his rest break. The employer has also not met their burden to show that claimant combined the two breaks at once, as the record suggests that claimant may have returned to his work-related driving route prior to stopping at the fast-food restaurant, and therefore the breaks were not taken in immediate succession.[1] Violations of the employer's break policy and reporting of time worked policy during this incident have therefore not been shown.

However, claimant does not dispute that he violated the employer's vehicle use policy by driving the vehicle to a supermarket and then to his wife's place of employment three miles away from his work-related route. Transcript at 27. The employer has not met their burden of showing that the other deviation from claimant's work-related route—stopping at a fast-food restaurant on his way back to the employer's workshop—exceeded the permission the employer's witness testified claimant had been granted to "grab lunch" at any place he passed "right on the way." Transcript at 12. Claimant testified that he "should have been aware" of the employer's vehicle use policy he was presented upon hire, but denied that the policy had been explained to him by his supervisor. Transcript at 21-22. Claimant also testified, regarding purchasing and delivering the flowers, that he "probably shouldn't have [driven] that three miles or whatever it was . . . I didn't think that one through." Transcript at 27. This evidence demonstrates that claimant, while conscious of his decision to use the employer's vehicle for personal business, was indifferent to the consequences of his actions and knew or should have known that using the vehicle to deliver flowers to his wife violated the employer's reasonable prohibition against his personal use of their vehicle. Accordingly, the employer has shown that claimant violated their reasonable expectation in this regard with wanton negligence.

Nonetheless, a wantonly negligent violation of the employer's policy is not misconduct if it was an isolated instance of poor judgment. Claimant's decision to use the employer's vehicle to deliver flowers to his wife necessarily involved judgment, and utilizing the employer's resources for strictly personal benefit evinced poor judgment because it resulted in a wantonly negligent violation of the employer's reasonable expectation. Further, claimant's actions did not exceed poor judgment. While the employer's

[1] Claimant testified that when discussing the incident during the September 15, 2023 meeting with the employer, "I was reinforced, 'Hey, you cannot take your breaks in combination,' because that's where my mind was. I did – I wasn't taking breaks so I thought okay, I can be a little late if that's what I was. So – then I was reprimanded for that because . . . I was supposed to be taking two 15-minute breaks and that wasn't happening, but that's the rules, and I didn't stick by 'em." Transcript at 27. It is unclear from this testimony if claimant believed that he exceeded the time allotted for either break, or that he combined some or all of the lunch and rest break, or if claimant was merely conveying that the employer raised those allegations and he admitted that he typically did not take his 15-minute breaks.

vehicle may have incurred a negligible amount of wear or gasoline usage from claimant's approximately six miles of driving on personal business, the record does not show that this caused harm to the employer such that an irreparable breach of trust in the employment relationship was created, or that it rendered the employment relationship impossible to continue.

Whether claimant's use of the vehicle to purchase and deliver flowers constituted an isolated instance of poor judgment therefore turns on whether it was "a single or infrequent occurrence rather than a repeated act or pattern of other willful or wantonly negligent behavior." As previously stated, though not the proximate cause of claimant's discharge, an additional reason the employer discharged claimant was the employer's belief that claimant was not performing work during the first 45 to 60 minutes of his shifts for the two weeks prior to September 13, 2023. This belief was based on claimant appearing to spend that time in the employer's workshop, which claimant's supervisor learned of by viewing surveillance footage of claimant "going into the shop and not leaving for like an hour" on those occasions. Transcript at 11. When questioned on September 15, 2023, claimant told the employer that he spent this time "gathering materials and . . . talking to the guys in the shop." Transcript at 9. The employer's witness testified that in response, "[W]e interviewed the three gentlemen that are in the shop in the morning with [claimant] and . . . all of them said that they never see him, that they don't talk to him in the morning and one of 'em even said he hadn't talked to [claimant] for 15 minutes the whole time he'd been there." Transcript at 9. Claimant agreed in his testimony that he spent this time in the shop as the video depicted, explaining, "I would pull stock from the night before, whatever I needed [to] do the cleanup because we had to be outta there on time. That seemed to be very utmost importance. No overtime, so generally things would get cleaned up the next morning[.]" Transcript at 24. Claimant rebutted the employer's hearsay evidence, testifying that he talked to the employees in the workshop "constantly" and that the "only one [claimant] didn't speak to" was seen "very little" by claimant, and claimant did not "even know his name." Transcript at 24. Claimant's testimony also implied he believed that since the beginning of his employment he had not received sufficient instruction on what duties he was expected to perform or how to perform them. *See* Transcript at 25.

It is unclear from the record what the employer believed claimant had been doing during the first 45 to 60 minutes of each shift, if not the work tasks claimant told the employer he had performed. It is also unclear from the record where the employer believed claimant had been during that time, if not in the workshop with the employees they later questioned. The hearsay accounts given by the workshop employees that they did not see or speak with claimant during these times are difficult to reconcile with claimant's testimony and the employer's description of the video footage, both of which place claimant in the workshop during the times in question. Claimant's first-hand testimony that he was performing work tasks in the workshop for the first 45 to 60 minutes of each shift is supported by other evidence and entitled to greater weight than the hearsay accounts of the workshop employees, and the facts have been found accordingly. Thus, the employer failed to meet their burden to show that claimant did not work all the time he reported working in the first two weeks of September 2023, and therefore that his wantonly negligent behavior on September 13, 2023, was not isolated. Accordingly, claimant's violation of the employer's vehicle use policy, though wantonly negligent, was an isolated instance of poor judgment and not 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. 24-UI-247167 is affirmed.

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

DATE of Service: March 28, 2024

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 – 本判决会影响您的失业救济金。 如果您不明白本判决， 请立即联系就业上诉委员会。 如果您不同意此判决，您可以按照该判决结尾所写的说明，向俄勒冈州上诉法院提出司法复审申请。

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 ໄດ້ ໂດຍປະຕິບັດຕາມຄຳແນະນຳທີ່ບອກໄວ້ຢູ່ຕອນທ້າຍຂອງຄຳຕັດສິນນີ້.

Arabic

هذا القرار قد يؤثر على منحة البطالة الخاصة بك، إذا لم تفهم هذا القرار، إتصل بمجلس منازعات العمل فورا، 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 دستورالعمل موجود در پایان آن، از دادگاه تجدید نظر اورگان درخواست تجدید نظر کنید.

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