

EMPLOYMENT APPEALS BOARD DECISION
2024-EAB-0263

Reversed
No Disqualification

PROCEDURAL HISTORY: On January 11, 2024, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant was discharged by the employer for misconduct and disqualified from receiving benefits effective October 1, 2023 (decision # 90146). Claimant filed a timely request for hearing. On February 22, 2024, ALJ Adamson conducted a hearing, and on February 23, 2024, issued Order No. 24-UI-248724, affirming decision # 90146. On March 14, 2024, claimant filed an application for review with the Employment Appeals Board (EAB).

WRITTEN ARGUMENT: Claimant's argument 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. 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 claimant's argument to the extent it was based on the record.

FINDINGS OF FACT: (1) The city of Drain, Oregon employed claimant in roles including wastewater treatment plant operator from August 22, 2012, until October 3, 2023. The Oregon Health Authority (OHA) required that claimant maintain a certification to perform certain duties relating to operating the plant.

(2) Claimant's work duties included testing the city's drinking water supply at regular intervals for chlorine levels. The tests were to be conducted during a "run" with a "coin analyzer" that recorded the results as required by state law and rule. Transcript at 17.

(3) The employer expected that their employees would report accurate chlorine test results. Claimant was aware of this expectation.

(4) In August 2022, the employer's coin analyzer malfunctioned and was no longer producing accurate readings. Claimant notified his supervisor and attempted to repair or replace the coin analyzer, though it was difficult to do so as manufacture of that equipment had ceased, and replacement parts were difficult

to obtain. Claimant believed he repaired the coin analyzer that month such that it was working “sporadic[ally],” which claimant considered “okay” to perform his job duties. Transcript at 17.

(5) In October 2022, the coin analyzer began experiencing the same problems as in August 2022. Claimant made additional repairs that month that rendered it functional until the “middle to end of November [2022] when it “died off again.” Transcript at 17. Claimant contacted OHA to inquire about the problem, and whether he could use a handheld analyzer to conduct the chlorine tests before and after a run while the coin analyzer was broken. OHA told claimant that testing in this way was a “treatment technique violation, which isn’t good,” but claimant believed there was no alternate way to conduct the required testing. Transcript 13. Between November 8 and 22, 2022, claimant conducted the chlorine tests in this manner and officially recorded the results, which showed sufficient amounts of chlorine in the drinking water. Claimant believed these results to be accurate.

(6) On November 17, 2022, a routine field test was performed by an employee other than claimant, which detected no measurable chlorine in the drinking water. Claimant and his supervisor were alerted to these findings. The supervisor then alerted OHA.

(7) On December 8, 2022, OHA reviewed the November 2022 chlorine test results recorded by claimant and believed they did not accurately reflect the amount of chlorine in the water when the tests were conducted. OHA began an investigation into the matter. The employer also hired an independent civil engineering firm to investigate the matter. Claimant was assigned to duties not involving water treatment while the investigation was conducted.

(8) On January 20, 2023, the civil engineering firm issued a report containing the opinion that claimant “falsified” the chlorine test results that were recorded at times in August, October, and November 2022. Transcript at 7.

(9) On August 28, 2023, OHA issued an administrative order concluding, in part, that between November 8 and 22, 2022, claimant violated their rules, including by “falsification of the November [chlorine testing] report,” and that his certification would therefore be revoked. Transcript at 9. Claimant had the right to request a hearing on the administrative order within 20 days, but the order became final without claimant having filed a request for hearing. Claimant did not request a hearing because he believed that if he did not request one, the employer would permit him to continue working in his other roles until he was allowed to reapply for the plant operator certification after one year, and then return to all his customary duties. The employer did not move to discharge claimant until after the administrative order became final because they wanted to see if exculpatory evidence might be presented at a hearing, if one was held.

(10) On October 3, 2023, the employer discharged claimant because they believed he falsified chlorine testing reports. The employer would have discharged claimant when they did for this reason even had his certification not been revoked by OHA.

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).

The employer reasonably expected that their employees would report accurate chlorine test results, and claimant understood this expectation. The employer discharged claimant when they did because they believe he falsified official chlorine test results. While the employer discharged claimant nearly a year after the alleged falsification was discovered, and after waiting for OHA’s revocation of his certification to serve as treatment plant operator to become final, the employer’s witness testified that claimant would have been discharged over the test results even had his certification not been suspended or revoked. Transcript at 8. As this, rather than the loss of certification, was the proximate cause of claimant’s discharge, it is the proper subject of the discharge analysis.¹

The order under review concluded that the employer met their burden of showing that claimant falsified the test results at issue based on OHA and the independent civil engineering firm opining after “lengthy investigations” that claimant had done so. The order further concluded that claimant acted with at least wanton negligence in that falsification. Order No. 24-UI-248724 at 3. However, the record does not support that claimant willfully or with wanton negligence falsified test results.

Claimant testified that at various times from August through November 2022, the coin analyzer needed to perform the required chlorine tests was inoperable, and he therefore used a handheld analyzer to perform the tests before and after the run during which the test should ordinarily occur. Transcript at 16-17. Claimant had informed his supervisor of the situation and made efforts during this period to secure a replacement or replacement parts for the coin analyzer, ultimately repairing it himself as best he could. Claimant further testified that he contacted OHA for advice on how to conduct the required chlorine tests while the coin analyzer was broken, and was told that using the handheld analyzer before and after the run would be a “treatment technique violation.” Transcript at 13. It can be inferred from the record that neither OHA nor the employer told claimant how he *could* conduct the tests without a working coin analyzer. The record shows that claimant therefore believed the handheld analyzer testing was a better alternative than performing the tests with the broken coin analyzer or not performing the tests at all. Claimant explained that he “assumed” that the test results he officially recorded using this method were “pretty accurate” and “figured those [results] were right, or pretty close.” Transcript at 17.

In contrast, the employer offered the opinions of OHA and the civil engineering firm that claimant “falsified” the test records. Transcript at 7, 9. The equipment and expertise in water testing presumably

¹ 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).

utilized by OHA and the civil engineering firm in conducting their investigations, when compared to those used by claimant during the periods in question, support a finding that, more likely than not, the test results certified by claimant did not accurately reflect the water's chlorine levels. However, the basis for their conclusions that these results were "falsified," rather than merely erroneously produced by using testing techniques that were flawed, is not in the record. Claimant's failure to appeal OHA's administrative order is not evidence that claimant agreed with or admitted to its findings and opinions, only that he did not wish to contest the revocation of his license, which the record suggests claimant believed would improve the chances of him keeping his job. Given the lack of foundation in the hearing record to support the investigators' opinions that the results were falsified, claimant's testimony that the test results he recorded were the product of his best efforts to conduct the tests without the coin analyzer, and that he believed them to be accurate, outweighs the expert opinions to the contrary regarding claimant's intent. Therefore, more likely than not, claimant did not willfully falsify the test result records, and the facts have been found accordingly.

Moreover, claimant's unintentional reporting of inaccurate results was not the result of wanton negligence. The employer has not shown that claimant knew or should have known that the test results he obtained and certified were inaccurate, nor has the employer shown that claimant was indifferent to the consequences of his actions in certifying test results he believed were acceptably accurate. The employer did not rebut claimant's testimony that the coin analyzer was inoperable when claimant testified it was, nor did they rebut that his supervisor was aware of its inoperable status. Further, the employer did not explain what course of action they or OHA had expected claimant to take in response to the broken coin analyzer, if not the alternate means of testing he ultimately used. The record shows that claimant was therefore presented only with options that appeared to violate state requirements and rules at the times the coin analyzer was not working. That claimant chose the option that he knew would result in a rule violation, yet believed was the violation least serious or impactful to the interests of the employer and the public, showed, at most, ordinary negligence. Accordingly, the employer has not shown by a preponderance of evidence that claimant recorded inaccurate chlorine test results as the result of *wanton* negligence.

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

DECISION: Order No. 24-UI-248724 is set aside, as outlined above.

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

DATE of Service: April 23, 2024

NOTE: This decision reverses an order that denied benefits. Please note that payment of benefits, if any are owed, may take approximately a week for the Department to complete.

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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