EO: 200
BYE: 202448

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

253
DS 005.00

EMPLOYMENT APPEALS BOARD DECISION
2024-EAB-0304

Esta decisión concluye que el reclamante fue despedido, pero no por mala conducta, y por lo tanto no está descalificado para recibir beneficios del seguro de desempleo basado en la separación laboral. Partes de esta decisión están traducidas al español. Sin embargo, hay información importante en esta decisión que aparece solo en inglés con respecto a por qué la Junta de Apelaciones de Empleo (EAB, por sus siglas en inglés) determinó que el reclamante no está descalificado para recibir beneficios. Si necesita interpretación en español de la parte de esta decisión que aparece en inglés, puede obtenerla llamando a la EAB al 503-278-2077 y solicitando un intérprete de español.[1]

Affirmed ~ No Disqualification
Confirmada ~ No Descalificación

PROCEDURAL HISTORY: On February 2, 2024, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant was discharged for misconduct, and therefore was disqualified from receiving unemployment insurance benefits effective November 19, 2023 (decision # 123136). Claimant filed a timely request for hearing. On March 7, 2024, ALJ Contreras conducted a hearing that was interpreted in Spanish, and on March 11, 2024, issued Order No. 24-UI-249860, reversing decision # 123136 by concluding that claimant was discharged, but not for misconduct, and therefore was not disqualified from receiving benefits based on the work separation. On March 25, 2024, the employer filed an application for review with the Employment Appeals Board (EAB).

HISTORIA PROCESAL: El 2 de febrero de 2024, el Departamento de Empleo de Oregón (el Departamento) envió notificación de una decisión administrativa que concluyó que el reclamante fue despedido por mala conducta y, por lo tanto, fue descalificado para recibir beneficios del seguro de desempleo a partir del 19 de noviembre de 2023 (decisión # 123136). El reclamante sometió una aplicación oportuna para una audiencia. El 7 de marzo de 2024, el juez administrativo Contreras llevó a

[1] This decision concludes that claimant was discharged, but not for misconduct, and therefore is not disqualified from receiving unemployment insurance benefits based on the work separation. Portions of this decision are translated into Spanish. However, there is important information in this decision that appears only in English regarding why the Employment Appeals Board (EAB) determined that claimant is not disqualified from receiving benefits. If you require Spanish interpretation of the portion of this decision that appears in English, you can obtain that by calling EAB at 503-278-2077 and requesting a Spanish interpreter.

cabo una audiencia que fue interpretada al español. El 11 de marzo de 2024, el juez administrativo emitió la Orden No. 24-UI-249860, revocando la decisión # 123136 al concluir que el reclamante fue despedido, pero no por mala conducta, y por lo tanto no fue descalificado para recibir beneficios basados en la separación laboral. El 25 de marzo de 2024, el empleador presentó una aplicación para revisión de la Orden No. 24-UI-249860 a La Junta de Apelaciones de Empleo (EAB).

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

In their written argument, the employer raised concerns about both procedural aspects of the hearing and the substantive outcome in this matter. First, the employer asserted that the ALJ "did not allow the [employer] sufficient time [to] conduct a full questioning of Claimant due to self-imposed 'time constraints' as stated by" the ALJ. Employer's Written Argument at 2. The employer appears to have been referring to the ALJ's refusal to allow the employer to pursue lines of questioning which the ALJ ruled as irrelevant to the determination of whether claimant was discharged for misconduct. For instance, the employer's representative attempted to ask claimant about employment other than his work for the employer, and whether claimant truthfully answered all the questions on his initial application for benefits. Transcript at 29, 26.

The ALJ did not permit this questioning, explaining over interruptions from the employer's representative:

> You need – you need – wait. Wait. You need to listen to me. We've gone more than an hour over the scheduled time for hearings. I'm telling you that that's not relevant. The information on the application is not before me in making this decision . . .
>
> The only questions that we need to have answered have to do with the separation. We – that directly related to the separation. I will be weighing the credibility of the testimony in making my decision.

Transcript at 29. The employer suggested in their written argument that the information regarding other or subsequent employment was necessary because "if [claimant] had obtained or maintained employment of any form after his termination, the underlying need for payment of unemployment benefits may not have been needed, per ORS 657.176." Employer's Written Argument at 2. Additionally, the employer's representative suggested at hearing that the information regarding claimant's truthfulness on his initial application for benefits was necessary to determine whether claimant's testimony at hearing was credible. Transcript at 29–30. Both suggestions lack merit.

Under OAR 471-040-0025(1) (August 1, 2004), the purpose of the hearing "is to inquire fully **into the matters at issue** and to make a decision on the basis of the evidence adduced at the hearing." (Emphasis added). Under OAR 471-040-0025(5), "[i]rrelevant, immaterial, or unduly repetitious evidence shall be excluded but erroneous rulings on evidence shall not preclude the administrative law judge from entering a decision unless shown to have substantially prejudiced the rights of a party." OAR 471-040-0025(8) states, in relevant part: "In any hearing, the administrative law judge shall render a decision on the issue and law involved as stated in the notice of hearing. The administrative law judge's jurisdiction and authority is confined solely to the issue(s) arising under the Employment Department Law." Thus,

the ALJ was required by OAR 471-040-0025 to limit the scope of the hearing, and evidence submitted into the record, to the issue as identified on the notice of hearing.

The purpose of ORS 657.176 is to determine "whether an individual is subject to disqualification as a result of a separation, termination, leaving, resignation, or disciplinary suspension from work or as a result of failure to apply for or accept work." ORS 657.176(1). Thus, determining whether claimant's separation from work disqualified him from benefits was, as the ALJ correctly determined, the sole focus of the hearing. Whether the Department "needed" to pay claimant benefits during any particular week as a result of claimant having performed work for another employer[2] is irrelevant to the analysis required by ORS 657.176, and the ALJ therefore properly excluded from the record testimony on this point.

Regarding claimant's truthfulness on his initial application for benefits, the ALJ correctly noted that the application itself is not in the record. Without an objective way to review the application, it is unlikely that an attempt to impeach claimant's credibility based on any purported inaccuracies that claimant made on the application would have been successful. Moreover, as explained in the Conclusions and Reasons section, below, the outcome in this matter did not turn on the credibility of claimant's testimony at hearing. Therefore, even if the ALJ erroneously excluded questioning regarding claimant's initial application, that exclusion did not substantially prejudice the employer, and the ALJ was not precluded from entering a decision based on the record as developed.

Next, the employer asserted that claimant was "terminated for misconduct," citing to evidence in the record as support. Employer's Written Argument at 3–4. This is addressed substantively in the Conclusions and Reasons section, below.

Finally, the employer asserted that the order under review "is nonsensical and Factually Inaccurate." Employer's Written Argument at 4. The majority of this section of the argument addresses the substance of the misconduct analysis, which is addressed in the Conclusions and Reasons section, below. Despite the assertion that the order under review was factually inaccurate, the employer offered no assertions of facts which were inaccurately found in the order under review. The employer also raised a concern about the citation to ORS 657.190 in the order under review, stating, "This citation has nothing to do with the facts of the case at hand." Employer's Written Argument at 4–5. This apparently refers to the "Issue" section of the order under review, which states the issue as "Whether claimant shall be disqualified from the receipt of benefits because of a separation, discharge, suspension, or voluntary leaving from work. ORS 657.176, 657.190; OAR 471-030-0038." Order No. 24-UI-249860 at 1. To the extent that the employer believes that ORS 657.190 has been applied to the facts in this case, they are mistaken. That portion of the order under review is a boilerplate recitation of the statutes and administrative rules which are, or might be, relevant to work separations. The employer is correct in identifying ORS 657.190 as inapplicable to claimant's discharge in this case. However, the analysis in the order under review does not cite to, or rely upon, that statute in reaching its conclusion, and the mere inclusion of a citation to that statute in the "Issue" section of the order under review was not an error of fact or law.

[2] *See generally* ORS 657.100.

EAB reviewed the hearing record in its entirety, which shows that the ALJ inquired fully into the matters at issue and gave all parties reasonable opportunity for a fair hearing as required by ORS 657.270(3) and (4) and OAR 471-040-0025(1).

FINDINGS OF FACT: (1) Best Kleen employed claimant as a sanitation worker from July 19, 2023, until November 22, 2023. Claimant was typically scheduled to work 40 hours per week, from 5:00 a.m. to 1:30 p.m., Monday through Friday, inclusive of meal and rest breaks.

(2) The employer's attendance policy required that employees "be reliable and punctual in reporting for scheduled work." Exhibit 2 at 4. The policy further required, "[i]n the rare instances when employees cannot avoid being late to work or are unable to work as scheduled, they should notify their supervisor as soon as possible in advance of the anticipated tardiness or absence." Exhibit 2 at 4. The employer provided claimant the handbook which contained this policy when they hired him. Claimant signed an acknowledgment of his receipt of this handbook on July 19, 2023. Exhibit 2 at 2.

(3) During the course of his employment, the employer felt that claimant violated their attendance policy on several occasions by being absent from work and, in some instances, failing to notify the employer that he would be absent.

(4) On November 10, 2023, claimant notified his supervisor that he would be leaving early and, at approximately 12:10 p.m., left work.

(5) Following claimant's early departure on November 10, 2023, the employer investigated claimant's attendance history. On November 22, 2023, after determining that claimant had accrued too many violations of the employer's attendance policy, the employer discharged claimant.

CONCLUSIONS AND REASONS: Claimant was discharged, but not for misconduct, and therefore is not disqualified from receiving unemployment insurance benefits based on the work separation.

CONCLUSIONES Y RAZONES: *El reclamante fue despedido, pero no por mala conducta, y por lo tanto no está descalificado para recibir beneficios del seguro de desempleo basado en la separación laboral.*

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 discharged claimant because they determined that claimant had accrued too many violations of their attendance policy. As a preliminary matter, the record contains conflicting evidence regarding when claimant engaged in behavior that may have violated the attendance policy, or whether the employer issued claimant any warnings about this behavior. The employer asserted that between August and November 2023, claimant had eleven such violations, including a departure one hour and 20 minutes earlier than the scheduled end of his shift on November 10, 2023. *See* Exhibit 1 at 3. Additionally, the employer asserted that claimant's supervisor warned claimant on October 26, 2023, that any future violations of the attendance policy could lead to him being discharged. Exhibit 1 at 3.

By contrast, claimant testified at hearing that he only missed three or four days of work while he worked for the employer, that he notified his supervisor each time, that he could not recall which days he was out, and that the earliest he ever left work was 1:00 p.m. Transcript at 19, 16. Claimant further testified that he did not recall the meeting with his supervisor on October 26, 2023. Transcript at 22.

The employer also offered into evidence copies of claimant's timecards from July 19, 2023, through November 22, 2023. *See* Exhibit 3. Although some of the timecards in the exhibit are difficult to discern, one does appear to show that on November 10, 2023, the final incident leading to claimant's discharge, claimant clocked out for the day at 12:10 p.m., supporting the employer's assertion that claimant left one hour and 20 minutes earlier than the scheduled end of his shift that day. Exhibit 3 at 18. Therefore, to the extent that the parties' accounts differed regarding how early, if at all, claimant left on November 10, 2023, the employer's account is afforded greater weight because their testimony was corroborated by documentary evidence contemporaneous to the event in question, and the fact on that point has been found accordingly. It is not necessary to resolve the remaining evidentiary conflicts in the record, however, because the evidence shows that, according to the employer's version of events, claimant was not discharged for a willful or wantonly negligent violation of the employer's standards of behavior.

The employer asserted in their written argument that the order under review erred in applying the "last straw" approach to claimant's discharge—i.e., considering the final incident which led the employer to discharge claimant to be the proximate cause of the work separation, and premising the misconduct analysis on that incident. Employer's Written Argument at 5. The employer suggested that the misconduct analysis should instead consist of a "review [of] the totality of the circumstances, not a single event, when rendering an opinion," asserting that ORS 657.176(2)(a) requires incorporation of "the totality of Claimant's body of work when intentionally (i) missing work, (ii) no-call/no-showing for work, and, (iii) leaving early from work." Employer's Written Argument at 5. In support of this assertion, the employer emphasized the following passage from OAR 471-030-0038(3)(a): "An act or series of actions that amount to a willful or wantonly negligent disregard of an employer's interest is misconduct." Employer's Written Argument at 5. The employer cites no authority to support this reading of OAR 471-030-0038(3)(a), and the applicable authorities reject this theory. *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). *See additionally* June 27, 2005, Letter to the Employment Appeals Board from Tom Byerley, Assistant Director, Unemployment Insurance Division (the last occurrence of an attendance policy violation is

considered the reason for the discharge). Therefore, the order under review correctly identified the "final incident" as the proper focus for the misconduct analysis.

The record shows that the final incident which led the employer to discharge claimant was claimant's early departure from work on November 10, 2023. The record contains no indication that claimant had any other attendance issues after that date, but that the delay between that incident and claimant's discharge was due to the employer's investigation into the matter. Furthermore, when the ALJ asked the employer's witness whether the employer would have discharged claimant if claimant had worked his full shift on November 10, 2023, the employer testified, "Based upon the totality of his performance I believe that it would have been only a matter of time before he had another violation after the counseling on October 26th." Transcript at 12. This answer suggests that the employer would not have discharged claimant at the particular time that they did if claimant had not left early on November 10, 2023. Claimant's early departure on that date was therefore the final incident which led to the discharge.

The record further shows that the final incident did not constitute misconduct. The employer's attendance policy required, in relevant part, that "[i]n the rare instances when employees cannot avoid being late to work or are unable to work as scheduled, they should notify their supervisor as soon as possible in advance of the anticipated tardiness or absence." The policy did not appear to explicitly cover instances where an employee left work early. However, the wording "unable to work as scheduled" is reasonably construed to include such instances, as leaving work early is tantamount to not working as scheduled. The employer's witness testified at hearing that claimant *did* advise claimant's supervisor that he would be leaving early that day, although claimant did not provide the supervisor with a reason for the early departure. Transcript at 6–7. The employer's policy, however, does not require that an employee provide a *reason* for not working as scheduled. It only requires that they notify their supervisor "as soon as possible." The employer did not assert that claimant failed to notify the employer as soon as possible. Therefore, the employer has failed to meet their burden to show that claimant violated their policy when he left work early on November 10, 2023. Because the employer discharged claimant because of claimant's behavior which did not constitute a willful or wantonly negligent violation of the employer's standards of behavior, the final incident that led to his discharge was not misconduct.

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

DECISION: Order No. 24-UI-249860 is affirmed.

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

DATE of Service: <u>May 7, 2024</u>

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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***NOTA**: Usted puede apelar esta decisión presentando una solicitud de revisión judicial ante la Corte de Apelaciones de Oregon (Oregon Court of Appeals) dentro de los 30 días siguientes a la fecha de notificación indicada arriba. Vea ORS 657.282. Para obtener formularios e información, puede escribir a la Corte de Apelaciones de Oregon, Sección de Registros (Oregon Court of Appeals/Records Section), 1163 State Street, Salem, Oregon 97310 o visite el sitio web en courts.oregon.gov. En este sitio web, hay información disponible en español.*

Por favor, ayúdenos mejorar nuestros servicios completando un formulario de encuesta sobre nuestro servicio de atención al cliente. *Para llenar este formulario, puede visitar* https://www.surveygizmo.com/s3/5552642/EAB-Customer-Service-Survey. *Puede acceder a la encuesta usando una computadora, tableta, o teléfono inteligente. Si no puede llenar el formulario sobre el internet, puede comunicarse con nuestra oficina para una copia impresa de la encuesta.*

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.

Employment Appeals Board - 875 Union Street NE | Salem, OR 97311
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