EO: 200
BYE: 202444

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

183
DS 005.00

Reversed
No Disqualification

PROCEDURAL HISTORY: On January 18, 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 15, 2023 (decision # 121157). Claimant filed a timely request for hearing. On March 19, 2024, ALJ McGorrin conducted a hearing, and on March 21, 2024, issued Order No. 24-UI-250579, affirming decision # 121157. On March 29, 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) Northwest Handling Systems, Inc. employed claimant as a parts coordinator from January 9 through October 20, 2023. The employer's business consisted of installing and repairing dock equipment.

(2) Claimant's duties as a parts coordinator required him to pick up equipment parts from the employer's facility and drive them to customers' businesses in other cities. Claimant typically worked from 8:00 a.m. to 4:30 p.m. The employer issued claimant a work vehicle to perform his duties.

(3) The employer's vehicle-use policy generally only permitted employees to use their employer-provided vehicles during working hours and for work-related purposes. However, the policy permitted some exceptions, such as allowing employees to deviate from their route a short distance in order to pick up lunch. The policy also permitted employees to store their work vehicles overnight at home, or wherever they were sleeping that night. The employer provided claimant with the "opportunity to review" this policy when claimant was hired. Transcript at 11. Claimant understood that his work vehicle was generally "not meant for personal use," but that he could nevertheless use it to make quick stops for personal purposes. Transcript at 14.

(4) On June 2, 2023, the employer issued claimant an "oral write-up" because they felt that claimant had violated their vehicle-use policy by taking his work vehicle for "lunch runs that are not in his normal route." Transcript at 10. Claimant's supervisor advised him at that time that claimant should not drive his work vehicle more than two miles each way when deviating from his work route to pick up lunch. Claimant's supervisor also advised claimant that "suspension or termination might follow" if claimant violated the policy again.

(5) During the last two months of working for the employer, claimant was receiving treatment for cancer. Additionally, claimant and his fiancée broke up around that time, leaving claimant without a permanent residence. As a result of these concurrent situations, claimant's "mindset wasn't where it should be[.]" Transcript at 20.

(6) While claimant was without a permanent residence, his general practice was to drive his work vehicle to his mother's house, figure out where he was going to spend the evening, and then drive his work vehicle to wherever he was going to spend the evening. Claimant kept his personal vehicle at his mother's home during this time, preferring to drive his work vehicle to where he was sleeping on any given night to save time and be ready for work the following morning. The "majority… if not all" of claimant's use of his work vehicle during this time was "to get wherever [he] was going to stay" on a given night. Transcript at 17. Claimant would sometimes return to his mother's house in the work vehicle, however, if he "missed something and had to go back [to her house] to bring it to wherever [claimant] was going." Transcript at 37. Claimant did not ask his supervisor permission to use his work vehicle in this manner, largely because of claimant's "frame of mind" at the time. Transcript at 25–26.

(7) In or around October 2023, the employer reviewed a report of the GPS tracking data from claimant's work vehicle, and found data suggesting that claimant had driven his work vehicle outside of work hours on five separate dates at the following times:

September 21, 2023	9:04 p.m. to 9:22 p.m.
September 22, 2023 – September 23, 2023	6:11 p.m. to 7:04 p.m., 12:17 a.m. to 5:27 a.m. (including stops)
September 26, 2023	5:45 p.m. to 8:09 p.m. (including stops)
September 27, 2023	6:50 p.m. to 7:50 p.m. (including stops)
October 10, 2023 – October 11, 2023	8:10 p.m. to 8:21 p.m., 10:09 p.m. to 10:19 p.m., 10:26 p.m. to 1:26 a.m. (including stops)

(8) The employer believed that the above data showed that claimant used his work vehicle for non-work purposes in a manner that violated their vehicle use policy. As a result, the employer discharged claimant on October 20, 2023.

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 discharged claimant because they believed that he had violated their vehicle use policy by driving his work vehicle for non-work purposes on several dates in September and October 2023. The order under review concluded that this constituted misconduct because the employer had previously warned claimant that further violations of their vehicle-use policy could lead to suspension or discharge but that, "[d]espite being threatened with discharge, Claimant violated the policy several more times." Order No. 24-UI-250579 at 4. The record does not support this conclusion.

As a preliminary matter, claimant rebutted some of the employer's assertions concerning when, and for what purpose, claimant drove his work vehicle after hours during the period in question. At hearing, the employer's witness did not appear to have first-hand knowledge of any of claimant's driving activities, instead testifying based on reports that she reviewed during the hearing. *See,* e.g., Transcript at 34. The employer's witness did not offer evidence to authenticate the GPS data in the employer's reports or otherwise corroborate its accuracy.

By contrast, claimant testified that while he was without a permanent residence, his "only" purpose for driving the work vehicle to wherever he would be sleeping on a given night was "to have [his] vehicle there in the morning," and that he "was not trying to go out and run errands in it." Transcript at 21. Further, as to the data reported about the evening of September 22, 2023, claimant testified that there was "no way" that he drove the work vehicle "for five hours… at midnight to 5 a.m., and then going to work." Transcript at 37. As claimant's testimony is based on his own first-hand knowledge, it is afforded more weight. Therefore, the record shows that claimant did not, on September 22, 2023, drive during the hours that the employer asserted. Claimant's denial of having driven during that time, taken with his testimony that he generally only drove the work vehicle to get to or from wherever he was staying on a given evening, further calls into question the accuracy of the employer's data on claimant's vehicle usage on the other nights in question. As such, the evidence on whether claimant drove the work vehicle for non-permitted purposes on those nights is, at best, equally balanced, and the employer therefore has not met their burden to show that claimant violated their vehicle usage policy on those nights.

Additionally, to the extent that claimant drove the work vehicle for purposes such as returning to his mother's house after he had left to drop off or pick up an item, the employer also has not shown that this violated the vehicle-use policy. The employer did not offer into the record a written copy of the vehicle-use policy, nor did their witness read into the record the verbiage of that policy, and the witness expressed some uncertainty as to what the policy required or forbid. Given this lack of clarity, the record does not show either that claimant's having driven back and forth to his mother's house from his temporary lodging violated the employer's policy, or that he had reason to know that it would violate the policy. Because the employer did not meet their burden in this regard, the record does not show by a preponderance of the evidence that claimant's incidental use of the vehicle was a willful or wantonly negligent violation of the employer's standards of behavior.

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

DECISION: Order No. 24-UI-250579 is set aside, as outlined above.

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

DATE of Service: May 13, 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.

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.

Please help us improve our service by completing an online customer service survey. To complete the survey, please go to https://www.surveygizmo.com/s3/5552642/EAB-Customer-Service-Survey. You can access the survey using a computer, tablet, or smartphone. If you are unable to complete the survey online and need a paper copy of the survey, please contact our office.

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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