

EMPLOYMENT APPEALS BOARD DECISION
2024-EAB-0360

Reversed
No Disqualification

PROCEDURAL HISTORY: On February 1, 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 November 12, 2023 (decision # 104059). Claimant filed a timely request for hearing. On March 15, 2024, ALJ Mellor conducted a hearing, and on March 22, 2024, issued Order No. 24-UI-250735, affirming decision # 104059. On April 10, 2024, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACTS: (1) North Sky Communications Inc. employed claimant as a copper splicer from September 10, 2018, until November 14, 2023.

(2) The employer did not have a specific timekeeping policy but had “a policy in [their] code of conduct and ethics that people keep proper timekeeping and complete the job that’s assigned.” Transcript at 9. Claimant believed that if he wished to take extended breaks he was permitted to do so and could “just clock out” and “was never told that [he] needed to notify anyone” if he did so. Transcript at 27.

(3) In August 2023, the employer assigned claimant to work a job repairing copper line for an internet service provider in Idaho. On August 8, 2023, claimant’s supervisor wanted claimant to complete an assignment before his shift ended. However, claimant could not finish the assignment without the assistance of a worker from the internet provider, and that individual was absent from the jobsite. Claimant left the jobsite and did not alert his supervisor that the assignment could not be completed because of the absence of the worker. On August 9, 2023, claimant was suffering from fatigue caused by an accumulation of fluid near his heart, and his supervisor told him “you don’t look like you’re feeling well.” Transcript at 19. Claimant subsequently informed his supervisor that he needed to return to his hotel to take a nap. Claimant did so, slept all day, and did not go to the jobsite. On August 10, 2023, claimant came into the office and informed his supervisor that he would not be working that day because of the passing of a family friend, and that he needed to be home. Claimant’s supervisor told claimant to go home, and claimant did so.

- (4) The employer considered claimant to have inadequately communicated with his supervisor regarding the events of August 8, 9, and 10, 2023. On August 10, 2023, the employer placed claimant on suspension pending an investigation into claimant's conduct on August 8, 9, and 10, 2023.
- (5) On August 17, 2023, claimant was placed on a medical leave of absence stemming from his heart condition. Claimant was hospitalized for ten days. Claimant returned to work in early October 2023.
- (6) On October 6, 2023, the employer gave claimant a second final written warning based on his conduct regarding the events of August 8, 9, and 10, 2023.
- (7) Beginning on October 8, 2023 and continuing during his shifts thereafter, claimant, in an effort to improve his productivity metrics, which had declined because of his age and poor health, began taking extended breaks by "tak[ing] a little extra long break" when he clocked out, which enabled him to "turn" the lengthened period of his breaks "into downtime where [claimant] wasn't responsible for being productive[.]" Transcript at 26, 35. Claimant pursued this strategy because his supervisor had been pressuring him to improve his productivity, but also viewed it as benefitting the employer "by limiting the hours they had to pay [him] while [he] wasn't . . . being productive." Transcript at 26.
- (8) On October 26, 2023, claimant's supervisor started reviewing claimant's timesheets and the GPS data of his company vehicle. The supervisor undertook this review because he suspected claimant had been clocking in and out improperly and driving his company vehicle to places he was not directed to be.
- (9) On November 10, 2023, claimant was off the clock, driving home from work in the employer's vehicle with his cell phone positioned on the dashboard. An alarm went off on the phone and claimant reached over to turn off the alarm. When he did so, the cell phone fell to the floor of the vehicle. Claimant reached down to pick up the phone and while he held it in his hand, another driver cut in front of him, causing the employer's dashboard camera to record footage of claimant holding the phone. The employer prohibited their employees from using their cell phone while driving. Claimant understood this expectation.
- (10) In the course of claimant's supervisor's review of claimant's timesheets and GPS data, the supervisor reviewed the camera footage from claimant's vehicle. The employer believed, based on the footage, that claimant was using his cell phone while driving on November 10, 2023.
- (11) On November 14, 2023, the employer discharged claimant. In claimant's discharge notice, the employer cited as reasons for the discharge claimant's October 2023 conduct relating to allegedly clocking in and out improperly, driving his company vehicle to places he was not directed to be, and not communicating with his supervisor. The discharge notice also cited the November 10, 2023, cell phone incident as a reason for the discharge.

CONCLUSIONS AND REASONS: The employer discharged claimant, 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 order under review concluded that the employer discharged claimant for “failing to keep his supervisor informed of deviations to his schedule.” Order No. 24-UI-250735 at 4. In so doing, the order correctly noted that the employer’s witness testified that “claimant would have been discharged even if he had not been photographed driving with his cellphone in his hand.” Order No. 24-UI-250735 at 4. The order concluded that claimant’s conduct was a willful or wantonly negligent violation of the employer’s expectations and, further, was not an isolated instance of poor judgment or a good faith error and therefore constituted misconduct. Order No. 24-UI-250735 at 4. The record does not support that claimant’s conduct constituted misconduct.

The employer discharged claimant on November 14, 2023, citing in their discharge notice both the November 2023 occasion in which claimant was holding his cell phone while driving, and claimant’s October 2023 conduct relating to allegedly clocking in and out improperly, driving his company vehicle to places he was not directed to be, and not communicating with his supervisor. Transcript at 9. However, at hearing, the employer’s witness testified that claimant would have been discharged even if the cell phone incident had not occurred. Transcript at 7. The employer’s witness explained that the employer intended to discharge claimant for the alleged violations the supervisor had found on October 26, 2023, with the “cell phone violation” simply “coming during the investigation period,” which led to both violation types being noted in claimant’s discharge notice. Transcript at 8-9. Claimant offered un rebutted testimony at hearing that a violation of the employer’s prohibition against using cell phones while driving would, upon the first offense, result in a verbal warning rather than discharge, further suggesting that the cell phone incident was not the determinative factor in claimant’s discharge. Transcript at 25.

Accordingly, the record shows that the alleged violations of the employer’s expectations that the supervisor discovered on October 26, 2023, were the proximate cause of the discharge, rather than the November 2023 cell phone incident.¹ This is so because claimant’s alleged October 2023 violations were the events that caused the employer to discharge claimant when they did. *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-*

¹ Even if the November 2023 cell phone incident had been the proximate cause of claimant’s discharge, it is not evident that claimant was using his phone on that occasion in a manner prohibited by the employer’s policy, or, if he was, that he did so willfully or with wanton negligence. At hearing, the employer’s witness stated, without elaboration, that the video footage “captured [claimant] driving while using his cell phone, which is against policy[.]” Transcript at 7. Claimant acknowledged that using a cell phone while operating the employer’s vehicle would violate the employer’s expectations. Transcript at 25. However, claimant credibly explained that he was not talking or texting on the phone but merely had reached toward the phone to turn off an alarm, which caused it to fall to the floor, and he had picked up the phone and was holding it for a moment when the footage was taken. Transcript at 25. Claimant also testified that the incident occurred while he was off the clock, driving home at the end of the day. Transcript at 24.

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). Therefore, the focus of the discharge analysis was claimant's conduct beginning October 8, 2023, which the supervisor discovered on October 26, 2023. While the order under review characterized this conduct as failure on claimant's part to "keep his supervisor informed of deviations to his schedule," the record shows, in concrete terms, that what the employer considered objectionable about claimant's conduct during this period consisted of claimant allegedly clocking in and out improperly, driving his company vehicle to places he was not directed to be, and failing to communicate with the employer. Transcript at 7, 20-21.

The employer failed to meet their burden to prove that the alleged violations the supervisor discovered on October 26, 2023, were willful or wantonly negligent breaches of the employer's expectations. First, as to claimant's actions clocking in and out in October 2023, the employer's witness testified that the employer did not have a "company policy specific to clocking out – in and out throughout the day," but regarded claimant's behavior as a breach of the employer's code of conduct and ethics that "people keep proper timekeeping." Transcript at 9. For his part, claimant explained that the employer's policy regarding taking extended breaks was "to just clock out . . . Like [he] did" and that he "was never told that [he] needed to notify anyone" if he did so. Transcript at 27. Claimant further stated that in October 2023, his supervisor had been pressuring claimant to improve his productivity, which had declined because of his age and poor health, and claimant's timekeeping behavior was an effort to improve his production metrics by "tak[ing] a little extra long break," which enabled him to "turn that into downtime where [claimant] wasn't responsible for being productive[.]" Transcript at 26, 35.

Given the absence of a specific employer policy governing timekeeping, claimant's assertions that no policy that he was aware of prohibited his conduct, and that his taking of extended breaks was intended to improve his productivity, the record fails to show that claimant's timekeeping behavior was a willful or wantonly negligent violation of the employer's expectation. It is also notable that, per claimant's testimony, his timekeeping behavior in October 2023 was motivated by "trying to do the company a favor by limiting the hours they had to pay me while I wasn't . . . being productive." Transcript at 26. This suggests that claimant believed in good faith that his actions benefited the employer in some way by ensuring that he was not paid for time that he was not working, and thus bolsters the conclusion that claimant's timekeeping behavior did not amount to violations that were willful in nature, or engaged in with indifference to the consequences, so as to amount to wanton negligence.

Apart from claimant's timekeeping activities, the other component of claimant's October 2023 conduct asserted to have violated the employer's expectations was claimant allegedly leaving jobsites and driving his company vehicle to places he was not directed to be. Transcript at 7, 20-21. The employer's witness testified that claimant was expected to notify his supervisor if he needed to leave the employer's jobsite for some reason, but did not offer specific details of any of the occasions in which claimant allegedly left jobsites in October 2023. Transcript at 11. Claimant stated that he understood the employer's policy to permit employees to "drive anywhere you want, within the realm of your break or lunch." Transcript at 37. Claimant further testified that he did not leave jobsites, but may have "clocked out and drove to the next worksite," or stopped at a convenience store on the way home after work. Transcript at 36. The employer failed to establish that claimant willfully or with wanton negligence left jobsites or took his company vehicle to places he was not authorized to be.

At hearing, the employer's witness at times framed claimant's October 2023 timekeeping behavior as a violation of a duty to communicate with the employer or tell his supervisor what was happening. Transcript at 10. However, the employer failed to establish that claimant willfully or wantonly negligently violated a known employer expectation regarding communication during October 2023. While the nature of claimant's alleged August 2023 violations of the employer's expectations related to an alleged failure on claimant's part to adequately communicate with his supervisor, which could arguably include failing to inform the supervisor of taking extended breaks, the second final written warning was not offered into evidence, and claimant testified he did not recall the conversation that occurred at the time he received the warning. Transcript 28. Claimant acknowledged that he had not told his supervisor about his taking of extended breaks in October 2023, but as discussed above, the employer did not have a specific policy governing timekeeping, and claimant "was never told that [he] needed to notify anyone" if he took extended breaks. Transcript at 27, 35. As for communication generally, the employer did not identify any specific examples of how or when claimant allegedly failed to communicate in October 2023, whereas claimant testified that he "communicated a lot, usually via text", "was pretty good at communicating the whole time," and "[i]f it was an emergency" he would "phone in." Transcript at 34.²

For the above reasons, the employer failed to meet their burden to prove that claimants discharged for misconduct. Claimant therefore is not disqualified from receiving unemployment insurance benefits based on the work separation.

DECISION: Order No. 24-UI-250735 is set aside, as outlined above.

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

DATE of Service: May 28, 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.

² The employer asserted that claimant's conduct in August 2023 had breached their expectations as well, particularly relating to having not adequately communicated with his supervisor, and that these violations culminated in claimant receiving a second final written warning on October 6, 2023. Transcript at 11, 18, 20. These alleged prior violations are not relevant to whether claimant was discharged for misconduct, however. This is because the record shows that claimant's October 2023 conduct was the reason the employer discharged him, and the employer failed to prove that that conduct amounted to willful or wantonly negligent violations of the employer's expectations. That concludes the discharge analysis, and it therefore is unnecessary to evaluate whether claimant's August 2023 conduct were willful or wantonly negligent violations of the employer's expectations.

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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

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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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