

EMPLOYMENT APPEALS BOARD DECISION
2024-EAB-0561

Affirmed ~ Confirmada
No Disqualification ~ No Descalificación

Este documento incluye información importante que no ha sido traducida al español. Llame a la Junta de Apelaciones de Empleo (EAB) al 503-378-2077 para obtener servicios de traducción gratuitos.¹

PROCEDURAL HISTORY: On June 17, 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 June 2, 2024 (decision # L0004560224).² Claimant filed a timely request for hearing. On July 15, 2024, ALJ Enyinnaya conducted a hearing that was interpreted in Spanish, and on July 18, 2024, issued Order No. 24-UI-259471, reversing decision # L0004560224 by concluding that claimant was discharged, but not for misconduct, and therefore was not disqualified from receiving benefits based on the work separation. On July 26, 2024, the employer filed an application for review with the Employment Appeals Board (EAB).

HISTORIA PROCESAL: *El 17 de junio de 2024, el Departamento de Empleo de Oregon (el Departamento) emitió 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 2 de junio de 2024 (decisión # L0004560224).³ El reclamante presentó una solicitud de audiencia*

¹ This document includes important information that has not been translated into Spanish. Please call the Employment Appeals Board (EAB) at 503-378-2077 to obtain free translation services.

² Decision # L0004560224 stated that claimant was denied benefits from June 2, 2024 to May 31, 2025. However, under ORS 657.176, the disqualification from benefits ends once claimant has earned four times his weekly benefit amount in subject employment. This may occur before May 31, 2025.

³ *La Decisión # L0004560224 declaró que al reclamante se le negaron los beneficios desde el 2 de junio de 2024 hasta el 31 de mayo de 2025. Sin embargo, bajo la ley ORS 657.176, la descalificación de los beneficios termina una vez que el reclamante ha ganado cuatro veces la cantidad semanal de sus beneficios en el empleo. Esto puede ocurrir antes del 31 de mayo de 2025.*

oportuna. El 15 de julio de 2024, la jueza administrativa Enyinnaya llevó a cabo una audiencia que fue interpretada al español, y el 18 de julio de 2024 emitió la Orden No. 24-UI-259471, revocando la decisión # L0004560224 al concluir que el reclamante fue despedido, pero no por mala conducta, y por lo tanto no estaba descalificado para recibir beneficios basados en la separación laboral. El 26 de julio de 2024, el empleador presentó una solicitud de revisión ante la Junta de Apelaciones de Empleo (EAB).

WRITTEN ARGUMENT: The employer submitted written arguments on July 26, 2024, and August 1, 2024. EAB did not consider the employer's July 26, 2024, written argument when reaching this decision because they did not include a statement declaring that they provided a copy of their argument to claimant as required by OAR 471-041-0080(2)(a) (May 13, 2019). Additionally, both arguments contained information that was not part of the hearing record and did not show that factors or circumstances beyond the employer's reasonable control prevented them 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 the employer's August 1, 2024, argument to the extent it was based on the record.

The employer also asserted that the hearing proceedings were unfair or the ALJ was biased. 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) (August 1, 2004).

ARGUMENTO ESCRITO: El empleador presentó un argumento escrito el 26 de julio de 2024 y el 1 de agosto de 2024. EAB no consideró el argumento escrito del empleador del 26 de julio de 2024 al llegar a esta decisión porque el empleador no incluyó una declaración que declarara que proporcionó una copia de su argumento al reclamante como lo requiere OAR 471-041-0080(2)(a) (13 de mayo de 2019). Además, los dos argumentos contenían información que no se incluyó en el registro de la audiencia y los argumentos no demostraban que factores o circunstancias fuera del control razonable del empleador les impidieran ofrecer la información durante la audiencia. Bajo las leyes ORS 657.275(2) y OAR 471-041-0090 (13 de mayo de 2019), EAB consideró solo la información recibida como evidencia en la audiencia al llegar a esta decisión. EAB consideró las partes del argumento del empleador del 1 de agosto de 2024 que se basaron en el expediente.

El empleador también afirmó que los procedimientos de la audiencia eran injustos o que la jueza administrativa no era imparcial. EAB revisó el registro de la audiencia en su totalidad, y el registro muestra que la jueza investigó bien los asuntos en cuestión y dio a todas las partes una oportunidad razonable para una audiencia justa como lo requieren las leyes ORS 657.270(3) y (4) y OAR 471-040-0025(1) (1 de agosto de 2004).

FINDINGS OF FACT: (1) Murphy Company employed claimant as a dryer grader at their lumber mill from February 11, 2003, until May 30, 2024.

(2) Claimant's primary language is Spanish. Claimant has limited proficiency in spoken English and cannot read in English.

(3) The employer maintained a policy which prohibited employees from engaging in “any type of theft” from the company or other employees. Transcript at 8–9. The employer provided claimant with a copy of this written policy in English, and another employee read it to claimant in English. Claimant signed an acknowledgment that he had received the policy, but did not fully understand it because it was not provided to him in Spanish.

(4) In 2007 and 2010, the employer issued claimant written warnings because he had not been wearing required personal protective equipment. The employer had also given claimant verbal warnings for similar issues around that time, but claimant was a “model employee over the last several years” prior to his discharge. Transcript at 24.

(5) On Sunday, May 26, 2024, claimant was working alone at the employer’s facility. Claimant decided to borrow a bucket filled with tools that belonged to a coworker, as claimant believed the tools would be helpful for a project he was working on at home. The employer’s facility was to be closed the following day, which was Memorial Day. Claimant was aware that the area in which the tools were located was monitored by a surveillance camera. Claimant took the tools home, intending to return them when he returned to work on Tuesday, May 28, 2024. Claimant did not believe he had violated the employer’s policy by borrowing the tools. Claimant did not ask the employer or his coworker for permission before borrowing the tools.

(6) On May 28, 2024, claimant returned to work with the borrowed tools in his truck. Because the employer’s parking lot was “a little bit distant” from their facility, claimant decided to return the tools at the end of his shift that day, rather than bringing them into the facility when he arrived in the morning. Transcript at 39. Later that day, the coworker who owned the tools reported to the employer that the tools were missing. The mill manager reviewed the security footage of the area where the tools had been kept and discovered that claimant had taken the tools.

(7) After discovering that claimant had taken the tools, and prior to the end of claimant’s shift, the mill manager called claimant into a meeting to discuss the matter. After claimant admitted that he had taken the tools, the manager directed claimant to retrieve the tools, which claimant did. Once claimant returned, he explained to the manager that he had borrowed the tools and had intended to return them. The manager then suspended claimant, pending the employer’s decision about whether to continue to employ claimant.

(8) On May 30, 2024, the employer discharged claimant for having taken the coworker’s tools without permission, which they believed violated their theft policy.

CONCLUSIONS AND REASONS: Claimant was discharged, but not for misconduct.

CONCLUSIONES Y RAZONES: *El reclamante fue despedido, pero no por mala conducta, y por lo tanto no estaba descalificado para recibir beneficios.*

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 for having taken the coworker's tools without permission, which they believed violated their theft policy. As a preliminary matter, it is not clear whether claimant's conduct actually violated this policy, because the employer did not describe the policy in any detail or offer it into evidence. Furthermore, while claimant took the tools without permission, the record does not support the conclusion that claimant's conduct amounted to theft under Oregon law. ORS 164.015 states, in relevant part, that:

A person commits theft when, with intent to deprive another of property or to appropriate property to the person or to a third person, the person:

(1) Takes, appropriates, obtains or withholds such property from an owner thereof[.]

In turn, ORS 164.005 states, in relevant part:

(1) “Appropriate property of another to oneself or a third person” or “appropriate” means to:

(a) Exercise control over property of another, or to aid a third person to exercise control over property of another, permanently or for so extended a period or under such circumstances as to acquire the major portion of the economic value or benefit of such property; or

(b) Dispose of the property of another for the benefit of oneself or a third person.

(2) “Deprive another of property” or “deprive” means to:

(a) Withhold property of another or cause property of another to be withheld from that person permanently or for so extended a period or under such circumstances that the major portion of its economic value or benefit is lost to that person; or

(b) Dispose of the property in such manner or under such circumstances as to render it unlikely that an owner will recover such property.

Although the employer alleged that claimant violated their theft policy, claimant’s conduct as described in the record does not meet the statutory definition of “theft.” Claimant’s testimony indicated that he had only ever intended to borrow the tools, not steal them. Transcript at 34–35. The fact that claimant brought the tools back in his truck on the morning of May 28, 2024, without having been first prompted by the employer, and intending to return them that day, supports this testimony. Thus, the record does not show that claimant intended to deprive his coworker of the tools under the statutory definitions regarding “theft.” Likewise, because claimant had the tools in his possession for only two days, and there is no indication in the record that claimant’s use or possession of those tools fell under the definitions in ORS 164.005, claimant did not “appropriate” the tools or “deprive” the coworker of the tools under the statutory meanings of those terms. Therefore, claimant’s conduct did not amount to “theft” under Oregon law.

This is relevant in part because, without the actual contents of the employer’s policy, and in light of the fact that claimant’s conduct did not amount to the statutory definition of “theft,” it cannot be reasonably inferred that claimant violated the policy based merely on a broad prohibition against theft. Further, even if claimant’s conduct *did* violate the policy, the record does not show that the employer ever provided claimant with a copy of the policy in claimant’s primary language, that they provided services to interpret the policy so that claimant could understand it, or that claimant understood the policy. Therefore, the record does not show, by a preponderance of the evidence, that claimant willfully or with wanton negligence violated the employer’s policy.

Even so, claimant’s conduct arguably violated the employer’s interests by borrowing his coworker’s tools without permission and, further, by failing to return those tools prior to the start of the coworker’s shift after the holiday. Claimant could have reasonably surmised that doing so could cause a disruption in the employer’s operations due to the coworker’s concern about his missing tools or inability to use them for work. Because claimant acted without any apparent concern for these consequences, claimant’s conduct likely amounted to a wantonly negligent disregard of the employer’s interest.

However, claimant's conduct was, at worst, an isolated instance of poor judgment. The record shows that claimant had incurred apparent violations of unrelated policies, relating to the usage of safety equipment, more than a decade prior to his discharge. However, since that time, he had otherwise been a "model employee." This shows that claimant's having borrowed the coworker's tools without permission was isolated conduct, and not a repeated act or part of a pattern of other willful or wantonly negligent behavior.

Likewise, claimant's conduct did not fall under any of the exceptions listed under OAR 471-030-0038(1)(d)(D). While arguably a poor exercise of judgment, his decision to borrow the tools without permission did not objectively create an irreparable breach of trust or otherwise make a continued employment relationship impossible. As discussed above, the record does not show by a preponderance of the evidence that claimant's conduct met the statutory definition of theft. Primarily, claimant lacked the required mental state necessary to be considered theft, as he did not intend to permanently deprive the coworker of the tools, but rather only intended to borrow the tools and then return them after a short time. Because that required mental state is a foundational requirement for an act to be considered theft, it cannot be said that claimant's conduct was tantamount to unlawful conduct. Neither is it apparent that claimant's conduct violated any other law. Therefore, while claimant's conduct was likely a wantonly negligent disregard of the employer's interests, it was, at worst, an isolated instance of poor judgment, which is not misconduct.

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-259471 is affirmed.

DECISIÓN: *Se confirma La Orden No. 24-UI-259471.*

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

DATE of Service: August 23, 2024

FECHA de Servicio: el 23 de agosto de 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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***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.

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