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

EMPLOYMENT APPEALS BOARD DECISION
2024-EAB-0571

Affirmed
No Disqualification

PROCEDURAL HISTORY: On May 15, 2024, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant was discharged by the employer, but not for misconduct, and was not disqualified from receiving benefits based on the work separation (decision # L0004236771). The employer filed a timely request for hearing. On July 12, 2024, ALJ Fraser conducted a hearing and issued Order No. 24-UI-258927, affirming decision # L0004236771. On July 24, 2024, the employer filed an application for review with the Employment Appeals Board (EAB).

EVIDENTARIY MATTER: In an August 3, 2024, email, the employer asked EAB to consider additional evidence, documents to "verify" the employer's testimony on matters disputed at the hearing. Under OAR 471-041-0090(1)(b) (May 13, 2019), "Any party may request that EAB consider additional evidence, and EAB may allow such a request when the party offering the additional evidence establishes that: (A) The additional evidence is relevant and material to EAB's determination, and (B) Factors or circumstances beyond the party's reasonable control prevented the party from offering the additional evidence into the hearing record."

In support of their request, the employer asserted that: "I was prepared at the hearing to present my side of the decision to fire the claimant for misconduct. However, I was not prepared to respond to untruths that the claimant stated. Providing my reasons is understandable, but I cannot prepare to respond to information that is inaccurate. I cannot anticipate those comments." However, the employer's request for EAB to consider additional evidence is denied, partly because the employer failed to establish that the documents they want EAB to consider are material to EAB's determination of whether claimant's discharge was for misconduct, because the employer did not submit the documents to EAB or explain to EAB what the documents would show.

The employer's request for EAB to consider additional evidence also is denied because the employer also failed to establish that it was beyond their reasonable control to offer the documents they want EAB to consider into evidence at the hearing. As acknowledged by the employer, the burden was on them to

Level 3 - Restricted

prove facts establishing misconduct by a preponderance of evidence. *See Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976). It was reasonably foreseeable that claimant would dispute material aspects of employer's testimony at the hearing, and within the employer's reasonable control to submit and provide claimant copies of corroborating documents before the hearing, such as the documents the employer offered into evidence at the hearing, but which were excluded due to the employer's failure to provide claimant copies of the documents before the hearing. Audio Record at 6:21. *See* OAR 471-040-0023(4) (August 1, 2004) ("Prior to commencement of an evidentiary hearing that is held by telephone, each party and the Department shall provide to all other parties and to the Department copies of documentary evidence that it will seek to introduce into the record.").

Because the employer failed to establish that their additional evidence is material to EAB's determination and that it was beyond the employer's reasonable control to offer the additional evidence into the hearing record, as required under OAR 471-041-0090(1)(b), the employer's request for EAB consider the additional evidence is denied.

FINDINGS OF FACT: (1) Bama Architecture & Design LLC employed claimant as a drafter from February 18, 2022, until January 25, 2024.

(2) The employer expected their employees to refrain from falsifying their timesheets. The employer provided their employees with a 15-minute paid break in the morning and a 15-minute paid break in the afternoon. The employer also provided their employees with an unpaid lunch break period of up to an hour but no less than 30 minutes during which the employees were required to clock out. The employer prohibited employees from combining the morning and afternoon breaks and using them to take a 30-minute paid lunch break.

(3) In January 2024, the employer conducted a review of claimant's timesheets from the previous five months. Claimant's timesheets showed that claimant listed working eight hours each day, from 9:00 a.m. to 5:00 p.m., without clocking out for a lunch break. The employer's owner had observed claimant taking a 30-minute lunch break on most of the days covered by the timesheets. The owner formed the belief that claimant had falsified the timesheets by representing she had worked eight hours per day when she had worked only seven and a half hours per day with an unreported 30-minute unpaid lunch break.

(4) Claimant understood the employer's expectation that she was prohibited from falsifying her timesheets. However, claimant understood she was allowed to combine her morning and afternoon paid breaks into one 30-minute paid lunch break period. Claimant believed doing so was a common practice in the office, which she based on observations of her colleagues and review of timesheets of other employees that were accessible on the employer's office server. During her two-year tenure working for the employer, claimant routinely took a 30-minute paid lunch break by combining her two 15-minute breaks, and her timesheets were always approved. If claimant had to take a lunch that was longer than 30 minutes, she got permission and adjusted her timesheet accordingly.

(5) On January 25, 2024, the employer discharged claimant based upon their belief that claimant had falsified her time sheets.

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). Good faith errors are not misconduct. OAR 471-030-0038(3)(b).

At hearing, the parties offered conflicting testimony regarding the employer's timesheet and break policies. The employer's owner testified that the employer's company handbook, which she testified claimant had signed, specified that lunch breaks were unpaid, for a period of up to an hour but no less than 30 minutes, and that paid morning and afternoon breaks could not be combined and used for the lunch break. Transcript at 11-12. However, the owner stated that when the employer discovered the discrepancies in claimant's timesheets, the employer did not remind claimant of their timesheet and break policies or ask her to explain why she had not complied with them, but simply discharged claimant without providing a reason. Transcript at 12.

In contrast, claimant testified that the employer allowed employees to combine their morning and afternoon paid breaks into one 30-minute paid lunch break period, and that she believed it was a common practice in the office for employees to do so, based on observations of her colleagues and review of timesheets of other employees that were accessible on the employer's office server. Transcript at 19, 20-21, 27. Claimant further testified that during her tenure working for the employer, she routinely took a 30-minute paid lunch break by combining her two 15-minute breaks, and her timesheets were always approved. Transcript at 23-24. Claimant stated that if she had to take a lunch that was longer than 30 minutes, she got permission and adjusted her timesheet accordingly. Transcript at 21.

Thus, on the disputed points of whether claimant was aware that it was prohibited for her to combine her two 15-minute paid breaks to use as a 30-minute paid lunch break, and that this practice caused her timesheets to falsely reflect that she had worked eight hours per day when she had work only seven and a half hours per day, the evidence was no more than equally balanced.[1] As such, the employer failed to meet their burden to prove that claimant violated their expectations willfully.

The employer also did not meet their burden to prove that claimant's conduct was wantonly negligent. A finding of wanton negligence requires a showing that the claimant should have known their conduct probably violated the employer's expectations, and acted with indifference to the consequences of their

[1] As discussed in the Evidentiary Matter section above, the employer offered documents into the record that were not admitted. Although, if admitted, the documents may have bolstered the employer's case, the ALJ's ruling excluding the documents from the record was correct because the employer had failed to provide claimant copies of the documents before the hearing as required by OAR 471-040-0023(4) (August 1, 2004). Audio Record at 6:21. *See* OAR 471-040-0023(4) ("Prior to commencement of an evidentiary hearing that is held by telephone, each party and the Department shall provide to all other parties and to the Department copies of documentary evidence that it will seek to introduce into the record.").

actions. Here, the record fails to show that claimant should have known that combining her breaks to take a 30-minute paid lunch break probably violated the employer's expectations, or that claimant's conducts was the result of indifference to the consequences of her actions, and not a good faith error. On one hand, claimant acknowledged receiving and reading through the employee handbook, and the employer's owner testified that the employee handbook "specifically says you cannot combine your breaks for one lunch." Transcript at 20, 11. However, claimant testified that she understood that combining breaks to take a 30-minute paid lunch break to be a common practice in the office based on observations of her colleagues and review of timesheets of other employees. Transcript at 19, 20-21, 27. Claimant was never disabused of this notion, as she testified that during her two-year tenure working for the employer, she routinely took a 30-minute paid lunch break by combining her two 15-minute breaks, and her timesheets were always approved. Transcript at 23-24.

Given that claimant engaged in the practice of combining her breaks to take a 30-minute paid lunch break for years without correction and based on what she believed her peers were also doing, the record fails to show she should have known her conduct probably violated the employer's expectations. Nor does the record show that claimant's conduct was the result of indifference to the consequences of her actions, and not a good faith error in her understanding of the employer's expectations. It was reasonable for claimant to believe her conduct was acceptable to the employer because it was a longstanding practice that the employer had never corrected and that was based on her observations of others. The record therefore fails to establish that claimant's taking of 30-minute paid lunch breaks and resulting inaccurate timesheets was wantonly negligent, and not the result of a good faith error. Good faith errors are not misconduct.

For these reasons, the employer failed to show that claimant's conduct was willful or wantonly negligent, and not a good faith error. The employer therefore failed to establish that claimant's discharge was for misconduct, and claimant is not disqualified from receiving benefits based on the work separation.

DECISION: Order No. 24-UI-258927 is affirmed.

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

DATE of Service: <u>August 23, 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.

<u>Please help us improve our service by completing an online customer service survey</u>. To complete the survey, please go to <u>https://www.surveygizmo.com/s3/5552642/EAB-Customer-Service-Survey</u>. 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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