

EMPLOYMENT APPEALS BOARD DECISION
2018-EAB-1104

Affirmed
No Disqualification

PROCEDURAL HISTORY: On October 3, 2018, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant but not for misconduct (decision # 73827). The employer filed a timely request for hearing. On November 15, 2018, ALJ Murdock conducted a hearing, and on November 16, 2018 issued Order No. 18-UI-119895, affirming the Department's decision. On November 29, 2018, the employer filed an application for review with the Employment Appeals Board (EAB).

Claimant submitted a written argument that contained information not presented during the hearing. Claimant did not explain why she did not offer this information at the hearing or otherwise show, as required by OAR 471-041-0080 (October 29, 2006) that factors or circumstances beyond her reasonable control prevented her from doing so. For this reason, EAB did not consider the new information that claimant sought to present by way of her written argument. EAB considered only information received into evidence during the hearing when reaching this decision.

FINDINGS OF FACT: (1) OR Krew LLC employed claimant as a registered nurse providing care to clients in a long-term care community nursing program from May 1, 2017, when it acquired Comfort Keepers, until August 15, 2018. At the time of the acquisition, claimant had worked for Comfort Keepers since November 2014.

(2) After the employer acquired Comfort Keepers, it began implementing new policies for the nurses. As one of its new policies, the employer expected nurses to confirm that a nursing visit was authorized before scheduling or going to visit a particular client. The employer also expected nurses to input in the employer's recordkeeping system accurate and adequate documentation to support nursing visits. The employer also expected claimant not to work in over 40 hours in a week without prior approval. Claimant generally understood the employer's expectations.

(3) Before July 17, 2018, claimant had failed on some occasions to confirm that visits were authorized before making nursing visits to clients. At the suggestion of an advice nurse, claimant falsified the dates of two nursing visits she made in June 2018 so that the visits would appear to have been authorized

when made. Claimant also failed on some occasions to input the required information to support nursing visits she made. On July 17, 2018, the employer issued a performance improvement plan (PIP) to claimant. The PIP required claimant to only make nursing visits to clients that were authorized and to enter in the employer's system accurate and adequate documentation of those nursing visits.

(4) After the PIP of July 17 was issued, claimant forgot on a few occasions to check and confirm that there was a valid authorization in place before scheduling or making nursing visits to clients. On a few occasions after July 17, claimant made errors in the documentation she entered in the employer's system about nursing visits she made or forgot to enter the required documentation. For the payroll period ending August 5, 2018, claimant worked over 40 hours in at least one of those weeks without prior approval. In that week, claimant had needed to perform several reassessment renewals, which took more time than typical nursing visits, and while she recorded the time she spent on those visits, she failed to add up or keep track of the total time she was working in that week. As a result, claimant was not aware that she worked more than 40 during that week.

(5) On August 13, 2018, claimant failed to submit proper documentation for a nursing visit she made. On August 15, 2018, the employer discharged claimant for failing to follow its policies after the PIP was issued.

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. OAR 471-030-0038(3)(a) (January 11, 2018) defines misconduct, in relevant part, as a willful or wantonly negligent violation of the standards of behavior which an employer has the right to expect of an employee, or an act or series of actions that amount to a willful or wantonly negligent disregard of an employer's interest. OAR 471-030-0038(1)(c) defines wanton negligence, in relevant part, as 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. The employer carries the burden to show claimant's misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

While the employer's witnesses discussed several incidents in which they contended that claimant violated the employer's expectations, it appears that the proximate cause of claimant's discharge were the alleged violations occurring after the PIP of July 17 was put in place. Because the employer did not discharge claimant for the alleged violations underlying the July 17 PIP, it presumably did not consider them sufficient to merit discharge. Accordingly, the alleged violations of the employer's standards that occurred after July 17 are the proper focus of the misconduct analysis. The violations at issue since they allegedly occurred after July 17 are claimant working more than 40 hours in one week without prior authorization; claimant not confirming that there was a valid authorization before scheduling and making nursing visits; and claimant failing to enter adequate documentation to support some visits she made.

With respect to working more than 40 hours in one week, claimant's testimony was that she had unusually time consuming tasks to perform that week, had not kept track of the total number of hours as she worked them and that her work hours exceeded 40 was due to an "oversight" or failing to pay

attention to the number of work hours she was accumulating during that week. Transcript 1 at 27.¹ With respect to failing to check that there was a valid authorization before making nursing visits, claimant's explanation was that she "forgot" to check, in part because she had not developed the "habit" of doing so during the years she had worked for Comfort Keepers. Transcript 1 at 20, 22. With respect to failing to enter accurate documentation in support of nursing visits, claimant testified that she "overlooked" doing so or, in other words, she experienced a lapse in attention. Transcript 1 at 23. The employer did not challenge claimant's explanations. Violations of an employer's standards that result, as here, from forgetfulness, careless failures to pay attention, mistakes, oversights, lapses, accidents or the like are generally not accompanied by the consciously aware state of mind needed to show that a claimant's behavior was willful or wantonly negligent, and that it constituted disqualifying misconduct. *See* OAR 471-030-0038(1)(c). Absent evidence showing the presence of additional circumstances from which the requisite state of mind on claimant's part may be inferred, the employer did not meet its burden to show that claimant's behavior was willful or wantonly negligent.

The employer discharged claimant but not for misconduct. Claimant is not disqualified from receiving unemployment insurance benefits.

DECISION: Order No. 18-UI-119895 is affirmed.

J. S. Cromwell and D. P. Hettle;
S. Alba, not participating.

DATE of Service: December 27, 2018

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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¹ Two transcripts were generated from the November 15, 2018 hearing. The first transcript included testimony taken from approximately 8:15 a.m. until approximately 9:00 a.m., which were the testimony of two employer witnesses and the beginning of claimant's testimony until the parties were disconnected from the conference phone line. The second transcript included the proceedings that were recommenced at approximately 9:01 a.m. as the parties called back in to the conference line and included the remainder of claimant's testimony and the testimony of a third employer witness. The transcript of the proceedings from 8:15 to 9:00 a.m. is denominated as Transcript 1 and from 9:01 until the hearing was adjourned is denominated as Transcript 2.



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 desisyong ito.

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 Asuntos Laborales. Si no está de acuerdo con esta decisión, puede presentar una Petición 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 محكمة الاستئناف 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.

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