

EMPLOYMENT APPEALS BOARD DECISION
2018-EAB-1188

Affirmed
Disqualification

PROCEDURAL HISTORY: On November 8, 2018, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 90856). Claimant filed a timely request for hearing. On November 19, 2018, the Office of Administrative Hearings (OAH) served notice of a hearing scheduled for December 5, 2018. On December 5, 2018, ALJ Janzen conducted a telephone hearing, at which claimant appeared and then disconnected after her request for a postponement was denied. On December 7, 2018, ALJ Janzen issued Order No. 18-UI-120924, affirming decision # 90856. On December 26, 2018, claimant filed an application for review with the Employment Appeals Board (EAB).

On January 17, 2019, claimant requested that the time period to submit a written argument be extended to January 29, 2019. EAB granted claimants' request. On January 28, 2019, claimant submitted her written argument. However, claimant failed to certify that she provided a copy of her argument to the other parties as required by OAR 471-041-0080(2)(a) (October 29, 2006). EAB therefore did not consider claimant's written argument when reaching this decision.

PRELIMINARY MATTER: After appearing at the December 5, 2018 hearing, claimant requested a postponement after realizing the employer also had appeared, asserting that she had not known the employer would be participating, and that she was not prepared for "that at all." Audio Record at ~ 6:25-7:00. As stated by the ALJ, OAR 471-040-0021(2) and (3) (August 1, 2004) provide that a request for a postponement may be granted if the "request is promptly made after the party becomes aware of the need for postponement" and "[t]he party has good cause, as stated in the request, for not attending the hearing at the time and date set." "Good cause" exists when "the circumstances causing the request are beyond the reasonable control of the requesting party [and] failure to grant the postponement would result in undue hardship to the requesting party." Audio Record at ~ 7:00-8:10.

After confirming that claimant had received the November 19, 2018 notice of hearing, on which the employer was listed as a party, the ALJ correctly informed claimant that the notice of rights included in the notice of hearing notified the parties that the other parties had the right to appear and participate in

the hearing.¹ Audio Record at ~ 8:10-8:40. Claimant denied receiving the notice of rights portion of the notice of hearing. Audio Record at ~ 8:45-9:15. However, we agree with the ALJ that it is more likely that claimant received the same notice of hearing as in the hearing record, and neglected to read the notice of rights portion of the notice of hearing. Audio Record at ~ 9:15-10:25. Claimant therefore failed to establish that the circumstances causing her request for a postponement were beyond her reasonable control.

Nor did claimant establish that a failure to grant the postponement would result in an undue hardship to her. Although claimant repeatedly asserted that she could not could not participate in the hearing because she was not prepared, she failed to elaborate with sufficient detail to support a finding that participating would have resulted in an undue hardship to her. Claimant therefore failed to establish good cause for not participating in the December 5, 2018 hearing. The ALJ therefore did not err in denying claimant's request for a postponement, claimant's assertions that the decision was unfair and the ALJ biased notwithstanding. *See* Audio Record ~ 5:30-16:57.

FINDINGS OF FACT: (1) Conduent Commercial Solutions, LLC employed claimant as an agent in training from April 24, 2018 to October 2, 2018.

(2) The employer's written attendance policy required employees to report for work as scheduled or notify the employer in advance if they would be late or absent with the reason for their tardiness or absence from work. The employer's written attendance policy also required employees to work their entire shifts or obtain management approval to leave early after providing the reason for their need to leave early. Claimant acknowledged receipt of the employer's written attendance policy at hire and was aware of its attendance expectations.

(3) Between April 24, 2018 and July 31, 2018, claimant was absent from work due to illness 18 times and left work early 14 times. Claimant notified the employer in advance each time she was absent. Claimant left work early on some of the 14 occasions because she did not feel well, and other times she did not provide a reason or obtain approval from management.

(4) On July 31, 2018, the employer warned claimant about her poor attendance. An employer representative issued the written warning to claimant in person and then reviewed the employer attendance policy requirements with her.

(5) From August 1, 2018 to August 18, 2018, claimant was absent from work three times due to illness and left work early two times. Claimant notified the employer that she would be absent due to illness on the three occasions she was absent from work. When claimant left work early, however, she did not notify the employer of her reason for leaving work early and did not obtain management approval to leave work early.

(6) On August 18, 2018, the employer issued a final written warning to claimant due to her poor attendance and continuing attendance policy violations. When an employer representative issued the warning to claimant in person, the representative again reviewed the employer attendance policy requirements with claimant.

¹ Notice of Hearing at 1-6.

(7) From August 19, 2018 to October 2, 2018, claimant was absent from work 12 times, and left work 90 minutes early on September 10, 2018 and 60 minutes early on September 15, 2018. Claimant notified the employer in advance each time she was absent and generally reported that she was sick. However, claimant did not notify the employer, provide it with a reason, or seek approval to leave work early on September 10 or September 15, 2018.

(8) On October 2, 2018, the employer discharged claimant for her poor attendance and attendance policy violations between August 19 and October 2, 2018.

CONCLUSIONS AND REASONS: We agree with the ALJ. The employer discharged claimant for misconduct.

ORS 657.176(2)(a) requires a disqualification from unemployment insurance benefits if the employer discharged claimant for misconduct. 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. In a discharge case, the employer has the burden to establish misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

The employer discharged claimant on October 2, 2018 for excessive absenteeism and leaving work early without notifying management or obtaining management approval multiple times between August 19 and October 2, 2018. The employer had the right to expect claimant to report for work and work as scheduled or notify the employer in advance if she would be absent and obtain management approval to leave early, particularly after employer representatives met with her on July 31, 2018 and August 18, 2018 and reviewed the attendance policy requirements. Between August 19, 2018 and October 2, 2018, claimant was absent from work 12 times, but notified the employer in advance that she would be absent, generally due to illness. To the extent those absences violated the employer's attendance policy, those violations did not constitute misconduct because, under OAR 471-030-0038(3)(b), absences from work due to illness are not misconduct.

However, between August 19, 2018 and October 2, 2018, claimant left work early without notifying management, providing the reason for leaving work early, or obtaining management approval on September 10 and September 15, 2018. Each of those early departures was a separate violation of the employer's attendance policy because claimant did not provide management with the required prior notice either time. By failing to do so, on each occasion, claimant was at least wantonly negligent because she demonstrated indifference to the consequences of her inaction when she knew or should have known that her conduct probably violated the employer's attendance expectations.

Claimant's conduct cannot be excused as an isolated instance of poor judgment or a good faith error under OAR 471-030-0038(3)(b). For conduct to be considered an isolated instance of poor judgment, it must be a single or infrequent occurrence rather than a repeated act or pattern of other willful or

wantonly negligent conduct. OAR 471-030-0038(1)(d)(A). Claimant's failure to notify the employer of her early departures from work was repeated, having occurred twice in August and twice in September 2018 and more likely than not, involved conscious exercises of poor judgment regarding each instance because she had provided appropriate notice in the past. Her wantonly negligent conduct was, therefore, not isolated. Nor can claimant's conduct be excused as the result of a good faith error. The record fails to show that claimant reasonably believed, or had a rational basis for believing, that the employer would condone or tolerate any failure to provide the required notice when leaving work before the end of her scheduled shift, particularly after being warned on July 31 and August 18, 2018 about attendance policy requirements.

The employer discharged claimant for misconduct. Claimant is disqualified from receiving unemployment insurance benefits based on her work separation until she has earned at least four times her weekly benefit amount from work in subject employment.

DECISION: Order No. 18-UI-120924 is affirmed.

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

DATE of Service: January 30, 2019

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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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 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.

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